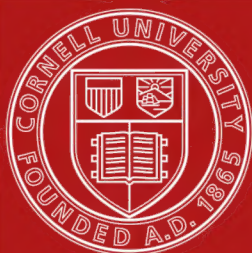


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PARTICULAR ACTIONS AND PROCEEDINGS

IN THE
COURTS OF RECORD
OF THE
STATE OF NEW YORK
UNDER THE
CIVIL PRACTICE ACT
AND
CONSOLIDATED LAWS

LAW, PRACTICE AND FORMS

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FOURTH EDITION
IN THREE VOLUMES

BY
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of the Delhi Bar

VOL. II



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PARTICULAR ACTIONS AND PROCEEDINGS

VOLUME TWO

COURT OF CLAIMS *

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ARTICLE I.**INTRODUCTORY.****A. History of tribunal.**

The present Court of Claims had originally the jurisdiction of the canal appraisers, having been constituted as the Board of Claims by chapter 205 of the Laws of 1883, with the powers which canal appraisers had under chapter 321 of the Laws of 1870.¹ By chapter 36 of the Laws of 1897 its title was changed to Court of Claims, under which name it continued until 1911. By chapter 856 of the laws of that year the designation was again changed to the Board of Claims with the same jurisdiction as theretofore.² By chapter 1 of the Laws of 1915 the Board of Claims was reorganized into the Court of Claims. The provisions for the organization and jurisdiction of the Court of Claims, as well as provisions for the practice in such court, were contained in the Code of Civil Procedure until its repeal in 1920. A Court of Claims Act was then enacted which now contains the former provisions of the Code without substantial change.

B. Immunity of State from suit.

The necessity for a tribunal for the adjustment and allowance of claims by citizens against the State arose out of the well-settled principle that a sovereign cannot be sued.³

1. *Locke v. State*, 140 N. Y. 480.

2. **Constitutionality of changes.**—Neither the Board of Claims created by chapter 205 of the Laws of 1883, nor the Court of Claims created by chapter 36 of the Laws of 1897, was a court or judicial body within the terms or meaning of the judiciary article of the State Constitution, but only an auditing board or quasi-judicial body, and hence the statute (L. 1911, ch. 856) abolishing the Court of Claims, as established by and under

the act of 1897, and re-establishing the Board of Claims was not in violation of the provision of the Constitution (Art. 6, § 11) that judicial officers can be removed only by the Senate with the concurrence of two-thirds of its members on the recommendation of the governor. *People ex rel. Swift v. Luce*, 204 N. Y. 478.

3. *Cunningham v. Macon & Brunswick R. Co.*, 109 U. S. 446; *People v. Dennison*, 84 N. Y. 272; *Rexford v. State*, 105 N. Y. 229; *Locke v. State*,

It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege and permit itself to be made a defendant in a suit by individuals or by another State. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit will be conducted; and may withdraw its consent whenever it may suppose that justice to the public requires it.⁴ The State is only answerable before the Court of Claims in respect to matters which it has consented to submit to its jurisdiction. The sovereign can be impleaded for the recovery of claims against it only in the mode, and to the extent, and as to such matters as the Legislature has authorized.⁵

ARTICLE II.

JURISDICTION.

A. In general.

The Court of Claims is a statutory court having only such powers as are conferred upon it by statute and which come within the authority of the Legislature to enact.⁶ It does not generally have authority to determine issues which are triable under the Constitution in the ordinary constitutional courts.⁷ Its jurisdiction is now defined in section 12 of the Court of Claims Act. The Court of Claims Act does not create a cause of action against the State, when otherwise none would exist, but merely waives the immunity from suit.⁸ It does not waive immunity from liability,⁹ and does not foreclose the State from contesting its liability.¹⁰

140 N. Y. 480; *Smith v. State*, 227 N. Y. 405; *DiMarco v. State*, 110 Misc. 426, 180 N. Y. Supp. 500.

A contractor, who by direction of the State Engineer demolished a sawmill standing on State lands, is not liable in damages to the owner, who must litigate the question of compensation with the Board of Claims. *Watson v. Empire Engineering Corporation*, 77 Misc. 543, 137 N. Y. Supp. 231.

4. *Beers v. State of Arkansas*, 20 How. (U. S.) 527.

5. *Stone v. State*, 138 N. Y. 124.

6. *Moroney v. State*, 67 Misc. 58, 124 N. Y. Supp. 824.

7. *Moroney v. State*, 67 Misc. 58, 124 N. Y. Supp. 824.

8. *William v. State*, 94 App. Div. 489, 88 N. Y. Supp. 19; *Herkimer Lumber Co. v. State*, 196 App. Div. 708, 189 N. Y. Supp. 1119.

9. *Smith v. State*, 227 N. Y. 405.

10. *Herkimer Lumber Co. v. State*, 196 App. Div. 708, 189 N. Y. Supp. 119.

B. Contract claims.

The Court of Claims has general jurisdiction of claims against the State arising out of contracts with the State.¹¹ Thus, it may hear the claim of an attorney for services rendered to a committee of the Assembly, pursuant to a resolution of that body authorizing the appointment of counsel to the committee.¹² It has jurisdiction to hear and determine the claim of a State officer for salary, where the Comptroller has refused to audit the claim because there was no appropriation to pay it.¹³ But, under section 12 of the Court of Claims Act, the court has no jurisdiction of a claim submitted by law to any other tribunal or officer for audit, except where the claim is founded upon express contract and such claim, or some part thereof, has been rejected by such tribunal or officer.¹⁴

C. Negligence or malfeasance of servants.

Before the enactment of statute on the subject, the State enjoyed a two-fold immunity as against a claim for the negligent or wrongful acts of its servants. There existed, not only the immunity from suit, but also an immunity from liability for the acts of servants.¹⁵ That is to say, the doctrine of *respondereat superior* did not apply as between the State and its employees.¹⁶ The immunity from suit has been waived, but the immunity from liability has not been changed. Hence as a general rule, an action cannot be maintained in the Court of Claims against the State, where the cause of action is based on the negligence or malfeasance of one of its servants.¹⁷ In the absence of a legislative or constitu-

11. Claim against State hospital.— See *Watkins Boating Co. v. State*, 106 Misc. 693, 175 N. Y. Supp. 310.

12. Nusbaum v. State, 119 App. Div. 755, 104 N. Y. Supp. 527; appeal dismissed, 190 N. Y. 542.

13. O'Neil v. State, 223 N. Y. 40.

14. Palmer v. State, 106 Misc. 696, 175 N. Y. Supp. 294.

15. Lewis v. State, 96 N. Y. 71; *Smith v. State*, 227 N. Y. 405.

Trespass.— The State is not liable for trespasses committed by its servants. *Litchfield v. Bond*, 105 App. Div. 229, 93 N. Y. Supp. 1016.

16. Gutekunst v. State, 188 App. Div. 316, 177 N. Y. Supp. 192; *Babcock v. State*, 190 App. Div. 147, 180 N. Y. Supp. 3.

17. Smith v. State, 227 N. Y. 405; *McAuliffe v. State*, 107 Misc. 553, 176 N. Y. Supp. 679; *DiMarco v. State*, 110 Misc. 426, 180 N. Y. Supp. 500; *Sherlock v. State*, 114 Misc. 491, 186 N. Y. Supp. 921.

Depositors in bank.— The statute (Laws of 1919, chap. 581) conferring jurisdiction upon the Court of Claims to hear, audit, and determine the claims of the depositors and creditors of two

tional enactment waiving this immunity, the State cannot be subjected to liability for such acts of its servants.¹⁸

D. Death by wrongful act.

It was the intention of the Legislature, expressed in section 12 of the Court of Claims Act, that the Court of Claims should have jurisdiction in those cases where death is caused by a wrongful act, neglect, or default upon the part of the State. The right given to prosecute a private claim against the State to recover damages for a wrongful act, neglect, or default on the part of the State, by which the death of any person has been caused, is not confined to residents of this State; but such a claim may be prosecuted by a resident of another State.¹⁹ In estimating the damages, the court is bound by the provisions of section 132 of the Decedent Estate Law, formerly section 1904 of the Code of Civil Procedure, and the recovery is limited to the pecuniary loss to the family of the decedent, and in determining his probable duration of life, the court may take into consideration annuity and mortality tables.²⁰

E. Conservation Law.

Under section 59 of the Conservation Law, the Court of Claims has jurisdiction to determine claims for lands appropriated by the State for forest preserves and parks.

F. Canal claims.

Claims against the State for the appropriation of lands or water for canal purposes are heard by the Court of

certain banks against the State, for damages sustained through the failure of said banks and each of them, declares in unequivocal language that it cannot be used to create any liability, and it expressly permits the State to interpose any legal or equitable defense, except the Statute of Limitations. Where a claim is prosecuted under said statute upon an allegation that the failure of the banks was due to the tortious and negligent acts of the officers, agents, and servants of the State, the defense that the State is not liable therefor must be given its legal effect, which is, that it is a complete

answer to the claim. *Sherlock v. State*, 114 Misc. 491, 186 N. Y. Supp. 921.

18. *Smith v. State*, 227 N. Y. 405.

Cornell University.—The State is not liable for the acts of a chauffeur of the State College of Agriculture at Cornell University, although it makes appropriations for such college. *Green v. State*, 107 Misc. 557, 176 N. Y. Supp. 681.

19. *Burke v. State of New York*, 64 Misc. 558, 119 N. Y. Supp. 1089.

20. *Lewis v. State*, 112 Misc. 667, 183 N. Y. Supp. 653.

Claims.²¹ The Court of Claims has jurisdiction to determine the title to land taken for Barge canal terminal purposes as between the State or one of its municipalities and a claimant, to appraise damages therefor, and to award compensation and payment to the owners.²² And under section 47 of the Canal Law, there is allowed and paid to every person sustaining damages from the canals or from their use and management, or resulting or arising from any accident, or other matter or thing connected with the canals, the amount of such damages to be ascertained and determined by the proper action or proceedings before the Court of Claims.²³ Thus, in the case of canal claims, recovery may

21. Canal Law, §§ 80-88; Chapter 630, Laws of 1921; *Benedict v. State*, 120 N. Y. 228.

22. *People ex rel. Palmer v. Travis*, 223 N. Y. 150.

23. *Rexford v. State*, 105 N. Y. 229.

"By this section [referring to section 47 of the Canal Law] the State waives immunity and assumes liability for damages sustained by reason of the construction of its canals but provides that the State shall not be liable unless all the facts proved therein make out a case which would create a legal liability against the State were the same established in evidence in a court of justice against an individual or corporation. So that before the State can be held liable in damages by reason of the construction of the canal the claimant must establish by legal evidence some act or neglect which would make an individual liable to another under the same circumstances. Therefore, in deciding this case the rule of law is to be applied the same as though the action was by one individual against another." *Flanigan v. State*, 113 Misc. 91.

Statute of Limitations.—See *Peck v. State*, 137 N. Y. 372; *Yaw v. State*, 127 N. Y. 190.

Underground waters.—Where the

State, in digging on its own land for the purpose of canal construction, cuts off underground water that supplied two wells on claimant's farm, no action lies against the State for the damage, and a claim therefor will be dismissed. *Flanigan v. State*, 113 Misc. 91.

Surface waters.—It is well settled that no liability arises from the obstruction of surface waters and their flow by a lower proprietor although the result is to dam the water back upon the land of an adjoining or upper owner. The State, in order to carry off the waters from a drainage ditch which it had constructed across claimant's land, excavated another ditch on its own land leading from the other ditch and into the Barge canal. Because of obstructions by vegetation and debris in the State ditch, the flow of water in the drainage ditch on claimant's land was impeded and it backed up, inundated and saturated a part of claimant's land, rendering it unfit for cultivation, and destroying the growing crops thereon. *Held*, that the evidence showing that the waters in the ditches were exclusively surface waters, the claim for damages will be dismissed. *Kilts v. State*, 113 Misc. 112, 184 N. Y. Supp. 107.

be had although the act in question is committed by a servant of the State; and the liability may exist where death results.²⁴

The word "person" as used in section 47 of the Canal Law includes a municipal corporation, so that such a corporation can prosecute a claim against the State.²⁵

Notwithstanding an act authorizing an abandonment of the canal, the State may be liable for injuries suffered from failure to keep in repair the bridges which it still maintains, and the Court of Claims has power to award damages for such injuries.²⁶ But on the hearing of a claim for damages sustained by an overflow caused by negligence in not keeping in repair the guard bank of the river made necessary in the construction of the canal, where it appeared that the State had abandoned and sold the canal and the lands connected therewith more than seven years before the claim accrued, it was held that the Board of Claims had no jurisdiction to consider the claim.²⁷

G. Claim in favor of municipality.

As a general proposition, the Court of Claims has no jurisdiction of a public claim. That is, it will not hear a claim in favor of a town.²⁸ But, under chapter 612 of the Laws of 1918, relating to claims suffered by reason of change of grade of highways caused by the improvement of the Barge canal, the claim of a village has been sustained.²⁹ And a municipality may prosecute a claim under section 47 of the Canal Law.³⁰ When an action is maintained by a municipality for the recovery of moneys paid to the State under a mistake of law, the general rule that money paid under a mistake of law cannot be recovered does not apply to a municipality.³¹

H. Claim barred by Statute of Limitations.

Section 12 of the Court of Claims Act forbids the hearing of a claim which has been barred by the Statute of

24. See *Sipple v. State*, 99 N. Y. 384, 16 Abb. N. C. 429; *Splittorf v. State*, 108 N. Y. 205; *Bowen v. State*, 108 N. Y. 166.

25. *Village of Seneca Falls v. State*, 115 Misc. 35, 187 N. Y. Supp. 409.

26. *Woodman v. State*, 127 N. Y. 397.

27. *Stone v. State*, 138 N. Y. 124.

28. *Town of New Lebanon v. State*, 111 Misc. 310, 181 N. Y. Supp. 322.

29. *Village of Hudson Falls v. State*, 111 Misc. 304, 181 N. Y. Supp. 189.

30. *Village of Seneca Falls v. State*, 115 Misc. 35, 187 N. Y. Supp. 409.

31. *County of Cayuga v. State*, 112 Misc. 517, 183 N. Y. Supp. 646.

Limitations.³² Moreover, the Legislature is forbidden by article VII, § 6, of the State Constitution, from conferring jurisdiction on the court to audit such a claim.³³

Under the Constitution, claims are not barred which have been duly presented for payment or allowance. Such claims need not be presented to the board of audit or the Court of Claims, but presented to the Legislature or to any officer or body having jurisdiction to pay, allow, or act upon the claim; and the prosecution thereof with reasonable diligence is enough to suspend the running of time against the claim.³⁴ Where the statute has left but a very short period within which to present a claim, and it appears that the claimant is engaged in trying to collect it by mandamus against the State comptroller, and that much of the delay is caused by the non-action of the courts which the claimant is powerless to prevent, it is held that the statute does not run against the claim.³⁵ And the limitation imposed by the Constitution upon the allowance of the claims against the State applies only where a tribunal has been constituted by the Legislature to hear and determine the controversy, and commences to run only from the time of the constitution of such tribunal.³⁶ This constitutional prohibition does not apply to a claim for services and materials furnished State officers, not enforceable in any tribunal until it receives legislative recognition.³⁷

Where a claim is dismissed because it is barred by the Statute of Limitations, the claimant is entitled on appeal to the most favorable view.³⁸

I. Claims founded on equity and justice.

The Legislature in special cases, when, in its judgment, justice requires, may empower the Court of Claims to disregard defenses strictly legal, and to hear and determine claims against the State founded on right and justice.³⁹ Claims against the State founded upon equity and justice may be recognized by the Legislature and an act authoriz-

32. *Peck v. State*, 137 N. Y. 372.

State, 153 N. Y. 279.

33. *Gates v. State*, 128 N. Y. 221.

37. *O'Hara v. State*, 112 N. Y. 146,

34. *Corkings v. State*, 99 N. Y. 491,
16 Abb. N. C. 448.

20 St. Rep. 647.

35. *Parmenter v. State*, 135 N. Y.
154.

38. *American Woolen Co. v. State*,
195 App. Div. 698, 187 N. Y. Supp.
341.

36. *Supervisors of Cayuga County v.*

39. *Cole v. State*, 102 N. Y. 48.

ing the Court of Claims to hear and determine such a claim is not invalid as violating the provision of the Constitution that the Legislature shall not audit or allow a private claim, or a claim barred by the lapse of time.⁴⁰

J. Accident at State Fair.

An action against the State for injuries caused during automobile races held on the State Fair grounds is within the jurisdiction of this court.⁴¹ While, under chapter 657 of the Laws of 1915, the Court of Claims has jurisdiction to hear, audit, and determine claims arising out of the automobile accident at the State Fair on September 16, 1911, notwithstanding the lapse of time since the claim accrued, subject to the restriction that no award shall be made or judgment rendered against the State unless the claim has been filed with the court within one year from the enactment of the statute, a claim filed before said statute took effect must be refiled in order to bring it within the jurisdiction of the court to make the award.⁴²

K. State highways.

Where a State highway is maintained by the State by the patrol system, it may be liable for injuries sustained from defects therein.⁴³ The State may be liable for injuries sustained by an adjoining owner from the flooding of his lands.⁴⁴ But the State is bound to exercise only ordinary prudence in the care of its highways.⁴⁵ The mere fact that a night watchman was in attendance at a dangerous place is insufficient to establish that the highway was being maintained by the patrol system.⁴⁶

40. *Munro v. State*, 223 N. Y. 208; *Babcock v. State*, 190 App. Div. 147, 180 N. Y. Supp. 3.

41. *Arnold v. State of New York*, 163 App. Div. 253, 148 N. Y. Supp. 479.

42. *Ross v. State of New York*, 103 Misc. 196.

43. Highway Law, § 176. See *Smith v. State*, 227 N. Y. 405; *Babcock v. State*, 190 App. Div. 147; 180 N. Y. Supp. 3.

Registration fees.—The Court of Claims has jurisdiction of a claim for

the refund of excess motor vehicle registration fees as the claim is not one required to be submitted to any other tribunal or officer for audit or determination. *Fifth Ave. Coach Co. v. State*, 73 Misc. 498, 131 N. Y. Supp. 62.

44. *Borden v. State*, 113 Misc. 232, 184 N. Y. Supp. 285.

45. *White v. State*, 113 Misc. 595, 185 N. Y. Supp. 237.

46. *Gutekunst v. State*, 188 App. Div. 316, 177 N. Y. Supp. 192.

I. Military matters.

The State has by statute provided a tribunal and a method for affording relief to those of its soldiers who shall be wounded or incapacitated as a result of illness and for pensioning dependents of such soldier, including his widow, minor children, or dependent mother, in case he shall have died as the result of injuries received or from illness.⁴⁷ As the State has furnished such a tribunal and submitted such cases to it for consideration, the Court of Claims has no jurisdiction.⁴⁸ But, in a particular case, the Court may be granted power to determine a claim for the death of a member of the National Guard.⁴⁹ And the Court of Claims may be invested with jurisdiction to determine claims for injuries sustained by third persons from the acts of members of the National Guard.⁵⁰

ARTICLE III.**PROCEDURE.****A. Court rules.**

Under section 14 of the Court of Claims Act, the court is authorized to establish rules for its government and the regulation of practice before it.

B. Notice of intention to file claim.

Section 15 of the Court of Claims Act provides that no claim, other than a claim for the appropriation of land, shall be maintained against the State, unless the claimant shall within six months after the accrual of the claim file in the office of the clerk of the court and with the attorney-general, a notice of his intention to file a claim against the State. The purpose of requiring the notice to be filed with the attorney-general is to give that official an opportunity to investigate the claim and ascertain the facts connected therewith.⁵¹ Unless such notice of intention is filed, the court generally has no jurisdiction of the claim.⁵² Under

47. Military Law, §§ 220-224.

48. *McAuliffe v. State*, 107 Misc. 553, 176 N. Y. Supp. 679.

49. *Lewis v. State*, 112 Misc. 667, 183 N. Y. Supp. 653.

50. *Lorich v. State*, 113 Misc. 409, 184 N. Y. Supp. 818.

51. *Gognetta v. State*, 111 Misc. 329, 181 N. Y. Supp. 184.

52. *Buckles v. State*, 221 N. Y. 418; *Frisbie & Stansfield Knitting Co. v. State*, 189 App. Div. 341, 179 N. Y. Supp. 294; *American Woolen Co. v. State*, 110 Misc. 413, 180 N. Y. Supp. 759; *Henderson v. State*, 115 Misc. 25, 187 N. Y. Supp. 403; *Murray v. State*, 115 Misc. 363.

such circumstances, a motion to dismiss the claim will be granted.⁵³

It was held that the filing of a claim is not equivalent to the filing of the written notice of intention to file a claim.⁵⁴ But an amendment to section 15 by chapter 474 of the Laws of 1921 changes this situation and permits the filing of either the claim or the notice of intention within the six months' period.

Since the enactment of chapter 157 of the Laws of 1919, the notice of intention should state the items of damage which the claimant has sustained.⁵⁵

Statutes in particular cases may, however, dispense with the necessity of filing the notice of intention.⁵⁶

The notice of intention cannot be amended. And the claim cannot be amended so as to set up a cause of action of a nature different from that stated in the notice of intention, and which is dependent upon essential facts not contained in the notice.⁵⁷

C. Bringing in parties.

Section 21 authorizes the court in certain cases to order other parties to be brought in. The jurisdiction of the Court of Claims to order the bringing in of other parties is limited to cases against the State, wherein the sovereign power has consented to be sued. Where a claim is against the State for damages for an alleged breach of contract for the building and construction of a so-called good road in the county of Orange, a motion for an order bringing in said county before the court as one of the parties defendant will be denied for want of jurisdiction.⁵⁸

53. *Palmer v. State*, 106 Misc. 696, 175 N. Y. Supp. 294; *Corsall v. State*, 107 Misc. 266, 176 N. Y. Supp. 420; *American Woolen Co. v. State*, 110 Misc. 413, 180 N. Y. Supp. 759; *Henderson v. State*, 115 Misc. 25, 187 N. Y. Supp. 403.

54. *Butterfield v. State*, 221 N. Y. 701.

As to destruction of notice of intent to file claim in the capitol fire of 1911, see *Coble v. State of New York*, 173 App. Div. 921, 157 N. Y. Supp. 1120.

55. *Cognetta v. State of New York*, 111 Misc. 329, 181 N. Y. Supp. 184.

56. *Cooper-Snell Co. v. State*, 230 N. Y. 249, rev'g 193 App. Div. 192; *Rogers v. State of New York*, 184 App. Div. 340, 171 N. Y. Supp. 337; *Barnhart v. State*, 113 Misc. 122, 184 N. Y. Supp. 139.

57. *Empire State R. Corp. v. State*, 113 Misc. 238, 184 N. Y. Supp. 234; *Murray v. State*, 115 Misc. 363.

58. *Elmore & Hamilton Con. Co. v. State of New York*, 62 Misc. 58, 115 N. Y. Supp. 1071.

D. Dismissal of petition.

A motion to dismiss a claimant's petition is in the nature of a demurrer and admits the truth of the facts contained therein.⁵⁹ The rule of practice that failure to renew or make a motion for non-suit at the close of all the evidence is an admission that some question of fact is to be passed upon, and is a waiver of the right to have the complaint dismissed as a matter of law, is applicable to the Court of Claims.⁶⁰

E. Reopening case.

It is within the discretion of the Court of Claims whether or not to reopen a case after it has been finally submitted and a decision has been rendered.⁶¹ The matter is discretionary even under a special statute authorizing an application for a rehearing of a specific claim.⁶²

F. Evidence.

In no case shall any liability be implied against the State, and no award shall be made on any claim against the State except upon such legal evidence as would establish liability against an individual or corporation in a court of law or equity.⁶³ It is error to allow a claimant to introduce a record of a previous award made by the Court of Claims for a similar claim "to show the liability of the State."⁶⁴ On the hearing of a claim based on the giving away of a canal bridge over which claimants were attempting to roll heavy weights, it was held to be error to permit a witness for the State to testify that he left the bridge in his judgment safe for the ordinary uses of a highway bridge, and that stones of that size were an excessive load for the bridge as constructed.⁶⁵

G. Decision.

A judge of the Court of Claims who did not become a member thereof until the evidence upon the claim had been heard, and the case submitted, has no authority to decide the case

59. *Dermott v. State*, 99 N. Y. 101.

60. *Spencer v. State*, 187 N. Y. 484.

61. *Lake Side Paper Co. v. State*, 15 App. Div. 169; 44 N. Y. Supp. 281.

62. *Chaphe v. State*, 117 N. Y. 511.

63. Court of Claims Act, § 26. See *Babcock v. State*, 190 App. Div. 147,

180 N. Y. Supp. 3; *Champlain Stone & S. Co. v. State of New York*, 66 Misc. 434, 123 N. Y. Supp. 546.

64. *Stone v. State*, 138 N. Y. 124, 51 St. Rep. 718.

65. *McDonald v. State*, 127 N. Y. 18, 37 St. Rep. 248.

or take part in its decision. The decision must be authenticated by the signatures of the judges taking part therein.⁶⁶

Under the statute requiring the practice in the Board of Claims to conform as near as may be to that prevailing in the Supreme Court, the decisions of the board should be in writing, signed by all or a majority of the commissioners, and separately stating the facts found and the conclusions of law.⁶⁷

H. Judgment.

Section 25 of the Court of Claims Act provides as to the contents, entry, allowance of interest, effect, and payment of the judgment. Ordinarily, the judgment bears interest only for twenty days after the Comptroller is authorized to pay it. The Court may, however, in a proper case, award interest on the claim up to the time of the judgment.⁶⁸

Where land has been appropriated for a State canal and the evidence both on the part of the claimant and the State places the damages at a certain sum, the judges of the Court of Claims cannot award a less sum on the theory that they are personally capable of assessing the damage as experts.⁶⁹

I. Costs.

Section 33 of the Court of Claims Act provides that costs, witnesses' fees and disbursements shall not be taxed, nor shall counsel or attorneys' fees be allowed by the court to any party. It has been questioned whether the forbidding of costs is constitutional in a proceeding to recover for the appropriation of land for canal purposes;⁷⁰ but its validity has been sustained in the Appellate Division.⁷¹

66. *Smith v. State of New York*, 214 N. Y. 140.

67. *Yaw v. State*, 127 N. Y. 190; *Ostrander v. State of New York*, 192 N. Y. 416.

68. *Sayre v. State*, 128 N. Y. 622, 38 St. Rep. 932.

69. *Burchard v. State of New York*, 128 App. Div. 750, 113 N. Y. Supp. 233; appeal dismissed, 195 N. Y. 577.

70. *Brainerd v. State*, 74 Misc. 100, 131 N. Y. Supp. 221.

71. *Taggarts Paper Co. v. State*, 187 App. Div. 843, 176 N. Y. Supp. 97.

ARTICLE IV.**APPEALS.****A. Appellate Division.**

Sections 29-32 provide for appeals from judgments of the Court of Claims. The sections give no greater right of appeal than is given from orders of the Supreme Court.⁷² The Appellate Division has only the same power to affirm, reverse or modify a judgment of the Court of Claims that it has in respect to judgments of the Supreme Court.⁷³ In the absence of a finding by the Court of Claims as to the amount of damage, it is without jurisdiction to make a new finding as to damages in accordance with the evidence, and can only grant a new trial when the award is insufficient.⁷⁴

B. Court of Appeals.

Where the Appellate Division has unanimously affirmed a judgment entered upon a decision of the Court of Claims, the Court of Appeals may assume that the findings made by the Court of Claims were supported by the evidence. Where it appears, however, that such findings are incomplete and do not sustain the judgment, but there is evidence which would have warranted the Court of Claims in making findings in addition to those made which would be sufficient to sustain the judgment, it is the duty of the Court of Appeals to infer or assume such findings in support of the judgment.⁷⁵

Where an appeal is taken by a claimant, on the ground of the insufficiency of the award, the Court of Appeals cannot interfere unless, upon the uncontradicted evidence, affected by no question of credibility, the award was inadequate, or where in ascertaining the damages the board adopted a wrong principle.⁷⁶

72. Appeal from order.—An order of the Court of Claims denying the defendant's motion, made at the opening of the trial, for a dismissal of the complaint is not appealable; the defendant's remedy is by an appeal from the judgment. *Withers v. State*, 61 App. Div. 251, 70 N. Y. Supp. 451.

73. *Crowley v. State*, 112 App. Div. 872, 98 N. Y. Supp. 1094.

74. *Crowley v. State*, 112 App. Div. 872, 98 N. Y. Supp. 1094.

75. *Ostrander v. State of New York*, 192 N. Y. 416.

76. *Slavin v. State*, 152 N. Y. 45.

Where a claim was wholly rejected and no award whatever made, it was held that the right to recover some sum must appear conclusively in order to raise the question of error, in the absence of an erroneous ruling adverse to the claimant.⁷⁷ In canal cases the Court of Appeals had power to pass upon the insufficiency or excessiveness of the damages awarded.⁷⁸

77. *Spencer v. State*, 135 N. Y. 619,
48 St. Rep. 442.

78. *Bowen v. State*, 108 N. Y. 166;
Sayre v. State, 123 N. Y. 291, 33 St.
Rep. 156.

CREDITORS' BILL.

See JUDGMENT CREDITORS.

CREDITORS OF ESTATES, REMEDIES AGAINST LEGATEES AND HEIRS.

See DECEDENTS' ESTATES.

CRIME, CARE OF PROPERTY OF PERSON IMPRISONED FOR.

- A. Statutory provisions.
- B. Civil Death.
- C. Appointment of Committee.
- D. Insane Convict.
- E. Precedents.
 - 1. Petition for Appointment of Committee.
 - 2. Order to show cause.
 - 3. Order Appointing Committee.

A. Statutory provisions.

Article XIV of the Prison Law contains provisions for the appointment of a committee of the property of one confined for life; and Article XV provides for the appointment of trustees of the property of one confined for less than life. These statutes are not considered of sufficient importance to justify their inclusion *in toto*.

B. Civil Death.

Under section 511 of the Penal Law a person sentenced to imprisonment for life is thereafter deemed civilly dead. This statement of the Penal Law is declaratory of the common law rule.

The general provisions of the Surrogate Court Act and other statutes relating to the estates of deceased persons refer to those who have died a natural death, not to persons confined in a prison for life.¹

C. Appointment of Committee.

A petition for the appointment of a committee of the estate of a life convict must show who are the heirs-at-law and next of kin of the convict, and a statement that certain persons mentioned in a petition are his next of kin is insufficient in the absence of a statement of facts showing how the alleged relationship arises.² Before the court takes possession of the property of a convict, every fact necessary to

1. Avery v. Everett, 110 N. Y. 317; 2. Matter of Stephani, 75 Hun, 188.
Matter of Zeph, 50 Hun, 523, 3 N. Y. 26 N. Y. Supp. 1039.
Supp. 460.

confer jurisdiction must be established by common law proof. It must appear that notice of the application has been served on every person entitled thereto.³ But, when the petition sets out all the jurisdictional facts required by the statute, and all the persons entitled to such proceeding have had notice thereof and have not appeared, the petition itself is sufficient proof of the jurisdictional facts to warrant the appointment of a committee.⁴

D. Insane Convict.

The appointment of a committee is properly made under the Prison Law, although the convict has become insane and has been moved to a state hospital for insane persons.⁵ Article 81 of the Civil Practice Act, relating in general to the appointment of committees for incompetent persons, does not forbid the procedure, in such a case, under the Prison Law.⁶

E. Precedents.

1. Petition for appointment of committee.

SUPREME COURT — COUNTY OF NEW YORK.

IN THE MATTER OF THE APPLICATION OF
CHARLES J. STEPHANI FOR THE AP-
POINTMENT OF A COMMITTEE OF THE
ESTATE OF ALPHONSE J. STEPHANI, A
LIFE CONVICT, UNDER THE PROVISIONS
OF ARTICLE XIV OF THE PRISON LAW.

187 N. Y. 178.

To the Supreme Court of the County and State of New York:

The petition of Charles J. Stephani respectfully shows to this court:

1. That your petitioner is over twenty-one years of age and of sound mind; that he resides at No. 90 Adlerflychtplatz, in the city of Frankfurt-on-the-Main, Germany; that he is the uncle of Alphonse J. Stephani, a life convict, serving a sentence in the State prison of New York; and that he is informed and verily believes that he is the sole legatee under the last will and testament of said Alphonse J. Stephani.

2. That the said Alphonse J. Stephani, being at that time a resident of the county of New York, was, on the 10th day of April, 1891, sentenced to imprisonment for life by the Court of Oyer and Terminer in

3. Matter of Estate of Stephani, 75 Hun, 188, 26 N. Y. Supp. 1039.

4. Trust Co. of America v. State Safe Deposit Co., 109 App. Div. 665, 96 N. Y. Supp. 585; aff'd, 187 N. Y. 178.

5. Trust Co. of America v. State Deposit Co., 187 N. Y. 178.

6. Trust Co. of America v. State Safe Deposit Co., 109 App. Div. 665, 96 N. Y. Supp. 585; aff'd, 187 N. Y. 178.

the county of New York, upon a conviction for murder in the second degree; that he is confined under the said judgment and is at present in the State Hospital asylum, Clinton prison, Dannemora, N. Y.

3. That the said Alphonse J. Stephani has certain personal property in the State of New York, the exact amount of which your petitioner cannot now state, as it depends upon the result of proceedings now pending for the settlement of the estates of Josephine Stephani, the mother, and of Carl Louis Alphonse Stephani, the father, of said Alphonse J. Stephani; but that the value thereof to the best of your petitioner's information, knowledge and belief, will not be less than twenty-five thousand (\$25,000) nor more than one hundred thousand dollars (\$100,000); that the said Alphonse J. Stephani owns no real estate within the State of New York, to the best of your petitioner's knowledge, information and belief.

4. That the father of said Alphonse J. Stephani died on or about November 19, 1888; that the mother of said Alphonse J. Stephani died on or about April 20, 1902; that the said Alphonse J. Stephani is unmarried and has no brothers or sisters, and no descendants of deceased brothers or sisters, and that his only next of kin and heirs-at-law, with their degree of relationship and places of residence, are as follows: (Insert names, degree of relationship and residences. The petition should also state the age of the next of kin and heirs-at-law or, at least, whether they are of full age, or minors over or under fourteen years of age, and that they are competent, and if any are incompetent persons that should also be stated).

5. That the appointment of a committee of the estate of said Alphonse J. Stephani is necessary for the care, custody and preservation thereof; and that the Trust Company of America is a proper and suitable person to be appointed as such committee; that no committee of the estate of said Alphonse J. Stephani has been appointed in this State, or elsewhere, to the knowledge of your petitioner, except that heretofore, and on the 8th day of November, 1893, an order was made appointing the Farmers' Loan & Trust Company committee of the estate of said Alphonse J. Stephani, a life convict, which appointment was vacated by the General Term of the Supreme Court by reason of technical defects in the proceeding, as reported in 75 Hun, page 188; and that there is not now a committee of the estate of said Alphonse J. Stephani.

WHEREFORE, your petitioner prays that an order may be made citing and requiring the said Alphonse J. Stephani and the said Emma Grossman, Louise von Holbach, Emma G. von Glaubitz, Friedrich Lenning, Marie Hill, Sophie Leith and Maria Lawrence and the district attorney of New York county to show cause, at a Special Term of this court, at a time therein stated, why the Trust Company of America or some other suitable person or corporation should not be appointed as committee of the estate of said Alphonse J. Stephani, as provided by article XIV of the Prison Law, and why the petitioner should not have the costs of this proceeding and such other and further relief as may be just and equitable.

CHARLES J. STEPHANI,
Petitioner.

(Add verification.)

(Here follows copy of judgment of conviction by the court, and duly executed and verified waivers by several of the next of kin and heirs-at-law of said life convict, duly waiving the issuance of a citation or any other notice of the application herein, and consenting that the prayer of the petition be granted.)

2. Order to show cause.

(Same title.)

Charles J. Stephani, of Frankfort, Germany, having duly presented his duly verified petition, bearing date June 27, 1903, in which he alleges that Alphonse J. Stephani is a life convict, serving a sentence in the State prison at New York, at present confined in the State Hospital asylum, Clinton prison, Dannemora, N. Y.; that he has personal property within the State of New York which requires the appointment of a committee for the care, custody and preservation thereof, and praying for the appointment of the Trust Company of America, or some other suitable person or corporation as such committee, under the provisions of article XIV of the Prison Law, and that the only next of kin and heir-at-law of said Alphonse J. Stephani, are the petitioner, Charles J. Stephani, an uncle (insert names, degree of relationship and residences); and the aforesaid next of kin and heirs-at-law (naming them) having presented their duly executed waivers, waiving issuance and service upon them of a citation or any other notice of the application herein, and consenting that the prayer of the petitioner be granted;

Now, on motion of Carter, Hughes, Rounds & Schurman, attorneys for the petitioner, Charles J. Stephani, it is hereby

Ordered, that Alphonse J. Stephani, Hon. William Travers Jerome, district attorney of the county of New York, and the said Mrs. Maria Hill show cause at a Special Term of this court, to be held at Part I thereof, in the County Court House, in the county of New York, on the 18th day of November, 1903, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why an order should not be made as prayed for in the petition, appointing the Trust Company of America or some other suitable person or corporation as committee of the estate of said Alphonse J. Stephani, as provided by article XIV of the Prison Law, and why the petitioner should not have the costs of this proceeding and such other and further relief as may be just and equitable; and it is further

Ordered, that notice of this application be given by serving upon the said Alphonse J. Stephani and William Travers Jerome, district attorney, and each of them personally, a copy of this order and of the petition of Charles J. Stephani not less than twenty days prior to the return day of this order, and that such service so made shall be deemed sufficient; and it further appearing from the petition herein that the said Marie Hill resides at 3 Lindenstrasse, Frankfort, Germany, and that service of this order cannot with due diligence be made upon her within the State of New York; it is further

Ordered, that notice of this application be given to the said Mrs. Marie Hill by publishing a copy of this order in two newspapers, to wit, in *The New York Law Journal*, published in the county of New York, and in the *New York Times*, published in the county of New York, once a week for six successive weeks, or at the option of the petitioner, by serving a copy of this order and of the said petition without the State upon the said Mrs. Marie Hill, personally, and that on or before the date of the first publication, as aforesaid, the petitioner deposit in the general post-office, in the city of New York, a copy of this order and of the said petition, contained in a securely closed postpaid wrapper, directed to the said Mrs. Marie Hill, at 3 Lindenstrasse, Frankfort, Germany.

New York, *September 16, 1903.*

JOHN PROCTOR CLARKE,

Justice of the Supreme Court of the State of New York.

(Here followed proofs of service, of the foregoing petition and order to show cause, upon the district attorney of New York county and upon all the next of kin and heirs-at-law of said life convict, except those who had duly waived notice and consent to appointment by proposed trustees.)

3. Order appointing committee.

(Caption and title.)

(Recitals.)

Ordered, that the petition of the petitioner, Charles J. Stephani, be, and the same hereby is, in all respects, granted and allowed; and it is further

Ordered, that The Trust Company of America, a corporation duly organized under the laws of the State of New York, and having its principal office at No. 149 Broadway, in the borough of Manhattan, city of New York, be, and the same hereby is, appointed the committee of the estate of Alphonse J. Stephani, a life convict, under the provisions of chapter 401, Laws of 1889, with all the rights, powers and duties of a committee, as provided by law; and it appearing that the said The Trust Company of America is organized under the Banking Law (chapter 689, Laws of 1892) of the State of New York, the filing of a bond is hereby dispensed with in accordance with the provisions of section 158, chapter 689, Laws of 1892; and it is further

Ordered, that the said The Trust Company of America, as such committee, be, and the same hereby is, directed and authorized to take into its possession all of the personal property of said Alphonse J. Stephani, and to apply so much of the income of the property of said Alphonse J. Stephani as in his judgment may be necessary or expedient to supply said Alphonse J. Stephani from time to time with such necessities of life as may be required for his comfort and be not inconsistent with the regulations of the State prison in which he is confined; and it is further

Ordered, that the petitioner herein, Charles J. Stephani, be allowed the sum of five hundred dollars (\$500) for his costs and counsel fees in this proceeding, payable out of the property of the said Alphonse J. Stephani, and the committee herein appointed, The Trust Company of America, is authorized and directed to pay the said amount of costs to the petitioner or his attorneys out of the property of the life convict, Alphonse J. Stephani, which may come into his possession; and it is further

Ordered, that the said committee, The Trust Company of America, or any other party to this proceeding, may at any time apply at the foot of this judgment for the further directions of the court.

Enter: FRANCIS M. SCOTT,
J. S. C.

CRIMINAL CONTEMPTS.

See CONTEMPT.

DAMAGES, TREBLE.

See REAL PROPERTY, PROVISIONS RELATING TO; WASTE.

DEBTOR AND CREDITOR LAW.*

ARTICLE I.

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- A. Scope of Chapter.
- B. Discharge of Insolvent from debts.

ARTICLE II.

General Assignments.

- A. Effect of Federal Bankruptcy Act.
- B. Jurisdiction of courts: Debtor and Creditor Law, § 2. Jurisdiction of proceedings.
- C. Validity and construction of general assignment.
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 - 3. General requirements relative to assignment.
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- D. General powers and duties of assignee.
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 - 6. Debtor and Creditor Law, § 8. Discharge or removal of assignee, correction of inventory or schedule; supplemental inventories or schedules.
 - 7. Debtor and Creditor Law, § 11. Proceeding in case of death of assignee.
 - 8. Title of assignee.
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 - 14. Distribution of property.
- E. Rights of creditors.
 - 1. Debtor and Creditor Law, § 5. Notice to creditors to present claims.
 - 2. Debtor and Creditor Law, § 12. Notice to parties interested* in the estate as creditors or otherwise.
 - 3. Debtor and Creditor Law, § 13. Debts which may be proved against the estate.
 - 4. Debtor and Creditor Law, § 17. Invalid claims.
 - 5. Claims of creditors.

* For a further discussion of the matters referred to in this chapter, see Collier on Bankruptcy; Moore on Fraudulent Conveyances; B., C. & G. Consolidated Laws.

- F. Power of court.
 - 1. Debtor and Creditor Law, § 15. Power of court.
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 - 3. Debtor and Creditor Law, § 20. General powers of court.
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- G. Examination of Witnesses.
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- H. Sale and compromise of claims and property.
 - 1. Debtor and Creditor Law, § 19. Sale and compromise of claims and property.
 - 2. Validity of sale.
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- J. Preferred claims.
 - 1. Debtor and Creditor Law, § 22. Wages and preferred claims.
 - 2. Debtor and Creditor Law, § 23. Limitation of preferences.
 - 3. Employees.
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 - 5. Mechanics' Liens.
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- K. Debtor and Creditor Law, § 24. Appraisal of insolvent estate in the hands of assignee.
- L. Accounting of assignee.
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- C. Who may be discharged and by what court.
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 - 3. Debtor and Creditor Law, § 136. Creditor may notify debtor to apply for discharge.
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- D. Petition.
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- B. Purpose of statute.
- C. Judgments which are subject to discharge.
- D. Judgments procured after discharge.
- E. Creditor having no notice of bankruptcy proceedings.
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ARTICLE I.**INTRODUCTORY.****A. Scope of Chapter.**

The Debtor and Creditor Law, constituting Chapter XII of the Consolidated Laws, contains divers statutes of lesser importance at the present time. They are mostly inheritances from the Revised Statutes and other statutes in force before the present Federal Bankruptcy Act was adopted. Article II of the statutes relates to Assignments for the Benefit of Creditors, a subject which still has some life, but is used little in comparison to its importance before the enactment of the Bankruptcy Act. Article III relates to the discharge of insolvents from their debts, and constitutes a State insolvency statute, and, as such, conflicts with the Federal act and hence its vitality is suspended until the repeal of the Federal Act. Articles IV and V relate to the discharge of debtors from imprisonment; and, while they may be resorted to in certain cases, they have little practical importance as the Civil Rights Law provides for the release of the prisoner without an application to the court. However, there are a few situations under which the offender may secure a speedier release by the order of the court, and to this extent some use may be made of the proceeding. Article VI provides for the discharge from the record of a judgment which has been released through proceedings under the Federal Statute. It is the only article of the law which has a substantial importance. Articles VII, VIII, and IX may be said to have some life, but resort to them is infrequently made.

B. Discharge of insolvent from debts.

Sections 50-88 of the Debtor and Creditor Law provide for the discharge of an insolvent from his debts. For many years these provisions have been a part of the statute law of the state in practically the same form as at present. They conflict with the National Bankruptcy Act, and hence their force is suspended during the life of the Federal Act. They may again have practical effect, if the Bankruptcy Act is repealed, but the present Federal statute has been in force for over twenty years, and there is at present no indica-

tion of a sentiment which would justify its repeal. While the state statute remains in the Consolidated Laws, with a possibility that it may again have life, this possibility is thought to be so remote that an extended discussion thereof is entirely unnecessary. In previous editions of *FIERO ON SPECIAL PROCEEDINGS*, which were published before the Federal Act had become so well established as the sole procedure for the discharge of an insolvent from his debts, a discussion of the State statute will be found.

ARTICLE II.

GENERAL ASSIGNMENTS.

A. Effect of Federal Bankruptcy Act.

Article II of the Debtor and Creditor Law contains the statutory provisions relative to general assignments for the benefit of creditors. Unlike the provisions relating to the discharge of an insolvent from his debts, they are not superseded by the National Bankruptcy Act. The Federal statute superseded "insolvent" laws; but statutes regulating general assignments are not such laws, for they do not purport to release the debtor from his debts. While the Federal Act has not abolished general assignments, it has had the effect of reducing their number, as debtors have availed themselves of the Federal Act rather than the state statutes. Moreover, under the National Bankruptcy Act, a general assignment for the benefit of creditors is an "act of Bankruptcy," and renders the assignor subject to involuntary proceedings.¹

1. The general assignment contemplated by section 3a (4) of the Bankruptcy Act is to be taken in its generic sense, and embraces any conveyance at common law or by statute by which the parties intend to make an absolute and unconditional appropriation of the property conveyed to raise funds to pay the debts of the vendor, share and share alike. Such a conveyance inevitably thwarts operation of the Bankruptcy Act. The following assignments have been held to be acts of bankruptcy: A general assignment

for the benefit of creditors, under a statute regulating this common-law right; a general assignment by a corporation made by direction of a majority of the directors and stockholders; a confession of judgment to a trustee for the benefit of all creditors. An assignment for the benefit of creditors which purports to transfer all the property of the partnership is an act of bankruptcy, even though the assignment itself may be void or voidable as against the firm because made by only one partner. There is no dis-

A general assignment for the benefit of creditors without preferences, made by a debtor without four months before the filing of a petition under the Federal Bankruptcy Act, is constructively fraudulent under such act, although innocent as a matter of fact.² The assignee for the benefit of creditors has no title to the property as against the right of the bankruptcy court to possess and administer it; and when the duly authorized officer of that court takes possession, he does not take property of the assignee, but the property of the bankrupt unaffected by the assignment.³

A general assignment for the benefit of creditors by the debtor's voluntary common-law deed of assignment, conveying all his property subject to the payment of his debts for the equal benefit of all his creditors, but not providing for the release of the debtor, is valid except as against proceedings seasonably taken under the Bankruptcy Act to set it aside as an act of bankruptcy, even though such an assignment may be regulated and supplemented by legislative safeguards of the State where it is made or operates. But where such an assignment has been made and proceedings are not instituted in bankruptcy within the statutory four months thereafter, the State court may proceed to administer the estate under local statutes and a trustee appointed in bankruptcy subsequent to the four months cannot attack such proceedings.⁴

inction in this respect between valid and invalid instruments. While a bill of sale or a deed of trust in the nature of a mortgage containing a power of sale but reserving an equity to the mortgagor or pledgor is not, technically speaking, an assignment, because the entire title to the property does not pass to the trustee, where there is an absolute conveyance of the title to the trustee for the benefit of all the creditors, the instrument is none the less an assignment because it provides that a possible surplus shall revert to the grantor, inasmuch as that is implied by law. It has been held, how-

ever, that a deed of trust which contained a condition of defeasance and an equity reserved to the grantor after satisfaction of claims of creditors was not a voluntary general assignment. *Moore on Fraudulent Conveyances*, p. 1099.

2. *Matter of Gray*, 47 App. Div. 554, 62 N. Y. Supp. 618; *Whittlesey v. Becker & Co.*, 142 App. Div. 313, 126 N. Y. Supp. 1046.

3. *Whittlesey v. Becker & Co.*, 142 App. Div. 313, 126 N. Y. Supp. 1046.

4. *Moore on Fraudulent Conveyances*, p. 1070.

B. Jurisdiction of courts.**Debtor and Creditor Law, § 2. Jurisdiction of proceedings.**

The term "judge" when used in this article shall apply equally to a county judge of the county within which the assignment is recorded and to justices of the supreme court, and the term "court" when used in this article shall, in like manner, apply to the county court of such county and to the supreme court. All applications hereunder made in the supreme court shall be made to the court, or a justice thereof within the judicial district where the assignment is recorded, and all proceedings and hearings under this article had in the supreme court upon the return of a citation or order shall be had at a special term of said court held in the county where the debtor resided at the time of the assignment, or in case of an assignment by copartners, in the county where the principal place of business of such copartners was at the time of such assignment, or in the case of an assignment by a corporation in the county where the principal office of such corporation was at the time of such assignment.

(See B., C. & G. Consol. L., 2nd Ed., p. 1585.)

C. Validity and construction of general assignment.**1. Debtor and Creditor Law, § 3. Requisites of general assignment.**

Every conveyance or assignment made by a debtor of his estate, real or personal, or both, to an assignee for the creditors of such debtor, shall be in writing, and shall specifically state therein the residence and kind of business carried on by such debtor at the time of making the assignment, and the place at which such business shall then be conducted, and if such place be in a city, the street and number thereof, and if in a village or town such apt designation as shall reasonably identify such debtor.

Every such conveyance or assignment shall be duly acknowledged before an officer authorized to take acknowledgment of deeds and shall be recorded in the county clerk's office in the county where such debtor shall reside or carry on his business at the date thereof. An assignment by copartners shall be recorded in the county where the principal place of business of such copartners is situated. An assignment by a corporation shall be recorded in the county where its principal place of business is situated. When real property is a part of the property assigned, and is situated in a county other than the one in which the original assignment is required to be recorded, a certified copy of such assignment shall be filed and recorded in the county where such property is situated.

The assent of the assignee, subscribed and acknowledged by him, shall appear in writing, embraced in or at the end of, or indorsed upon the assignment, before the same is recorded, and, if separate from the assignment, shall be duly acknowledged.

In all cases where an assignment is made by a corporation the right to recover the amount due from stockholders on unpaid capital stock issued to or subscribed for by them shall pass to the assignee whether mentioned in the assignment or not.

(See B., C. & G. Consol. L., 2nd Ed., p. 1587.)

2. Debtor and Creditor Law, § 4. Debtor's schedule.

A debtor making an assignment shall, at the date thereof or within twenty days thereafter, cause to be made, and filed with the county clerk of the county where such assignment is recorded, and file a duplicate thereof with the assignee, an inventory or schedule containing:

1. The name, occupation, place of residence, and place of business, of such debtor;

2. The name and place of residence of the assignee;

3. A full and true account of all the creditors of such debtor, stating the last known place of residence of each, if known, if unknown the fact to be stated, the sum owing to each, with the true cause and consideration therefor, and a full statement of any existing security for the payment of the same;

4. A full and true inventory of all such debtor's estate at the date of such assignment, both real and personal, in law and in equity, with the incumbrances existing thereon, and of all vouchers and securities relating thereto, and the nominal as well as actual value of the same according to the best knowledge of such debtor; and a claim for such exemptions as he may be entitled to;

5. An affidavit made by such debtor, that the same is in all respects just and true.

In case such debtor shall omit, neglect or refuse to make and file such inventory or schedule within the twenty days required, the assignee named in such assignment shall, within ten days after the date thereof, cause to be made, and filed as aforesaid such inventory or schedule as above required, in so far as he can; and for such purpose the judge shall, at any time, upon the application of such assignee, compel by order such delinquent debtor, and any other person to appear before him and disclose, upon oath, any knowledge or information he may possess, necessary to the proper making of such inventory or schedule. The assignee shall verify the inventory and schedule so made by him, to the effect that the same is in all respects just and true to the best of his knowledge and belief.

In case the assignee shall be unable to make and file such inventory or schedule, within said ten days, the judge may, upon application upon oath, showing such inability, allow him such further time as shall be necessary, not exceeding sixty days. If the assignee fail to make and file such inventory or schedule within said ten days or such further time as may be allowed, the judge shall require, by order, the assignee forthwith to appear before him, and show cause why he should not be removed. Any person interested in the trust estate may apply for such order and demand such removal. The books and papers of such delinquent debtor shall at all times be subject to the inspection and examination of any creditor. The judge is authorized, by order, to require such debtor or assignee to allow such inspection or examination. Disobedience to such order is a contempt, and obedience to such order may be enforced by attachment.

6. The assignor shall comply with all lawful orders of the judge; examine the corrections of all claims presented against his estate, if ordered by the judge so to do, and if any is incorrect or false notify his assignee thereof immediately; deliver to his assignee all his books, papers and records; execute and deliver such papers as shall be ordered by the judge; execute and deliver

to his assignee transfers of all his property outside the state of New York; if ordered by the judge attend before the assignee in the county where the assignor resides, and submit to an examination under oath concerning the conducting of his business, the cause of his inability to pay his debts, his dealings with his creditors and other persons, the amount, kind and whereabouts of his property, and all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding.

(See B., C. & G. Consol. L., 2nd Ed., p. 1593.)

3. General requirements relative to assignment.

Any limitation provided by the statute regulating the making of general assignments for creditors is deemed to be incorporated therein.⁵ One of the chief requisites of an assignment is that the assignor shall place all of his property, both real and personal, in the possession of his trustee. The failure to do so makes the assignment under the statutes absolutely void.⁶ The fact that an assignee for the benefit of creditors has failed to comply with the statute, regarding the recording of the assignment and the giving of a bond, does not render the assignment itself void or cause the title to the assets to revert to the assignor.⁷

An agreement between an assignor and the assignee that the latter shall have a greater compensation than his legal fees, based upon an agreement of the assignee that he will administer the trust to the best of his knowledge, skill, and ability, is void for want of consideration and as against public policy.⁸

Where an assignment, absolute in form and actually delivered, is made upon the condition that it is to provide a cash payment to the creditors only in case all of them agree to the proposed composition, an inquiry may be made

5. *Paddell v. Janes*, 84 Misc. 212, 145 N. Y. Supp. 868.

Bill of sale.—A written instrument from a debtor to a creditor, purporting to be a bill of sale of all the debtor's property, which is worth much more than the creditor's claims, and which states that the property is sold in consideration of the indebtedness due the creditor and to secure other creditors, is not a bill of sale, either absolute or as collateral security, but an attempted assignment for

the benefit of creditors, which is invalid in failing to comply with the statute, and the property may be attached by other creditors. *Young v. Stone*, 61 App. Div. 364, 70 N. Y. Supp. 558; *aff'd*, 174 N. Y. 517.

6. *Paddell v. Janes*, 84 Misc. 212, 145 N. Y. Supp. 868.

7. *Matter of Berman*, 173 App. Div. 689, 160 N. Y. Supp. 79.

8. *Carpenter v. Taylor*, 164 N. Y. 171.

as to whether the conditions were ever fulfilled, and if it appears that they were not, the instrument will be held never to have become effective.⁹

While an assignee for creditors may use all of the assigned property to pay creditors of the assignor, there is a reversion in favor of the assignor of any property left after the execution of the trust imposed whether such reversion be reserved in the assignment or not.¹⁰

Where the individual general assignments made by the members of a firm directed the assignee to discharge in full all debts and liabilities of the partnership and of the assignor, and provided that, if the residue of the proceeds was not sufficient to pay said debts and interest in full, he should apply the residue of the property to the payment of the debts ratably and in proportion, so that no distinction was made between the individual debts and firm debts, a judgment creditor of the firm is entitled to share in the individual assets of the assignors equally with their individual creditors, and with creditors of the firm to the extent of the balance remaining due upon the claim against the firm.¹¹

4. Acknowledgment.

An assignment which has in fact been acknowledged before a competent officer is not void because the certificate does not show a proper acknowledgment.¹² Where the venue of a certificate of acknowledgment annexed to an assignment for the benefit of creditors is "State of New York, City and County of Albany," and the signature thereto is, "Geo. W. Cassedy, Master in Chancery in New Jersey," oral evidence is competent to show that the acknowledgment was actually taken in New Jersey.¹³

5. Fraudulent assignment.

An assignment for the benefit of creditors may be attacked by creditors on the ground that it was fraudulent. A general

9. *Doughty v. Weston*, 174 App. Div. 212, 160 N. Y. Supp. 1075.

10. *Paddell v. Janes*, 84 Misc. 212, 145 N. Y. Supp. 868.

11. *Matter of Whitney & Kitchen*, 146 App. Div. 45, 130 N. Y. Supp. 629; appeal dismissed, 202 N. Y. 580.

12. *Linderman v. Hastings Card & Paper Co.*, 38 App. Div. 488, 56 N. Y. Supp. 456.

13. *Rogers v. Pell*, 47 App. Div. 240, 62 N. Y. Supp. 92; aff'd, 168 N. Y. 587.

assignment without preferences may be held fraudulent where the assignor has withheld a considerable amount of his property from the assignee.¹⁴ But the omission from the inventory and schedules of certain personal property does not impair the validity of that instrument, where it appears that the assignee took possession of the omitted property under the assignment, and the omission is not shown to have been a result of any fraud on the part of the assignor.¹⁵

Where it is apparent that conveyances of land by a husband to his wife were intended to transfer the title to her only until he should need it, money raised by him upon the property while it stood in her name cannot be lawfully preferred by him in an assignment for the benefit of creditors as loans due to her, and such preference and payments of interest upon such alleged loans, made just before the assignment was executed, are fraudulent and invalidate the assignment.¹⁶

An assignment made after various conveyances of property, one of which was ostensibly for a loan previously made to the assignor, the proceeds of which he did not satisfactorily account for, his business being apparently prosperous, and after a transfer of his whole interest in two corporations, of which he was manager, may be set aside as fraudulent.¹⁷

Where defendant, in an action on a note, failed to answer or demur, but procured extensions of time under agreement that no judgment should be entered against it, and that on its part no other claims should intervene or judgments be entered against it prior to plaintiff's claim, and that it would promptly notify plaintiff of anything which might intervene to the prejudice of its priority, an assignment for the benefit of creditors, made by defendant in disregard of its agreement and without notice to plaintiff, will be set aside as fraudulent.¹⁸

Where an assignment was made on Saturday afternoon,

14. *Harting v. Rosenfeld*, 26 Misc. 175, 56 N. Y. Supp. 753.

15. *Troescher v. Cosgrove*, 46 App. Div. 498, 61 N. Y. Supp. 1036.

16. *Patchen v. Waedferlaer*, 29 Misc. 494, 61 N. Y. Supp. 949; *aff'd*,

52 App. Div. 367, 65 N. Y. Supp. 122.

17. *Cruikshank v. Walsh*, 39 App. Div. 632, 66 N. Y. Supp. 894.

18. *Third Nat. Bank v. Buffalo Wheel Co.*, 66 App. Div. 293, 73 N. Y. Supp. 114; *aff'd*, 171 N. Y. 637.

when the county clerk's office had been closed, and was not recorded until after a meeting of the creditors on Monday afternoon, at which they requested that it be not recorded, and then only after a creditor attending had obtained an attachment, it was held that the delay afforded no ground for claim of fraud in the assignment.¹⁹

Where a judgment creditor sues to set aside an assignment for the benefit of creditors on the ground of fraud, and is successful as to a portion of the property transferred to the assignee, but he obtains no benefit from the judgment, it is not an election by him to take in hostility to the assignment, and he may take under it, and his judgment constitutes no bar to such relief.²⁰

6. Corporation.

A general assignment without preferences, executed by a corporation, will not be set aside because its officers had previously made payments of its moneys to themselves, where there is no proof that the corporation itself authorized such payments.²¹ But a general assignment by the president of a corporation without authority of the board of directors is void as against creditors and stockholders.²² An assignment for benefit of creditors made by a corporation to a director or stockholders is not invalid under section 66 of the Stock Corporation Law, relative to prohibited transfers to officers or stockholders.²³ And, in any event, such statute does not apply to foreign corporations.²⁴ An assignment by a foreign corporation, made in this State, of property here, is subject to Debtor and Creditor Law.²⁵

An assignment made by a foreign corporation in the State of its domicile and valid under the laws thereof enables its assignees to maintain an action in the courts of this State,

19. *Irving Nat. Bk. v. Wilson Bros. Woodenware & Toy Co.*, 34 App. Div. 481, 54 N. Y. Supp. 313.

20. *Matter of Garver*, 84 App. Div. 262, 82 N. Y. Supp. 594; *aff'd*, 176 N. Y. 386.

21. *Creteau v. Foote & Thorne Glass Co.*, 54 App. Div. 168, 66 N. Y. Supp. 370.

22. *Schaefer v. Scott*, 40 App. Div. 438, 57 N. Y. Supp. 1035.

23. *Linderman v. Hastings Card & Paper Co.*, 38 App. Div. 488, 56 N. Y. Supp. 456; *Munzinger v. United Press*, 52 App. Div. 338, 65 N. Y. Supp. 194.

24. *Matter of Halstead*, 42 App. Div. 101, 58 N. Y. Supp. 898.

25. *Matter of Halstead*, 42 App. Div. 101, 58 N. Y. Supp. 898.

where there are no preferences and no conditions imposed upon creditors.²⁶

A general assignment executed by a corporation organized under the laws of another State, by which it conveys all its property to an attorney in trust for the benefit of its creditors, certain of whom are preferred, will be recognized as a valid transfer of a claim existing against a domestic corporation organized under the laws of this State, which has commenced proceedings for its voluntary dissolution, and the receiver appointed in such proceedings will be directed to pay over the amount of the claim to a trustee appointed by the court of the State in which such foreign corporation was domiciled, in place of a deceased assignee named in the instrument of assignment.²⁷

D. General powers and duties of assignees.

1. Debtor and Creditor Law, § 14. Duties of assignee.

It shall be the duty of the assignee to collect and reduce to money the property of the estate, under the direction of the court; report promptly to the court any claims presented to him which are not provable, or are incorrect or false and shall also report promptly for allowance all claims presented to him which are not disputed; close up the estate as expeditiously as possible; furnish such information concerning the estate as may be requested by parties in interest; keep regular accounts; pay dividends as often as is compatible with the best interests of the estate; file a final report and account at least fifteen days before the final meeting of creditors.

(See B., C. & G. Consol. L., 2nd Ed., p. 1605.)

2. Debtor and Creditor Law, § 6. Bond of assignee.

The assignee named in any such assignment shall, within thirty days after the date thereof, and before he shall have any power or authority to sell, dispose of or convert to the purposes of the trust any of the assigned property, enter into a bond to the people of the state of New York, in an amount to be ordered and directed by the judge, with sufficient sureties to be approved of by such judge, and conditioned for the faithful discharge of the duties of such assignee, and for the due accounting of all moneys received by him, which bond shall be filed in the clerk's office of the county where such assignment is recorded, but in case the debtor shall fail to present such inventory within the ten days required, then the assignee, before the ten days thereafter shall have elapsed, may apply to said judge by verified petition for leave to file a provisional bond, until such time as he may be able to present the schedule or inventory as hereinbefore provided.

(See B., C. & G. Consol. L., 2nd Ed., p. 1598.)

²⁶. *Workum v. Caldwell*, 27 Misc. 72, 58 N. Y. Supp. 175.

²⁷. *Matter of Hulbert Bros. & Co.*, 160 N. Y. 9.

3. Debtor and Creditor Law, § 7. Further security.

The judge may, upon his own motion or upon the application of any party in interest, and on such notice as he may direct to be given to the assignor, assignee, and surety, require further security to be given whenever, in his judgment, the security afforded by the bond on file is not adequate.

(See B., C. & G. Consol. L., 2nd Ed., p. 1599.)

4. Debtor and Creditor Law, § 9. Failure to file bond.

A failure to file any bond required by or under this article within the specified time will not deprive the judge of his power over the assignee or the trust estate.

(See B., C. & G. Consol. L., 2nd Ed., p. 1601.)

5. Debtor and Creditor Law, § 10. Action on bond; application of recovery.

Any action brought upon an assignee's bond may be prosecuted by a party in interest by leave of the court; and all moneys realized thereon shall be applied by direction of the judge in satisfaction of the debts of the assignor, in the same manner as the same ought to have been applied by such assignee.

(See B., C. & G. Consol. L., 2nd Ed., p. 1601.)

6. Debtor and Creditor Law, § 8. Discharge or removal of assignee; correction of inventory or schedule; supplemental inventories or schedules.

The judge shall, in the case provided in section four, and may also, at any time, on the petition of one or more creditors, showing misconduct or incompetency of the assignee, or on petition of the assignee himself, showing sufficient reason therefor, and after due notice of not less than five days to the assignor, assignee, surety and such other person as the judge may prescribe, remove or discharge the assignee, and appoint one or more in his place, and order an accounting of the assignee so removed or discharged, and may enjoin such assignee from interfering with the assignor's estate, and make provision by order for the safe custody of the same, and enforce obedience to such injunction and orders by attachment; and, upon the discharge of the assignee upon his own application, such assignee's bond shall be canceled and discharged. The new assignee shall give a bond, to be approved as required by section six. The judge shall have power, by order, to require or allow any inventory or schedule filed to be corrected or amended. The judge may also require and compel, from time to time, supplemental inventories or schedules to be made and filed within such time as he shall prescribe, and to enforce obedience to all orders by attachment.

(See B., C. & G. Consol. L., 2nd Ed., p. 1600.)

7. Debtor and Creditor Law, § 11. Proceeding in case of death of assignee.

In case an assignee shall die during the pendency of any proceeding under this article, or at any time subsequent to the filing of any bond required herein, his

personal representative or successor in office, or both, may be brought in and substituted in such proceeding on such notice, of not less than eight days as the judge may direct to be given; and any decree made thereafter shall bind the parties thus substituted as well as the property of such deceased assignee, provided, however, that if such assignee die subsequent to the filing of his bond, and before any proceeding may have been had thereunder, then the surety on such bond may apply to the judge for an accounting, who may, on such terms as to him seems just and proper, appoint another assignee and release such surety.

(See B., C. & G. Consol. L., 2nd Ed., p. 1602.)

8. Title of assignee.

The assignee is merely a trustee, and not owner; he buys nothing and pays nothing, but takes the title for the purpose of trust duties. His obligations are those which pertain to voluntary trustees, not acting gratuitously, and he is bound to exercise that degree of diligence which persons of ordinary prudence are accustomed to use in their own affairs.²⁸ An assignee for creditors is merely the representative of the assignor in the payment of debts and is accountable to him for all property not used for that purpose, and takes the property subject to the equities of third parties.²⁹

A general assignment transfers to the assignee all the rights which the assignor had under an undertaking given to secure an attachment in an action in which the assignor was the defendant.³⁰ There is no contractual relation between one making a general assignment for creditors and the assignee who takes by appointment and not by way of contract.³¹

An assignee who takes possession of the assignor's store and locks the same with knowledge that the rent is unpaid, so that he has reason to believe that summary proceedings will be started, is liable to the assignor for the value of the goods which are stolen when the landlord removes them to the sidewalk, if he is negligent in taking no steps to protect the goods.³²

An assignee, whether deriving authority from a general or particular assignment, cannot bind his assignor to the

28. *Baillargeon v. Dumoulin*, 148 N. Y. Supp. 443. N. Y. Supp. 1037.

29. *Paddell v. Janes*, 84 Misc. 212, 145 N. Y. Supp. 868. 31. *Paddell v. Janes*, 84 Misc. 212, 145 N. Y. Supp. 868.

30. *Joffe-Mayer Co. v. Raden*, 134 Div. 534, 163 N. Y. Supp. 257. 32. *Welensky v. Breslin*, 176 App.

obligation of personal enforcement, or beyond the distribution of the property passed by the assignment.³³

An assignment for creditors by a building contractor, who had a contract providing that, in case the owner was compelled to complete the work, and the cost of completion did not exceed the balance due the contractor, the difference should be paid to him, passed to the assignee the amount due the contractor at the time the assignment was made, or whatever became due to him thereafter by reason of the owner's completing the work and leaving a surplus, as against a subsequently filed mechanic's lien.³⁴

Where a firm of insurance agents collected premiums due the company and deposited them in the bank in the name of the firm for the purpose of remitting them to the company, and after remitting checks against the deposit made an assignment for the benefit of creditors before the checks could be presented to the bank for payment, the money, being held in trust and capable of identification, did not pass to the assignee.³⁵

9. Rents.

The liability of the assignee under a lease of his assignor rests on the covenants and not upon use and occupation.³⁶ A general assignee of a tenant is not liable for monthly rent which fell due the day before the assignment was made; nor for use and occupation where the lease remained in effect during the entire period of his occupancy.³⁷ To render the assignee liable for the rental of premises under a lease to the assignor, he must have assumed the obligation expressly or by unequivocal acts; and the mere retention of exclusive possession for six days is insufficient to indicate an election to continue the lease.³⁸

Where a lessee, having sublet a portion of the demised premises at an annual rental, payable monthly, subsequently

33. *Moss v. Lindblomm*, 26 Misc. 157, 56 N. Y. Supp. 746; reversed, 39 App. Div. 586, 57 N. Y. Supp. 703.

34. *N. J. Steel & Iron Co. v. Robinson*, 74 App. Div. 481, 77 N. Y. Supp. 547; reversed, 178 N. Y. 632.

35. *Dickinson v. First National Bank*, 64 App. Div. 254, 72 N. Y.

Supp. 6.

36. *Cameron v. Nash*, 41 App. Div. 532, 58 N. Y. Supp. 643.

37. *Walton v. Stafford*, 162 N. Y. 558.

38. *H. L. Judd & Co. v. Bennett*, 28 Misc. 558, 59 N. Y. Supp. 624.

makes an assignment for the benefit of creditors, the assignee may recover of the sub-tenant rent due at the time of the assignment although subsequently the owner of the property rescinded the assignor's lease because of its insolvency, and dispossessed the sub-tenants by summary proceedings.³⁹

The assignee's use and occupation of premises leased to his assignor is a sufficient consideration for his personal promise to pay the rental of the premises.⁴⁰ Where the assignee took possession of the premises formerly occupied by the assignor, with the consent of the landlord, who thereafter recovered a judgment for use and occupation against the assignee personally, it was held that the landlord had no claim to a preference or to any payment from the estate.⁴¹

10. Actions by assignee.

An assignee of a firm may maintain an action to set aside transfers made by his assignors in violation of section 23, prohibiting preferences in excess of one-third of the assigned estate, where the complaint alleges that such payments and transfers were made and received with knowledge of the insolvency of the assignors and in contemplation of the impending general assignment.⁴² Under section 17 the assignee of a mortgagor may attack the validity of a chattel mortgage on the ground that it was not properly filed.⁴³

Where the sole question is as to the right of possession of goods as between a pledgee thereof and the general assignee of the pledgors, the latter are not essential parties to the action.⁴⁴

In an action to recover for goods sold and delivered by an assignor, the plaintiff offered the original general assignment, which was recorded, and also the assignee's bond and schedule, and objection was made to the inventory and schedule only, and the assignee testified, without objection, to the

39. *Meyer v. Schulte*, 160 App. Div. 236, 144 N. Y. Supp. 1028; *aff'd*, 213 N. Y. 675.

40. *Kage v. Stern*, 144 N. Y. Supp. 160.

41. *Matter of Donaldson*, 27 Misc. 745, 59 N. Y. Supp. 656.

42. *Wile v. Cauffman*, 39 App. Div. 206, 57 N. Y. Supp. 240.

43. *Stich v. Pirkel*, 100 Misc. 594, 166 N. Y. Supp. 440. See also *Harris v. Batjer*, 26 Misc. 702, 57 N. Y. Supp. 90. Compare *Sheldon v. Wickham*, 161 N. Y. 500, under an earlier statute.

44. *National Bank of Deposit v. Sardy*, 26 Misc. 555, 57 N. Y. Supp. 625; *aff'd*, 44 App. Div. 357, 61 N. Y. Supp. 155, 166 N. Y. 380.

fact of assignment; and it was held, that the claim that there was no proof of the assignment was untenable.⁴⁵

11. Actions against assignee.

A general assignee for creditors in an action against the estate may either compromise the claim, or answer and admit the truth of such allegations as he knows to be correct.⁴⁶ Where an assignment for the benefit of creditors directs the payment of the assignor's debts, the assignee is precluded from interposing the defense of usury to a debt mentioned in the schedule.⁴⁷

12. Bond of assignee.

Where an assignment for creditors is superseded by a bankruptcy proceeding under the Federal Statute, but the assignee fails to pay over the funds to the trustee, the latter can maintain an action on the assignee's bond.⁴⁸

13. Discharge or removal of assignee.

An assignee for the benefit of creditors will not be removed at the suit of creditors because he has offered judgment on a valid claim against the estate, where no fraud or fraudulent intent is shown.⁴⁹ The failure of an assignee to record the assignment and to give a bond may furnish sufficient reason for his removal, but in such a case it is the duty of the court to appoint another assignee.⁵⁰

The widow and executrix of the will of a deceased assignee for the benefit of creditors should not be appointed as sub-

45. *Hitchings v. Kayser*, 65 App. Div. 302, 72 N. Y. Supp. 749; *aff'd*, 171 N. Y. 636.

46. *Markell v. Hill*, 34 Misc. 133, 69 N. Y. Supp. 537; reversed, 64 App. Div. 191, 71 N. Y. Supp. 924.

47. *Matter of Atwood & Sons*, 40 App. Div. 272, 57 N. Y. Supp. 1031.

48. *Cohen v. American Surety Co.* of N. Y., 192 N. Y. 227.

49. *Markell v. Hill*, 34 Misc. 133, 69 N. Y. Supp. 537; reversed on other grounds, 64 App. Div. 191, 71 N. Y. Supp. 924.

Laches.—Where an application was made in 1903 to remove an assignee of

a firm which had assigned in 1886, and there were no specific charges of misconduct, and the assignee alleged that he had sold all the assets in 1886; that the expenses and preferred debts exceeded them; that the general creditors in 1887 waived a formal accounting, and that the moving creditor had not notified him of his claim until the motion, and one of the assignors was dead, the application was denied for laches. *Matter of Gebhardt*, 41 Misc. 570, 85 N. Y. Supp. 118.

50. *Matter of Berman*, 173 App. Div. 689, 160 N. Y. Supp. 79.

stituted assignee in the place of her husband over the objection of creditors who claim that the deceased assignee was dilatory in the performance of his trust, failed to prosecute claims with diligence, made improper payments to counsel, and that his account is bound to be surcharged in substantial amounts.⁵¹

14. Distribution of property.

An assignee for the benefit of creditors in distributing the property should follow strictly the terms of the assignment. It is his guide and furnishes the measure of his duty.⁵²

E. Rights of creditors.

1. Debtor and Creditor Law, § 5. Notice to creditors to present claims.

The judge may, upon the petition of the assignee, authorize him to advertise for creditors to present to him their claims, with the vouchers therefor, duly verified, on or before a day to be specified in such advertisement, not less than ten days from the publication thereof, which advertisement or notice shall be published in one newspaper, to be designated by the judge, as most likely to give notice to the persons to be served, at least once and such additional times as the judge may direct; the last publication shall be at least one week prior to the date specified.

Said verified claim of creditor shall set forth whether any, and, if so, what securities are held for such claim, and whether any, and, if so, what payments have been made thereon.

Whenever a claim is founded upon an instrument in writing, such instrument, unless lost or destroyed, shall be filed with the claim. After the claim is allowed or disallowed, such instrument may be withdrawn by permission of the court. If such instrument is lost or destroyed, a statement of such fact and of the circumstances of such loss or destruction shall be filed under oath with the claim.

(See B., C. & G. Consol. L., 2nd Ed., p. 1597.)

2. Debtor and Creditor Law, § 12. Notices to parties interested in the estate as creditors or otherwise.

Parties interested in the estate as creditors, or parties otherwise interested, if the judge so directs, shall have at least ten days' notice by mail to their respective addresses as they appear in the schedule filed by the assignor, or at such other addresses as they shall have filed with the assignee, of (a) all proposed sales of property, (b) the declaration and time of payment of dividends, (c) the filing of the final account of the assignee and of the hearing thereon, (d) the proposed compromise of any controversy. Such notice may be published as the judge shall direct and must be returnable in court.

51. Matter of Reilly, 185 App. Div. 581, 173 N. Y. Supp. 248.

52. Matter of Whitney, 144 App. Div. 117, 128 N. Y. Supp. 1034; appeal dismissed, 202 N. Y. 580.

The judge may cause such notices to be sent or published on the petition of the assignee at any time after the assignment, or on petition of any other person interested in the estate, at any time after the lapse of sixty days from the filing of such assignment, or where an assignee has been removed and ordered to account as hereinbefore provided on the petition of a creditor, or an assignee's surety, or assignor, and on good cause being shown, the judge may grant an order directing the assignee to show cause at the time specified why a sale of the property should not be had or a dividend should not be paid, or a settlement of his account should not be had, or such other matters as in the opinion of the judge should be disposed of.

Upon the hearing and determination of such order to show cause the judge may make such order in the premises as justice requires.

(See B., C. & G. Consol. L., 2nd Ed., p. 1603.)

3. Debtor and Creditor Law, § 13. Debts which may be proved against the estate.

Debts of the assignor may be proved and allowed against his estate which are (a) a fixed liability, as evidenced by a judgment absolutely owing at the time of the assignment, or (b) a claim for taxable costs incurred before the assignment, in good faith, in an action to recover a provable debt; (c) or founded upon an open account, or upon a contract, express or implied whether due or not due.

In allowing the claims against the estate, in all cases of mutual debts or credits between the estate of the assignor and a creditor the amount shall be stated and one debt shall be set off against the other, and the balance only shall be allowed.

A set-off or counterclaim shall not be allowed in favor of any debtor of the assignor which (a) is not provable against the estate; or (b) was purchased by or transferred to him after the filing of the general assignment or with intent to such use and with knowledge or notice, or if he had reasonable cause to believe, that such assignor was insolvent.

(See B., C. & G. Consol. L., 2nd Ed., p. 1604.)

4. Debtor and Creditor Law, § 17. Invalid claims.

Claims which for want of record or for other reasons would not have been valid as against the claims of creditors of the assignor shall not be liens against his estate.

(See B., C. & G. Consol. L., 2nd Ed., p. 1615.)

5. Claims of creditors.

A creditor may file a claim with the assignee after distribution and before final decree.⁵³ A creditor bank which since the making of a general assignment by a debtor has

⁵³ Matter of Bowlby, 34 Misc. 311, 69 N. Y. Supp. 783.

Timely filing.—Where a general assignment for the benefit of creditors

was filed in the proper county clerk's office on November 11, 1914, at 1:28 P. M., the filing of a creditor's claim with the attorneys for the assignee in

realized on collateral security held by it will be allowed a dividend only upon the balance of its claim.⁵⁴

Where an assignment to trustees to pay debts was void, and a creditor, with knowledge thereof, accepted and retained a dividend to release the trustee, and thereafter procured from the assignor his notes and security for the balance of the claim unpaid, and enters judgment by confession, he cannot enforce it against the funds representing the assignor's estate.⁵⁵

Where the assignors have obtained money by means of fraud, they at once become liable to repay the same, and the fact that the indebtedness is not due when the assignment was made does not affect the right of set-off.⁵⁶

Since the enactment of section 13 of the Debtor and Creditor Law, providing that debts of the assignor may be proved and allowed against his estate "whether due or not due," unmatured claims against the debtor are subject to the right of set-off by a creditor.⁵⁷

Where a firm of stockbrokers has made a general assignment for the benefit of creditors a customer who owns stock pledged with the insolvent as security for any balance due from him is entitled to a return of the securities on payment of the balance due, where the certificates have been identified and there is no other claim upon them.⁵⁸

In proceedings in New York city the rule requiring notice to present claims to the referee to be sent to all the creditors upon the books of the assignor must be observed.⁵⁹

A judgment creditor of an estate which has been assigned for the benefit of creditors may sue to set aside a fraudu-

the forenoon of November 11, 1915, is timely. *Matter of Vietor*, 101 Misc. 308, 166 N. Y. Supp. 1012.

Amendment of claim.—The court has the power and it is its duty to treat formal verified proofs of claim filed by creditors after the expiration of the prescribed time limit as amendments of unverified proofs of claim previously filed. *Matter of Vietor*, 101 Misc. 308, 166 N. Y. Supp. 1012.

^{54.} *Matter of Vietor*, 101 Misc. 308, 166 N. Y. Supp. 1012. See also *Mat-*

ter of Bicknell, 31 Misc. 302, 64 N. Y. Supp. 360.

^{55.} *N. Y. Pub. Lib. v. Tilden*, 39 Misc. 169, 79 N. Y. Supp. 161.

^{56.} *Wolf v. National City Bank*, 170 App. Div. 565, 156 N. Y. Supp. 575.

^{57.} *Matter of Bluestone*, 169 App. Div. 462, 155 N. Y. Supp. 161.

^{58.} *Matter of Dickenson*, 171 App. Div. 486, 157 N. Y. Supp. 248.

^{59.} *Matter of Ripsom & Newland Fur. Co.*, 32 Misc. 56, 66 N. Y. Supp. 113.

lent judgment, where the complaint alleges that the assignee refuses to sue after demand, or is a party to the fraud.⁶⁰

An application for an order discharging an assignee after the execution of a composition agreement by creditors alleged to be all of the creditors of the assignor will not be granted where it appears that the notice to present claims has not been published.⁶¹

F. Power of court.

1. Debtor and Creditor Law, § 15. Power of court.

The court shall have power:

1. To allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against the estate.

2. To authorize the business of assignor to be conducted for limited periods by assignee, if necessary in the best interests of the estate, and allow additional compensation for such services.

3. To bring in and substitute additional persons or parties in the proceeding when necessary for the complete determination of a matter in controversy, by issuing a citation directed to such persons or parties and to be served as ordered by the court.

4. To reopen estates whenever it appears they were closed before being fully administered.

5. To determine all claims of assignors to their exemptions.

6. To authorize an assignee to bring an action, which he is hereby empowered to maintain, against any person who has received, taken or in any manner interfered with the estate, property or effects of the debtor in fraud of his creditors and which might have been avoided by a creditor of the assignee and the assignee may recover the property so transferred or its value.

7. To direct upon the final settlement of the estate that the assignee pay to the lawful creditors their proportionate dividend notwithstanding their claim has not been presented in accordance with the notice sent out by the assignee, provided one year has not elapsed since the filing of the general assignment.

8. To allow secured creditors such sum only as to the court seems to be owing over and above the value of their securities.

9. To examine the parties and witnesses on oath in relation to the assignment and accounting and all matters connected therewith and to compel their attendance for that purpose and their answers to questions, and the production of books and papers;

10. To require the assignee to render and file an account of his proceedings, and to enforce the same in the manner provided by law for compelling an executor or administrator to comply with a surrogate's order for an account;

60. *Markell v. Hill*, 34 Misc. 133, 69 N. Y. Supp. 537; reversed, 64 App. Div. 191, 71 N. Y. Supp. 924.

61. *Matter of Lewis*, 156 N. Y. Supp. 307.

11. To take and state such account, or to appoint a referee to take and state it, and such referee shall have the powers enumerated in subdivision nine of this section;

12. To settle and adjudicate upon the account and the claims presented and to decree payment of any creditor's just proportional part of the fund or, in case of a partial accounting, so much thereof as the circumstances of the case render just and proper;

13. To discharge the assignee and his surety at any time, upon performance of the decree, from all further liability upon matters included in the accounting, to creditors appearing and to creditors not having appeared after due citation, or not having presented their claims after due advertisement;

14. On proof of a composition between the assignor and his creditor to discharge the assignee and his sureties from all further liability to the compounding creditors appearing or duly cited, and to authorize the assignee to release the assets to the assignor; provided, however, that if there be any creditors not assenting to the composition, the court shall determine what proportion of the fund shall be paid to or reserved for creditors not assenting, which shall not be less than the sum or share to which they would be entitled if no composition had been made, and may decree distribution accordingly;

15. To adjourn the proceedings from time to time, grant further orders if necessary, and amend the petition and proceedings thereon before decree in furtherance of justice;

16. To punish as for a contempt any disobedience or violation of any order made or process issued in pursuance of this article, and to restrain by arrest and imprisonment any party or witness when it shall satisfactorily appear that such party or witness is about to leave the jurisdiction of the court, and to take bail to secure the attendance of such party or witness, to be prosecuted under the order of the court in case of forfeiture by and for the benefit of the party in whose interest such examination shall be ordered;

17. To exercise such other or further powers in respect to the proceedings and the accounting therein as a surrogate may by law exercise in reference to an accounting by an executor or administrator.

(See B., C. & G. Consol. L., 2nd Ed., p. 1608.)

2. Debtor and Creditor Law, § 18. Effect of orders; power of judge and duties of clerk.

All orders or decrees in proceedings under this article shall have the same force and effect, and may be entered, docketed and enforced and appealed from, the same as if made in an original action brought in the court in which the proceeding is pending; provided, however, that a final decree, directing the payment of money, may be enforced by serving a certified copy thereof personally upon the assignee for the benefit of creditors, and if said assignee wilfully neglects to obey said decree, by punishing him for a contempt of court. The imprisonment of said assignee, by virtue of proceedings to punish him for contempt, as prescribed in this section, or a levy upon his property by virtue of an action, shall not bar, suspend or otherwise affect an action against the sureties on his final bond. All proceedings under this article shall be deemed to be had in court. The said court shall always be

open for proceedings under this article. The judge, when named in this article, shall, in such proceedings, be deemed to be acting as the court. The clerk of the court shall keep a separate book, in which shall be entered, in each case, the date and place of record of the assignment, and a minute of all proceedings therein, under this article, with such particularity as the court shall direct by general order. He shall record therein at length the orders and decrees of the court, settling, rejecting or adjusting claims, and directing the payment of money, or releasing assets by the assignee, and removing or discharging the assignee and his sureties, and such other orders as the courts shall direct by general order. The said clerk shall securely keep the papers in each case in a file by themselves, and shall be entitled to a fee of one dollar for filing all the papers in each case, and entering the proceedings in the minute-book, and fifty cents to be paid by the assignee, unless otherwise directed, for recording each order or decree required by this article or the general order of the court.

(See B., C. & G. Consol. L., 2nd Ed., p. 1615.)

3. Debtor and Creditor Law, § 20. General powers of court.

Any proceeding under this article shall be deemed for all purposes, including review by appeal or otherwise, to be a proceeding had in the court as a court of general jurisdiction, and the court shall have full jurisdiction to do all and every act relating to the assigned estate, the assignees, assignors and creditors, and jurisdiction shall be presumed in support of the orders and decrees therein unless the contrary be shown; and after the filing or recording of an assignment under this article, the court may exercise the powers of a court of equity in reference to the trust and any matters involved therein.

(See B., C. & G. Consol. L., 2nd Ed., p. 1619.)

4. Late decisions as to power of court.

Where the Supreme Court of this State has authorized an assignee to compromise debts for which judgments have been recovered against the debtors in another State, and there is no proof as to what the law of such State is as to the effect of a general assignment upon the transfer of title to personal property, the Supreme Court has power to restrain resident creditors from prosecuting writs of attachment in the foreign State against such judgments, and thus preventing the assignee from carrying out the compromise.⁶² The Supreme Court has concurrent jurisdiction with the County Court to punish an assignee for the benefit of creditors as for a contempt, where he has willfully neglected to obey a decree for payment of money, a certified copy of which has been previously served on him.⁶³ By buying at an assignee's

62. *Bloomingtondale v. Maas*, 30 Misc. 672, 64 N. Y. Supp. 266.

63. *Matter of Merklen*, 44 Misc. 169, 89 N. Y. Supp. 786.

sale, the purchaser makes himself a party to the proceeding, and subjects himself to the jurisdiction of the court, so that it has power, upon a summary application, to set aside the sale.⁶⁴

The Supreme Court has jurisdiction of a final accounting of an assignee in which the right of an attorney of the assignee to profits on claims purchased by him is in issue.⁶⁵

The County Court has power to appoint a substituted assignee in place of a deceased assignee for the benefit of creditors of a debtor whose business was conducted and the assignment recorded in the county.⁶⁶

G. Examination of witnesses.

1. Debtor and Creditor Law, § 16. Examination of witnesses.

The judge may also, at any time, on petition of the assignee or any party interested, order the examination of witnesses and the production of any books and papers by any party or witness before him or before a referee appointed by him for such purpose or before the assignee who shall have power to administer oaths, compel the attendance of witnesses, and production of books, records and papers by the issuance of subpoena, and the evidence so taken, together with books and papers, or extracts therefrom, as the case may be, shall be filed in the county clerk's office, and may be used in evidence by any creditor or assignee in any action or proceeding then pending, or which may hereafter be instituted. No witness or party as above provided shall be excused from answering on the ground that his answer may incriminate him, but such answer shall not be used against him in any criminal action or proceeding.⁶⁷

(See B., C. & G. Consol. L., 2nd Ed., p. 1613.)

2. Reference.

An assignee is entitled to examine persons who have taken possession of and sold the bankrupt's property under the contention that they delivered it to the insolvent under contracts of conditional sale. But such examination should be had before a judge rather than before a referee, where the

64. *Matter of Sheldon*, 173 N. Y. 287.

65. *Matter of Dwight*, 61 App. Div. 357, 70 N. Y. Supp. 563; appeal dismissed, 173 N. Y. 583.

66. *Rogers v. Pell*, 166 N. Y. 565.

67. *Order limited*.—The examination to gain information as to the assigned

property, allowed by section 16, must be confined by the order requiring a transferee of the assignee to produce its books and papers, to those relating to the purchases made from the assignee. *Matter of Farmer*, 38 App. Div. 621, 56 N. Y. Supp. 328.

latter course would entail unnecessary expense upon the parties.⁶⁸

3. Judgment creditor.

A judgment creditor, whose judgment was entered on a verdict rendered before the assignment was made, is a party "interested" within the meaning of section 16 and is entitled as such to petition for an order for examination, notwithstanding his claim is founded on a tort.⁶⁹

H. Sale and compromise of claims and property.

1. Debtor and Creditor Law, § 19. Sale and compromise of claims and property.

The judge may, upon the application of the assignee and for good and sufficient cause shown, and upon such terms as he may direct, authorize the assignee to sell, compromise or compound any claim or debt belonging to the estate of the debtor. But such authority shall not prevent any party interested in the trust estate from showing upon the final accounting of such assignee that such debt or claim was fraudulently or negligently sold, compounded or compromised. The sale of any debt or claim heretofore made in good faith by any assignee shall be valid, subject, however, to the approval of the judge, and the assignee shall be charged with and be liable for, as part of the trust fund, any sum which might or ought to have been collected by him.

All sales shall be had at public auction unless otherwise ordered by the judge. Upon application to the judge, and for good cause shown, the assignee may be authorized to sell any portion of the estate at private sale; in which case he shall keep an accurate record of each article sold, and the price received therefor, and to whom sold; which account he shall file at once. Upon application by the assignee or a creditor setting forth that a part or the whole of the estate is perishable, the nature and location of such perishable property, and that there will be loss if the same is not sold immediately, the judge, if satisfied of the facts stated and that the sale is required in the interest of the estate, may order the same to be sold with or without notice to creditors.

(See B., C. & G. Consol. L., 2nd Ed., p. 1617.)

2. Validity of sale.

An assignee for the benefit of creditors may not sell at public auction the assets of the assigned estate without a previous order of the court obtained on the return of notice

68. Matter of U. S. Restaurant & Realty Co., 146 App. Div. 114, 130 N. Y. Supp. 606.

69. Matter of Workingmen's Pub. Assoc., 62 App. Div. 604, 71 N. Y. Supp. 248.

to creditors and others interested.⁷⁰ Where the moneys obtained by the assignee on the sale of property are all that it was reasonably worth, and the sales were made at public auction in accordance with the rules and practice of the court, the fact that they did not amount to the value stated in the inventory, prepared by the assignor, does not afford ground for charging the assignee with the difference.⁷¹ But, if made at private sale below the appraised value, and no explanation is given by the assignee, his accounts may be surcharged with the loss.⁷²

The validity of the sale conducted by the attorneys of the assignee, one of them acting as auctioneer, to one with whom, unknown to the trustees or insolvent, they had agreed that, if he became the purchaser, it should be for the joint benefit of them and him, may be asserted, not only by the trustee, but by the insolvent.⁷³

A transfer by an assignee for creditors of an account of his assignor with brokers secured by the deposit of a certificate of stock of which the assignee was not aware, to an attorney, may be set aside for fraud or mutual mistake and because the minds of the parties have never met.⁷⁴

The purchase by the assignee of part of the assigned property at a foreclosure sale, on his individual account, is not void but voidable only. The creditors have a right to step in and take the benefit of it, although no actual fraud is shown, but his acquisition of the title ends his relation to the property as trustee of an express trust.⁷⁵ An assignee who purchases property on foreclosure sale for the benefit of such creditors is entitled to be reimbursed what he has

70. *Matter of Gurian*, 92 Misc. 296, 155 N. Y. Supp. 930.

Objection to sale.—Objection to the sale of some small articles for cash before the assignee filed his bond cannot be made by a creditor who attended a meeting of creditors at which consent to such sales was given. *Irving Nat. Bk. v. Wilson Bros. Wood-ware & Toy Co.*, 34 App. Div. 481, 54 N. Y. Supp. 313.

71. *Matter of Donaldson*, 27 Misc. 745, 59 N. Y. Supp. 656.

72. *Matter of MacFarlane*, 65 App.

Div. 93, 72 N. Y. Supp. 723; *aff'd*, 169 N. Y. 608.

73. *Bush v. Halsted*, 121 App. Div. 538, 106 N. Y. Supp. 133, holding that the invalidity of the sale need not be asserted in the accounting proceedings by the trustee or by action to avoid the final order of confirmation therein, but may be by a subsequent independent action.

74. *Flynn v. Smith*, 111 App. Div. 870, 98 N. Y. Supp. 56.

75. *Smith v. Hamilton*, 43 App. Div. 17, 59 N. Y. Supp. 521.

paid to acquire the property, and not merely so much thereof as is required to satisfy the mortgage.⁷⁶

A factor holding goods of a firm, on which he has made advances at the time it makes a general assignment, is not obliged to sell the goods at auction, but may dispose of them in the manner he deems best calculated to realize the largest sum.⁷⁷

I. Debtor and Creditor Law, § 21. Trial, costs and commissions.

The court, in its discretion, may order a trial by jury or before a referee, of any disputed claim or matter arising under the provisions of this article. It may in its discretion award reasonable counsel fees and costs, determine which party shall pay the same, and make all necessary rules to govern the practice under this article. The assignee or assignees named in any assignment shall receive for his or their services a commission of not to exceed five per centum on the whole sum which will have come into his or their hands, except in a case where such percentage shall not equal two hundred dollars in which case the court may grant such a sum which with such percentage shall equal two hundred dollars. If the assignee continues the business the court may allow him additional compensation equal to what he might be allowed as hereinabove provided.

The actual and necessary expenses incurred by the assignee in the administration of the estate shall be reported in detail, under oath, and examined and approved or disapproved by the court. If approved they shall be paid out of the estate.

(See B., C. & G. Consol. L., 2nd. Ed., p. 1621.)⁷⁸

J. Preferred claims.

1. Debtor and Creditor Law, § 22. Wages and preferred claims.

In all distribution of assets under all assignments made in pursuance to this article, the wages or salaries actually owing to the employees of the assignor or assignors at the time of the execution of the assignment for services rendered within three months prior to the execution of the assignment, not exceeding three hundred dollars to each employee, shall be preferred before any other debt; and should the assets of the assignor or assignors not be sufficient to pay in full all the claims preferred, pursuant to this section, they shall be applied to the payment of the same pro rata to the amount of each such claim.

(See B., C. & G. Consol. L., 2nd Ed., p. 1623.)

76. *Eisert v. Bowen*, 117 App. Div. 488, 102 N. Y. Supp. 707; *aff'd*, 191 N. Y. 544.

77. *Matter of Atwood & Sons*, 40 App. Div. 272, 57 N. Y. Supp. 1031.

78. *Costs to creditor*.—Where, upon the accounting of an assignee, it appears that the efforts of one creditor have resulted in increasing the fund

to be divided among all the creditors, the court under sections 20 and 21 may grant to such creditor costs as in an action and a counsel fee unrestricted in amount, all payable out of the estate. *Matter of Leon Mayer, Inc.*, 108 Misc. 662, 178 N. Y. Supp. 86.

2. Debtor and Creditor Law, § 23. Limitation of preferences.

In all general assignments of the estates of debtors for the benefit of creditors any preference created therein, other than for wages or salaries of employees under the last section, shall not be valid except to the amount of one-third in value of the assigned estate left after deducting such wages or salaries, and the costs and expenses of executing such trust; and should said one-third of the assets of the assignor or assignors be insufficient to pay in full the preferred claims to which, under the provisions of this section, the same are applicable, then said assets shall be applied to the payment of the same pro rata to the amount of each of said preferred claims.

(See B., C. & G. Consol. L., 2nd Ed., p. 1624.)

3. Employees.

Wages of "employees" for three months prior to the execution of the assignment are preferred.⁷⁹ Independent contractors who have done work for the assignor are not employees, and are not entitled to preference in payment as such.⁸⁰ A salesman employed to sell on commission, though his compensation is measured in part by a share of the profits, may be an employee entitled to preference under the statute.⁸¹ Commissions of a salesman are not entitled to preference in payment under the statute, where they were no part of his wages or salary, but were earned under an independent agreement by which he became a consignee of the goods and, in his discretion, reconsigned them to the firm and shared with it the commissions on the sales.⁸²

79. *Hopkins v. Cromwell*, 89 App. Div. 481, 85 N. Y. Supp. 839.

Notes.—An employee of an assignor is entitled to be scheduled as a preferred creditor for salary due at the date of the assignment, and also for amounts due on notes executed prior to the assignment in payment of monthly bonuses, but not due until after the date of the assignment. *Strauss v. Morrison*, 165 App. Div. 163, 150 N. Y. Supp. 587.

Motion to pay claim denied.—Motion to compel an assignee to pay a claim for services rendered to the assignor previous to the assignment, as a preferred claim, it not appearing that the services were rendered within a year, or whether the assignee had funds to pay preferred claims in full, and an

action being pending to set the assignment aside, denied. *Matter of Jacobs*, 27 Misc. 757, 59 N. Y. Supp. 549.

80. *Matter of Ripsom & Newland Fur. Co.*, 32 Misc. 56, 66 N. Y. Supp. 113.

A truckman carrying on a general business by means of teams driven by other men, his personal services not entering into and constituting the foundation of the claim, is not entitled to a preference as an employee. *Matter of Kimberly*, 37 App. Div. 106, 55 N. Y. Supp. 1024.

81. *Matter of Donaldson*, 27 Misc. 745, 59 N. Y. Supp. 656; *Matter of Smith*, 59 N. Y. Supp. 799.

82. *Matter of Fowler*, 29 Misc. 425, 60 N. Y. Supp. 545.

4. Taxes.

The personal taxes of the assignor are a preferred claim against the estate.⁸³ Personal taxes due to a city from the assignor, with interest for his defaults in payment within the statutory time, are entitled to a preference before all other claims presented, after deducting the expenses and costs of the accounting.⁸⁴

5. Mechanic's liens.

Where a general contractor, who had furnished labor and materials for a building, and to whom money was due, made a general assignment for the benefit of creditors, the assignee took title to such moneys subject to liens filed by laborers or materialmen or subcontractors after the general assignment, but within the ninety days prescribed by statute.⁸⁵

6. Limitation upon preferences in assignment.

Under section 23, the assignor cannot create preferences in favor of certain of his creditors to an extent greater than one-third of the estate.⁸⁶ And, in case a creditor is preferred by a transfer shortly before the execution of the assignment, it is held that the assignee can maintain an action in equity against the transferee, for a violation of the statute.⁸⁷ To avoid a transfer made to pay *bona fide* existing debts prior to a general assignment on the ground that they are preferences in violation of the act, it must be clearly shown, not only that the debtors intended to create such a preference, but also that the creditors knew that an assignment was contemplated and that the purpose of the transfers was to give a preference in excess of that allowed by the act.⁸⁸ The knowledge possessed by the member of an insolvent firm, who joins in preferential transfers to himself as guardian of certain infants before the execution of a general assignment by the firm, and afterward joins in such general assignment, affects the transfers to him as guardian.⁸⁹

83. Matter of Ripsom & Newland N. Y. 69.
Fur. Co., 32 Misc. 56, 66 N. Y. Supp.

113. See also Matter of Bowlby, 36 Misc. 343, 73 N. Y. Supp. 565.

84. Matter of Donaldson, 27 Misc. 745, 59 N. Y. Supp. 656.

85. J. P. Kane Co. v. Kinney, 174

86. Matter of Dachy, 169 N. Y. 460.

87. Wile v. Cauffman, 39 App. Div. 206, 57 N. Y. Supp. 240.

88. Shotwell v. Dixon, 163 N. Y. 43.

89. Wile v. Cauffman, 39 App. Div. 206, 57 N. Y. Supp. 240.

K. Debtor and Creditor Law, § 24. Appraisal of insolvent estate in the hands of assignee.

Whenever by reason of the provisions of any law of this state it shall become necessary to appraise in whole or in part any insolvent estate in the hands of any assignee for the benefit of creditors, the persons whose duty it shall be to make such appraisal shall value the real estate at its full and true value, taking into consideration actual sales of neighboring real estate similarly situated during the year immediately preceding the date of such appraisal, if any; and they shall value all such property, stocks, bonds or securities as are customarily bought or sold in open markets in the city of New York or elsewhere, for the day on which such appraisal or report may be required, by ascertaining the range of the market and the average of prices as thus found, running through a reasonable period of time.

(See B., C. & G. Consol. L., 2nd Ed., p. 1627.)

L. Accounting of assignee.

1. Effect of subsequent bankruptcy proceedings.

Where, after an assignment for the benefit of creditors, bankruptcy proceedings are instituted against the insolvent, the assignee is entitled to account in the bankruptcy court, which right will be presumed to have been impliedly written into the assignee's official bond so as to render the surety liable for the assignee's failure to comply with the judgment of the bankruptcy court in the accounting proceedings.⁹⁰ But it has been said that the assignee may also be required to account in the State courts.⁹¹

2. Notice of accounting.

All creditors of the assignor are entitled to notice of his accounting.⁹² Notice must be given to all creditors when the assignee applies for the confirmation of the report of the referee appointed to take and state his account, for a final order for the distribution of the assigned estate, and for the discharge of the assignee and the surety on the bond.⁹³

90. *Cohen v. American Surety Co. of N. Y.*, 192 N. Y. 227.

91. *Matter of Bieber*, 38 App. Div. 639, 59 N. Y. Supp. 118.

92. *Deceased assignee.*—Where an assignee dies, and a compulsory proceeding is taken by certain of the creditors for an accounting by his personal representative and for a transfer of the

assets to a substituted assignee, and for discharge of the sureties of the deceased assignee, all of the creditors interested in the assignment must be cited. *Matter of Farmer*, 35 Misc. 150, 71 N. Y. Supp. 462.

93. *Field v. Empire Case Goods Co.*, 166 N. Y. Supp. 508.

The assignee must give notice to known claimants, although he also advertises for claimants and the claim is not filed.⁹⁴ The courts will not pass upon the accounts of an assignee who has been removed and direct the discharge of his bond, where no citations have been served on the assignor, sureties, or creditors, as they have a right to have the accounts duly proved on a reference.⁹⁵

3. Reference.

A reference to examine the accounts of the assignee is proper practice, and it has been thought that the court has no power to dispense therewith.⁹⁶ A referee's report which is not filed until after the death of the assignee is a nullity, and there should be a substitution of his personal representatives under section 11. If the report was not filed or delivered to one of the attorneys concerned, within sixty days after the submission of the case, the sureties of the assignee, parties to the proceeding, or the personal representatives of the assignee, may elect to end the reference under section 470 of the Civil Practice Act. Service of the notice terminates the reference.⁹⁷ The report of the referee surcharging the assignee will be set aside, and a new reference ordered, when it is impossible from the record and report to determine what items of account were disallowed, error being committed in refusing an allowance for attorney's fees.⁹⁸

On the hearing before a referee on the accounting of an assignee for the benefit of creditors, a statement purporting to show stock on hand and the value thereof, which was prepared at the assignee's request and subsequently used in a suit brought by him, is admissible in evidence, though containing items not included in the assignee's inventory.⁹⁹

94. *Matter of Flower*, 167 N. Y. Supp. 778.

95. *Matter of Reynolds & Co.*, 30 Misc. 397, 62 N. Y. Supp. 515.

96. *Matter of McMahon*, 92 Misc. 305, 155 N. Y. Supp. 864.

97. *Matter of Venable*, 111 App. Div.

508, 97 N. Y. Supp. 938.

98. *Matter of Kautsky*, 56 App. Div. 440, 67 N. Y. Supp. 882.

99. *Matter of MacFarlane*, 65 App. Div. 93, 72 N. Y. Supp. 723; *aff'd*, 169 N. Y. 608.

4. Neglect of assignee.

Where the assignee retains the estate for a long time, makes repairs, and sells part of it in bulk on credit, he must show that his delay and methods were for the benefit of the estate, or he is liable for the resulting loss.¹ Where a party appointed assignee for the benefit of creditors, who is also named receiver of the debtor's property in another State, fails to keep his account in such different capacities separate, sells property at less than its inventoried value, which he fails to show is fair and reasonable, and also fails to account for property inventoried, it is not error to refuse to allow him compensation for services.²

5. Compensation of assignee.

Section 21 of the Debtor and Creditor Law fixes the assignee's compensation at five per cent of the whole sum coming into his hands, except in a case when such sum would not exceed \$200, in which case the court may grant a sum to bring the compensation up to \$200. And if the assignee continues the business of the assignor, the court may allow him additional compensation.

Where, after an assignment has been made, a corporation is formed to take over the business of the assignors, and the assignee, with the consent of the parties interested, instead of selling the assets, turns them over to the corporation, the assignee is entitled to commissions on the property turned over.³

Where banks held warehouse receipts for rice in a rough state, unmilled and unmarketable, belonging to the assigned estate, and the assignee arranged with them that he should have the rice milled and put in a suitable condition for sale, which was done and resulted in a surplus for the estate, it was held that the assignee was entitled to commissions upon the surplus alone.⁴

Where a petition prays merely for the reference and allowance of an assignee's claim for services and for discharge, without reference to any pending proceedings, an order

1. *Matter of Ripsom & Newland-Fur Co.*, 32 Misc. 56, 66 N. Y. Supp. 113.

2. *Matter of MacFarlane*, 65 App. Div. 93, 72 N. Y. Supp. 723; *aff'd*, 169 N. Y. 608.

3. *Meyer v. Page*, 112 App. Div. 625, 98 N. Y. Supp. 739.

4. *Matter of Talmage*, 39 App. Div. 466, 57 N. Y. Supp. 427; *aff'd*, 161 N. Y. 643.

directing a trial of such claims "in conjunction" with the accounting of the permanent receiver of the company for which petitioner was appointed assignee is improper.⁵

Where, on the accounting of an assignee for the benefit of creditors, he has not been charged with interest, though he has neglected for six years to invest the funds, he will not be denied his commissions nor the taxable costs of such accounting.⁶

6. Allowance for attorney fees.

An attorney stands in the same relation to the assignee, with respect to an allowance for his services, as any other agent or employee, and the question is to be determined by the tests of necessity, propriety, and reasonable value of the services; he cannot be allowed for services which the statute imposes on the assignee himself, nor for resisting an application to compel him to account as he was legally bound to do, nor for a payment for prosecuting a claim amounting to more than half the face thereof, and from which nothing was realized.⁷ Where the estate is small, the court will not allow liberal or even adequate attorney's fees; but only such as are commensurate with the estate.⁸ An assignee cannot recover for services of attorneys requiring only ordinary business judgment. Where costs and disbursements of an assignee have been taxed without notice, on a motion to confirm the report of a referee on the assignee's accounting, the court can tax the costs and disbursements *de novo*. The assignee is entitled to the costs of publishing the citation to creditors.⁹ Counsel fees should not be allowed on a motion, but should be paid by the assignee and made a part of his account.¹⁰

Where an attorney for an assignee for the benefit of creditors purchases claims against the estate, he is only entitled, on final accounting, to recover the amount paid therefor, and cannot make a profit on the transaction, though the pur-

5. *Walter v. F. E. McAllister Co.*, 33 Misc. 562, 68 N. Y. Supp. 952.

6. *Matter of Bostwick*, 40 Misc. 17, 81 N. Y. Supp. 172.

7. *Matter of Donaldson*, 27 Misc. 745, 59 N. Y. Supp. 656.

8. *Matter of Bicknell*, 31 Misc. 302, 64 N. Y. Supp. 360.

9. *Matter of Bowlby*, 34 Misc. 311, 69 N. Y. Supp. 783.

10. *Matter of Reynolds & Co.*, 30 Misc. 397, 62 N. Y. Supp. 515.

chase is made with the consent of the assignee, and for the benefit of the estate in an attempted settlement.¹¹

Payment of fees of attorneys and compensation for expert services should be deferred until the final accounting and the claimants therefor given an opportunity to explain their claims and compelled to submit to an examination and cross-examination in open court where it appears that the quantity and quality of the legal services rendered by the attorneys is not clearly discernible from their account and the agreement by a committee of the creditors for expert services is not clearly set forth in the record.¹²

7. Disbursements of assignee.

An assignee for creditors will be allowed clerk hire for three months when necessary for inventorying, assorting, and selling a stock of goods.¹³ Where a party is named assignee for the benefit of creditors under a general assignment, and is subsequently appointed receiver to take charge of the debtor's property in another State, and gives a bond for the faithful discharge of his duties as such, he cannot be charged as assignee with all the assignor's property, whether in the State where appointed assignee or where appointed receiver, and then be refused credit for disbursements made on the receiver's account.¹⁴

8. Costs of accounting.

Costs of an accounting by the assignee for creditors, including referee's and stenographer's fees and allowance to the assignee, may be taxed by the court in the first instance, where all parties had notice of the motion, and there was no dispute, though they should be taxed by the clerk on notice.¹⁵ Interest on the fees of the referee and the stenographer runs only from the date of the entry of judgment.¹⁶

11. *Matter of Dwight*, 61 App. Div. 357, 70 N. Y. Supp. 563; appeal dismissed, 173 N. Y. 583.

12. *Matter of Bien Co.*, 165 App. Div. 679, 151 N. Y. Supp. 103.

13. *Matter of Bowlby*, 34 Misc. 311, 69 N. Y. Supp. 783.

14. *Matter of MacFarlane*, 65 App.

Div. 93, 72 N. Y. Supp. 723; *aff'd*, 169 N. Y. 608.

15. *Matter of Oakley*, 41 Misc. 652, 85 N. Y. Supp. 227.

16. *Matter of MacFarlane*, 65 App. Div. 93, 72 N. Y. Supp. 723; *aff'd*, 169 N. Y. 608.

ARTICLE III.**DISCHARGE OF DEBTOR FROM IMPRISONMENT.****A. In general.**

The release of civil prisoners does not assume as important a position in our law as it did in the early history of the State. This is due, to a large extent, to section 72 of the Civil Rights Law which requires their release after three months in case they are confined under an execution or mandate to enforce the recovery of less than five hundred dollars, and after six months if the amount involved is more than five hundred dollars. The release under the Civil Rights Law follows as a matter of course, no application to the court being required. The Debtor and Creditor Law contains two articles for the release of civil prisoners. Article IV provides for the exemption of an insolvent from arrest and imprisonment. The practice prescribed by this article has been employed few, if any, times within the last forty years and is thought to be of such slight utility that the mere reference to the article is sufficient for the purposes of this work, without a discussion of the few early cases which may be found construing its provisions. Article V contains a procedure for the discharge of a judgment debtor from imprisonment upon his making an assignment of his property. The procedure can be used where the sum for which the prisoner is confined is less than five hundred dollars; or, if the sum exceeds five hundred dollars, if he has been imprisoned for at least three months. In other words the article V, when applicable, may save a civil prisoner an imprisonment of three months which he might otherwise have to endure before he could be discharged under section 72 of the Civil Rights Law. Few modern cases will be found discussing the statute, but, as it is not entirely obsolete, it is thought advisable to give a short discussion of its principal features.

B. Object of statute.

The object of the statute is the discharge of honest debtors who make a full and honest surrender of all of their property for their creditors.¹⁷

17. Matter of Brady, 69 N. Y. 215.

C. Who may be discharged and by what court.**1. Debtor and Creditor Law, § 120. Who may be discharged.**

A person imprisoned by virtue of an execution to collect a sum of money, issued in a civil action or special proceeding, may be discharged from imprisonment, as prescribed in this article. A person who has been admitted to the jail liberties is deemed to be imprisoned, within the meaning of this article.

(See B., C. & G., Consol. L., 2nd Ed., p. 1650.)

2. Debtor and Creditor Law, § 121. To what court application to be made.

Application for such a discharge must be made by petition, addressed to the court from which the execution issued; or to the county court of the county in which he is imprisoned; or, if he is imprisoned in the city of New York, to the supreme court.

(See B., C & G. Consol. L., 2nd Ed., p. 1651.)

3. Debtor and Creditor Law, § 136. Creditor may notify debtor to apply for discharge.

Where a person has been imprisoned by virtue of an execution, for the space of three months after he was entitled, by the provisions of this article, to apply for a discharge; and has neither made such an application, nor applied for his discharge under the provisions of article third of this chapter; the judgment creditor, by virtue of whose execution he was imprisoned, may serve upon the prisoner a written notice, requiring him to apply for his discharge, according to the provisions of this article.

(See B., C. & G. Consol. L., 2nd Ed., p. 1659.)

4. Debtor and Creditor Law, § 137. Effect of failure so to apply.

If the prisoner does not, within thirty days after the personal service of such notice, either present a petition to the proper court, as prescribed in article third of this chapter or serve, upon the creditor giving the notice, a copy of the petition and schedule, with a notice of his intention to apply for his discharge, as prescribed in this article; or if, after such a presentation or service, he does not diligently proceed thereupon to a decision, he shall be forever barred from obtaining his discharge under the provisions of this article, or of article third of this chapter.

(See B., C. & G. Consol. L., 2nd Ed., p. 1659.)

5. Debtor and Creditor Law, § 138. Debtor to State or United States not to be discharged.

Neither of the following named persons shall be discharged from imprisonment under the provisions of this article:

1. A person owing a debt or duty to the United States.
2. A person owing a debt or duty to the State, for taxes or for money received or collected by any person, as a public officer or in a fiduciary capacity; or a cause of action specified in § 1969 of the Code of Civil Procedure, or a judgment recovered upon such a cause of action.

(See B., C. & G. Consol. L., 2nd Ed., p. 1660.)

6. Infant.

An infant is entitled to his discharge from imprisonment on complying with the terms of the statute. The prisoner's act in making an assignment will be regarded as valid notwithstanding his infancy.¹⁸

7. Person confined for contempt.

A prisoner will not be discharged where he is imprisoned for a contempt of court for the non-performance of some act or duty which it is within his power to perform.¹⁹ A prisoner will not be discharged who is in custody of the sheriff under an attachment to bring him into court to answer interrogatories in a proceeding for contempt.²⁰ But it has been held that a person committed for non-payment of alimony may be entitled to his discharge.²¹

8. One admitted to jail limits.

Formerly there was a conflict of decisions whether one admitted to the jail limits could have relief under the statute;²² but the express language of section 120 now determines this question in the affirmative.

9. Violation of Conservation Law.

A defendant, who has been convicted for a violation of the Conservation Law and imprisoned under section 28 thereof, cannot be discharged under the provisions of the Debtor and Creditor Law.²³

10. Jurisdiction of court.

An application for the discharge of an insolvent debtor may be made in the court out of which the execution was issued.²⁴ The application must be made to the court, not to

18. *People v. Mullin*, 25 Wend. 698.

19. *Spaulding v. People*, 7 Hill, 301; *aff'd*, 10 Paige, 301; *Van Wezel v. Van Wezel*, 3 Paige, 38; *Patrick v. Warner*, 4 Paige, 398. See *Contempt*, Vol. 1, p. 628.

20. *Jackson v. Smith*, 5 Johns. 115; *Bissell v. Kip*, 5 Johns. 89.

21. *People v. Cowles*, 4 Keyes, 38.

22. *Holmes v. Lansing*, 3 Johns. Cas. 73; *Peters v. Henry*, 6 Johns. 121; *Coman v. Storm*, 26 How. Pr. 84; *Bylandt v. Comstock*, 25 How. Pr. 429.

23. *Matter of Locke*, 174 App. Div. 287, 160 N. Y. Supp. 431; *aff'd*, 222 N. Y. 538.

24. *Matter of Irving*, 3 How. Pr. N. S. 236.

a judge thereof;²⁵ but, though the petition be addressed to the county judge instead of to the court, the validity of the discharge is not affected, as it is a mere irregularity and not a jurisdictional defect.²⁶

D. Petition.

1. Debtor and Creditor Law, § 122. When petition may be presented.

A person so imprisoned may apply for such a discharge, at any time; unless the sum, or, where he is imprisoned by virtue of two or more executions, the aggregate of the sums, for which he is imprisoned, exceeds five hundred dollars; in which case, he cannot present such a petition, until he has been imprisoned, by virtue of the execution or executions, for at least three months.

(See B., C. & G. Consol. L., 2nd Ed., p. 1651.)

2. Debtor and Creditor Law, § 123. Contents of petition; schedule.

The petition must be in writing; it must be signed by the petitioner; and it must state the cause of his imprisonment, by setting forth a copy, or the substance of the execution, or, if there are two or more executions, of each of them. The petitioner must annex thereto, and present therewith, a schedule, containing a just and true account of all his property, and of all charges affecting the same, as the property and charges existed at the time when he was first imprisoned, and also as they exist at the time when the petition is prepared; together with a just and true account of all deeds, securities, books, vouchers, and papers, relating to the property, and to the charges thereupon.

(See B., C. & G. Consol. L., 2nd Ed., p. 1652.)

3. Debtor and Creditor Law, § 124. Affidavit of petitioner.

An affidavit, in the following form, subscribed and taken by the petitioner, on the day of presentation of the petition, must be annexed to the petition and schedule:

"I, ———, do swear" (or "affirm," as the case may be), "that the matters of fact, stated in the petition and schedule hereto annexed, are, in all respects, just and true; and that I have not, at any time or in any manner whatsoever, disposed of or made over any part of my property, not exempt by express provision of the law from levy and sale by virtue of an execution, for the future benefit of myself or my family, or disposed of or made over any part of my property, with intent to injure or defraud any of my creditors."

(See B., C. & G. Consol. L., 2nd Ed., p. 1653.)

4. Sufficiency of papers, in general.

While the form of the petition is not prescribed by the statute, enough must appear upon the face of it to give the officer jurisdiction. All the facts to entitle the applicant

²⁵ Matthews' Case, 14 Abb. 115;
Matter of Walker, 2 Duer, 655.

²⁶ Borthwick v. Howe, 27 Hun,
505.

to a discharge must appear, particularly all jurisdictional facts.²⁷ It is essential to the jurisdiction of the court that the papers should conform with exactness to the provisions of the statute.²⁸ Facts, not mere conclusions from facts, must be set forth in the petition in order that the court may determine whether the schedule is correct and whether the petitioner's proceedings are just and fair; therefore, when these facts are not presented the application of the petitioner will be denied, but, it seems, with leave to renew on sufficient papers.²⁹ A petition for the discharge of an imprisoned debtor sufficiently sets forth the cause of his imprisonment if it alleges that he is confined in the county jail by virtue of an execution against his person, issued in a civil action, brought by a person therein named.³⁰

5. Imprisonment for three months.

Where the aggregate of the sum for which the debtor is imprisoned exceed \$500, the petition must allege that the debtor has been imprisoned three months, as such fact is jurisdictional.³¹ An objection to the jurisdiction of the court on this ground may be taken at any time.³² The limitation of time during which the debtor may be imprisoned on civil process applies only to the time he is imprisoned on the final process, and does not include a prior imprisonment on another arrest.³³

6. Schedule.

The requirement that a schedule shall be annexed to the petition is mandatory; and its absence is a jurisdictional

27. *Browne v. Bradley*, 5 Abb. 141; *People v. Brooks*, 40 How. Pr. 165.

28. *Bulymore v. Cooper*, 46 N. Y. 236; *Matter of Paton*, 7 Misc. 467, 27 N. Y. Supp. 992, 58 St. Rep. 512, 23 Civ. Pro. 331.

29. *Matter of Paton*, 7 Misc. 467, 27 N. Y. Supp. 992, 58 St. Rep. 512, 23 Civ. Pro. 331.

30. *Ex parte Chappell*, 23 Hun. 179.

Description of action.—A discharge is not defective, although the petition asked for a discharge in an action, "in which one Goodwin was plaintiff,

and Munger and others, defendants," thereby naming only one of two plaintiffs, and but one of the defendants arrested. *Goodwin v. Griffis*, 88 N. Y. 629.

31. *People v. Bancker*, 5 N. Y. 106; *Browne v. Bradley*, 5 Abb. Pr. 141; *Kappel v. Yotz*, Dly. Rgstr., December 26, 1883.

32. *Matter of Rosenberg*, 10 Abb. Pr. N. S. 450.

33. *Matter of Coyne*, 18 Civ. Pro. 397, 13 N. Y. Supp. 797.

defect.³⁴ A statement in the petition and a recital in the order to the effect that the debtor had no property, not exempt from levy and sale under the execution, out of which a judgment could be satisfied, is not equivalent to the account required to be furnished in the schedule of all his property, and does not excuse the omission to file the schedule required.³⁵ The omission of an account of the debtor's real and personal estate as it existed at the time of the arrest is not supplied by allegations in the petition that prior to the rendition of the judgment the debtor was adjudged a bankrupt, and an assignee in bankruptcy appointed.³⁶ The petitioner's schedules must set forth facts and not mere conclusions.³⁷

7. Verification.

The court does not obtain jurisdiction to discharge the prisoner unless he verifies the petition at the time he presents it, and the affidavit is a prerequisite to jurisdiction.³⁸ The affidavit is not required to be indorsed and sworn to in presence of the court, but it must have been sworn to on the day the petition is presented.³⁹

8. Waiver of insufficiency of papers.

A judgment creditor, by appearing before a county judge on a proceeding for the discharge of the judgment debtor from imprisonment, waives the objection that the affidavit of the petitioner is not made on the day of the presentation thereof, by not objecting thereto.⁴⁰ But a judgment creditor, on whom is served a notice of motion for the discharge of the judgment debtor based on a petition annexed thereto, which is insufficient upon its face to give the court jurisdiction, is entitled to assume that no proceedings will be had

34. *Bulymore v. Cooper*, 46 N. Y. 236.

35. *Seward v. Wales*, 40 App. Div. 339, 58 N. Y. Supp. 42; *aff'd* on opinion below, 167 N. Y. 538.

36. *Bulymore v. Cooper*, 46 N. Y. 236.

37. *Matter of Paton*, 7 Misc. 467, 27 N. Y. Supp. 992, 58 St. Rep. 512, 23 Civ. Pro. 331.

38. *Browne v. Bradley*, 5 Abb. 141; *Bulymore v. Cooper*, 2 Lans. 71; *aff'd*, 46 N. Y. 236. See *Hillyer v. Rosenberg*, 11 Abb. Pr. N. S. 402.

39. *Richmond v. Praim*, 24 Hun. 578; *Schaeffer v. Risely*, 44 Hun. 6, 6 St. Rep. 417.

40. *Shaffer v. Riseley*, 114 N. Y. 23, 22 St. Rep. 168, 16 Civ. Pro. 369.

under the petition, and his failure to appear on the motion does not amount to a waiver or a default.⁴¹

E. Notice to creditors.

1. Debtor and Creditor Law, § 125. Notice to creditors.

At least fourteen days before the petition is presented, the petitioner must serve, upon the creditor in each execution, by virtue of which he is imprisoned, a copy of the petition, and the schedule; together with a written notice of the time when, and place where, they will be presented. If, by reason of changes occurring after the service, it is necessary, before presenting the petition and schedule, to correct any statement contained in the schedule, the correction may be made by a supplemental schedule, a copy of which need not be served, unless the court so directs.

(See B., C. & G. Consol. L., 2nd Ed., p. 1654.)⁴²

2. Debtor and Creditor Law, § 126. Id; when service cannot be made.

The papers, specified in the last section, may be served, either upon the creditor or his representative, or upon the attorney whose name is subscribed to the execution; and, in either case in the manner prescribed in this act for the service of a paper upon an attorney, in an action in the supreme court. Where it is made to appear by affidavit, to the satisfaction of the court, that service cannot, with due diligence, be so made within the State, upon either, the court may make an order, prescribing the mode of service or directing the publication of a notice in lieu of service, in such a manner and for such length of time, as it thinks proper; and thereupon, it may direct an adjournment of the hearing to such a time as it thinks proper.

(See B., C. & G. Consol. L., 2nd Ed., p. 1654.)

3. Debtor and Creditor Law, § 127. Id; when State a creditor.

Where the State is a creditor, the papers must be served upon the attorney-general, who must represent the State in the proceedings.

(See B., C. & G. Consol. L., 2nd Ed., p. 1655.)

F. Proceedings upon presentation of petition.

1. Debtor and Creditor Law, § 128. Proceedings on presentation of petition.

Upon the presentation of the petition, schedule, and affidavit, with due proof of service of publication, as prescribed in the last three sections, the court must make an order, directing the petitioner to be brought before it, on a day designated therein; and on that day, or on such other days as it appoints, the court must, in a summary way, hear the allegations and proofs of the parties. If the court is satisfied that the petition and schedule are correct, and that the peti-

41. *Seward v. Wales*, 40 App. Div. 539, 58 N. Y. Supp. 42; *aff'd* on opinion below, 167 N. Y. 538.

42. Power of court.—The court has

no power to dispense with the fourteen days' notice. *Matter of Quick*, 92 App. Div. 131, 87 N. Y. Supp. 316; *aff'd*, 179 N. Y. 601.

tioner's proceedings are just and fair, it must make an order, directing the petitioner to execute to one or more trustees, designated in the order, an assignment of all his property, not expressly exempt by law from levy and sale by virtue of an execution; or of so much thereof as is sufficient to satisfy the execution or executions, by virtue of which he is imprisoned.

(See B., C. & G. Consol. L., 2nd Ed., p. 1655.)

2. Debtor and Creditor Law, § 129. Adjournment.

Upon sufficient cause being shown by a creditor, the court may, from time to time, adjourn the hearing; but not to a day later than three months after the presentation of the petition.

(See B., C. & G. Consol. L., 2nd Ed., p. 1657.)⁴³

3. Debtor and Creditor Law, § 130. Proceedings on adjourned day.

An objection to a matter of form shall not be received upon an adjourned day; and, unless the opposing creditor satisfies the court that the proceedings on the part of the petitioner are not just and fair, the court must direct an assignment, as prescribed in the last section but one, and must grant a discharge, as prescribed in the following sections of this article.

(See B., C. & G. Consol. L., 2nd Ed., p. 1657.)

G. Assignment.

1. Debtor and Creditor Law, § 131. Assignment; effect thereof.

The assignment must be acknowledged or proved, and certified, in like manner as a deed to be recorded in the county, and must be recorded in the clerk's office of the county where the petitioner is imprisoned. Where it appears, from the schedule or otherwise, that real property will pass thereby, the assignment must also be recorded as a deed, in the proper office for recording deeds, of each county where the real property is situated. The assignment vests in the trustee or trustees, for the benefit of the judgment creditors in the executions, by virtue of which the petitioner is imprisoned, all the estate, right, title, and interest of the petitioner in and to the property, so directed to be assigned.

(See B., C. & G. Consol. L., 2nd Ed., p. 1657.)

2. Debtor and Creditor Law, § 135. Powers and duties of trustees.

The trustee must collect the demands, and sell the other property assigned to him. He must apply the proceeds thereof, after deducting his commissions and expenses allowed by law, as follows:

43. Adjournments.—Where the petitioners failed to appear on the day to which the hearing had been adjourned, and the proceedings were dismissed with leave to come in on terms, and the petitioner moved to open the default, it was held that the court had lost jurisdiction by the omission to ad-

journ the proceedings on the day assigned for the hearing. *Bylandt v. Comstock*, 25 How. Pr. 429. And when the proceedings were not adjourned to the next term, the adjournment of the court without day put an end to them. *People v. Brooks*, 40 How. Pr. 165.

1. To the payment of the jail fees, upon the imprisonment and discharge of the petitioner.

2. If any surplus remains, to the payment of the creditors, by virtue of whose executions the petitioner was imprisoned, when he presented his petition; or, if there is not enough to pay them in full, to the payment to each, of a proportionate part of the sum due upon his execution.

3. If any surplus remains, he must pay it over to the petitioner, or his executor or administrator.

Personal service upon the creditor, or his attorney, of written notice, of the time and place of making a distribution, as prescribed in subdivision second of this section, has the same effect as publishing a notice thereof, in a case prescribed by law.

(See B., C. & G. Consol. L., 2nd Ed., p. 1659.)

3. What to be assigned.

The court must have satisfactory evidence that the assignment has been actually made, and the property covered by the assignment actually delivered; and the assignment must include, not only the property that the judgment debtor had at the time of signing his petition, but also all property in his possession at the time when the order for the assignment is made.⁴⁴

H. Discharge.

1. Debtor and Creditor Law, § 132. Discharge, when to be granted.

Upon the production, by the petitioner, of satisfactory evidence, that the petitioner has actually delivered to the trustee or trustees all the property so directed to be assigned, which is capable of delivery; or upon the petitioner's giving security, approved by the court, for the future delivery thereof; the court must make an order, discharging the petitioner from imprisonment, by virtue of each execution, specified in his petition. The sheriff, upon being served with a certified copy of the order, must discharge the petitioner as directed therein, without any detention on account of fees.

(See B., C. & G. Consol. L., 2nd Ed., p. 1657.)

2. Debtor and Creditor Law, § 133. Petitioner's property still liable.

Notwithstanding such a discharge, the judgment creditor in the execution has the same remedies, against the property of the petitioner, for any sum due upon his judgment, which he had before the execution was issued; but the petitioner shall not, except as is otherwise especially prescribed in the next section, be again imprisoned by virtue of an execution upon the same judgment, or arrested in an action thereupon.

(See B., C. & G. Consol. L., 2nd Ed., p. 1658.)

44. *Borthwick v. Howe*, 27 Hun, 505.

3. Debtor and Creditor Law, § 134. When creditor may issue new execution against person.

If the petitioner is convicted of perjury, committed in any of the proceedings upon his petition, any judgment creditor, by virtue of whose execution he was imprisoned, may issue a new execution against his person.

(See B., C. & G. Consol. L., 2nd Ed., p. 1659.)

4. When petitioner not entitled to discharge.

The debtor will not be discharged unless the proceedings are "just and fair."⁴⁵

Acts before as well as those after the making of the application may be examined to determine whether a debtor should be discharged.⁴⁶ He is not entitled to his discharge where he has disposed of his property with intent to defraud any of his creditors.⁴⁷ Fraud in the disposition of his property by the debtor will bar discharge, though fraud in contracting the debt is not such a bar.⁴⁸

If the creditor establishes upon the hearing that the debtor has disposed of or made over any part of his property with intent to injure or defraud any of his creditors, he is not entitled to a discharge, although

45. *Matter of Fowler*, 59 How. Pr. 148.

Fraudulent statement.—There is nothing in the statute that would authorize holding that a debtor cannot be discharged because he has made a false and fraudulent representation as to the solvency of a person to whom credit was given by the person who has recovered a judgment for damages against the prisoner for the injury thus sustained. *Matter of Fowler*, 59 How. Pr. 148.

Failure to account for property.—Where a defaulter could not account for property misappropriated, except as to a portion conveyed away, and not specified in his inventory, it was held that he could not have the benefit of the act. *People v. White*, 14 How. Pr. 498.

Preference.—A debtor has a right to prefer any creditor, or defeat a preference to any creditor by a general as-

signment or other preference. It is sufficient if the intent be to pay honest debts. *Matter of Pearce*, 29 Hun, 270; *Roswog v. Seymour*, 7 Robt. 429; *Corning v. White*, 2 Paige, 567.

The General Term would not review the determination of the County Court, whether the schedules of the debtor were just and fair. *Richmond v. Prain*, 24 Hun, 578.

The Court of Appeals will not interfere with a finding of fact as to the intent with which a debtor disposed of his property. *Matter of Sedgwick*, 12 Wkly. Dig. 270.

46. *Matter of Watson*, 2 E. D. Smith, 429; *Matter of Brown*, 39 Hun, 27. Compare *Sparks v. Andrews*, 7 Wkly. Dig. 276.

47. *Coffin v. Gourlay*, 9 Wkly. Dig. 490, 20 Hun, 408.

48. *Matter of Pearce*, 29 Hun, 270. *Contra*, *Price v. Orcutt*, Dly. Rgstr., May 26, 1884.

such act was committed before the commencement of the action in which he is imprisoned, provided they are shown to be so far connected with the action as to be grounds for the order on which his imprisonment was based. The fraudulent disposition need not have been made with a view to his discharge.⁴⁹ A discharge will be refused on the ground that a fraudulent mortgage of property was made before the commencement of the action, but in view of its commencement, though in no way connected with the subject of the action.⁵⁰ Where the petitioner, after imprisonment, filed a voluntary petition in bankruptcy, and, by virtue of it, assigned all his property to the assignee in bankruptcy, and then filed his petition for a discharge under this act, it was held that such disposition of his property was a fraud on the act, and a ground for refusing the discharge.⁵¹ But where the debtor was charged in execution, after petition filed in bankruptcy, it was held to be a valid disposition of his property, and no bar to his discharge. A creditor cannot contest the discharge who is in no way injured or defrauded by the act in question.⁵² Only existing creditors at the time can complain that the debtor at one time conveyed all his property with intent to defraud his creditors. The fraud which the bankrupt must be guilty of is not the fraud in contracting the debt or liability, but fraud in the subsequent disposition of his property to evade such liability.⁵³ The fact that the defendant converted funds received in a fiduciary capacity does not necessarily prevent his discharge where it does not appear that he has disposed of his own property to the benefit of himself or family with intent to defraud creditors.⁵⁴ A judgment that the firm has been guilty of a fraudulent disposition of its property does not necessarily preclude the discharge of one of the partners.⁵⁵

49. *Matter of Brady*, 69 N. Y. 215.

50. *Gaul v. Clark*, 1 Wkly. Dig. 209.

51. *People v. Brooks*, 40 How. Pr. 165; *Spear v. Wardwell*, 1 N. Y. 144; *Hall v. Kellogg*, 12 N. Y. 325.

52. *Matter of Brady*, 69 N. Y. 215.

53. *Matter of Pearce*, 29 Hun, 270.

54. *Suydam v. Belknap*, 20 Hun, 87; *Matter of Caamano*, 8 Civ. Pro. 29, 2

How. Pr. N. S. 240. See, also, *Warschauer v. Webb*, 10 Civ. Pro. 169, 18 Abb. N. C. 232; *People ex rel. Rodding v. Grant*, 10 Civ. Pro. 174. Contra, *People ex rel. Lust v. Grant*, 10 Civ. Pro. 158.

55. *Matter of Benson*, 11 Wkly. Dig. 394, 10 Daly, 166.

It has been said that a debtor is not entitled to his discharge if it appears he has been in the enjoyment of an income, and expended it in the support of his family without any effort to pay the judgment, and the circumstances are such that he might have set apart a portion of his income to apply on the judgment, for omitting to do so is not "just and fair."⁵⁶

Where the insolvent, just prior to a general assignment by his firm, permitted his wife to withdraw all his ready money in the firm on account of indebtedness to her, had collected firm moneys and applied to his own use, etc., it was held that his proceedings had not been just and fair, and his application for a discharge denied.⁵⁷ But the fact that the debtor conveyed property to his wife, before the existence of the debts owned by the opposing creditors, will not prevent a discharge.⁵⁸ Where it appears that an imprisoned debtor, although owning no property not exempt from execution, works for his wife without wages upon a farm owned by her, and has good credit, a discharge will be refused, on the ground that his proceedings are not just and fair.⁵⁹ Where the petitioner fails, satisfactorily, to account for his disposition of a sum of money received by him, the discharge will be denied, or if the court is satisfied that the debtor has disposed of his property with an intent to defraud his creditors, or if it appear that the petition and schedules are not correct, the discharge will be denied.⁶⁰ A discharge has also been denied where it appeared that the debtor had drawn his entire bank account immediately after an adverse verdict, and where he was unable to account for the same.⁶¹

5. Order.

The design of section 132 is to leave it to the sound discretion of the court whether to require any security, and, if any, then to fix the form of the security and the amount according to the circumstances of each particular case.⁶² If the

56. *Matter of Donoghue*, 17 Abb. ... N. C. 277; *Matter of Lowell*, 8 Civ. Pro. 7. 59. *Matter of Boyce*, 11 N. Y. Supp. 624, 19 Civ. Pro. 23.

57. *Matter of Howes*, 9 Civ. Pro. 17.

60. *Matter of Haight*, 11 Civ. Pro. 227.

58. *Matter of Haight*, 11 Civ. Pro. 227.

61. *Barek v. Senn*, Dly. Registr. May 31, 1883.

62. *Roswog v. Seymour*, 7 Robt. 429.

order for discharge omits the recital of a material fact, the fact may be shown *aliunde*.⁶³

The sheriff should discharge the prisoner although the order for the discharge does not state that the petition was in writing signed by the party with the schedule annexed; the sheriff will be protected in an action for an escape by showing that these facts existed.⁶⁴

If the order is relied upon without proof *aliunde* of the facts needful for jurisdiction, the recitals should be full, but otherwise no recitals are absolutely necessary. It is valid if the facts exist which render it so, whether recited or not, but for the protection of the sheriff in discharging the prisoner it should contain *prima facie* evidence of regularity of the proceedings, and show sufficient jurisdictional facts.⁶⁵ A sheriff, seeking to justify the release by him of an imprisoned debtor under an order of the County Court, must show either that the order recited all the jurisdictional facts or else establish by proof *aliunde* that all the statutory prerequisites were observed.⁶⁶

6. Effect of discharge.

The discharge of the imprisoned debtor pursuant to the statute does not discharge his sureties from liability upon their undertaking.⁶⁷ Where a debtor, held by a sheriff within the jail liberties upon a body execution on a debt provable in bankruptcy, files a petition therein, procures a discharge, and thereupon, of his own motion, goes and remains beyond the liberties, the sheriff is not liable to the creditor in the execution as for an escape.⁶⁸ A judgment debtor imprisoned under a body execution who, upon representing that his wife was very sick, obtains permission from the judgment creditor to visit her upon condition that he will return to the jail limits on the same day, is estopped from asserting that his release from imprisonment under such circumstances is a satisfaction of the judgment.⁶⁹

63. *Goodwin v. Griffis*, 88 N. Y. 630. See, also, *Schaffer v. Riseley*, 6 St. Rep. 417.

64. *Schaffer v. Riseley*, 44 Hun, 6.

65. *Bulymore v. Cooper*, 46 N. Y. 236; *Bennett v. Burch*, 1 Denio, 141; *Develin v. Cooper*, 84 N. Y. 410.

66. *Seward v. Wales*, 40 App. Div.

539, 58 N. Y. Supp. 42; *aff'd on opinion* below, 167 N. Y. 538.

67. *Prusia v. Brown*, 45 Hun, 81.

68. *Walker v. Harder*, 39 Misc. 749, 80 N. Y. Supp. 948.

69. *Hoyle v. McCrea*, 42 App. Div. 313, 59 N. Y. Supp. 200.

7. Effect of irregular procedure on discharge.

Where the prisoner is confined under an execution requiring the payment of more than \$500 and the papers do not show that he has been imprisoned more than three months before making the application, the court is without jurisdiction; and the discharge affords no justification to the sheriff who releases the prisoner under the order.⁷⁰

8. Second application for discharge.

An adjudication on the merits is a bar to a future application.⁷¹ An insolvent debtor, whose petition for a discharge has been refused because his proceedings are adjudged to be not just and fair, in that he failed to include in his petition an account of some of his property, cannot be permitted to present a new petition, including such property, and stating no new facts to explain or justify his acts in his former proceedings, but he will be left to an application to reopen the former proceeding, upon proof of the good faith of the matters charged upon him in that proceeding.⁷²

ARTICLE IV.**DISCHARGE OF BANKRUPT FROM JUDGMENT.****A. Debtor and Creditor Law, § 150. Discharge of bankrupt from judgment.**

At any time after one year has elapsed, since a bankrupt was discharged from his debts, pursuant to the acts of congress relating to bankruptcy, he may apply, upon proof of his discharge, to the court in which a judgment was rendered against him, or if rendered in a court not of record, to the court of which it has become a judgment by docketing it, or filing a transcript thereof, for an order, directing the judgment to be canceled and discharged of record. If it appears upon the hearing that he has been discharged from the payment of that judgment or the debt upon which such judgment was recovered, an order must be made directing said judgment to be canceled and discharged of record; and thereupon the clerk of said court shall cancel and discharge the same by marking on the docket thereof that the same is canceled and discharged by order of the court, giving the date of entry of the order of discharge. Where the judgment was a lien on real property owned by the bankrupt prior to the time he was adjudged a bankrupt, the lien thereof upon said real estate shall not be

⁷⁰ *People v. Bancker*, 5 N. Y. 106; *Browne v. Bradley*, 5 Abb. 141; *Matter of Rosenberg*, 10 Abb. Pr. N. S. 450; *Dusart v. Delacroix*, 1 Abb. Pr. N. S. 409, n.

⁷¹ *Matter of Roberts*, 10 Hun, 253, 59 How. Pr. 136; rev'd on other grounds, 70 N. Y. 5.

⁷² *Matter of Thomas*, 10 Abb. Pr. N. S. 114.

affected by said order and may be enforced, but in all other respects the judgment shall be of no force or validity, nor shall the same be a lien on real property acquired by him subsequent to his discharge in bankruptcy. Notice of the application, accompanied with copies of the papers upon which it is made, must be served upon the judgment creditor, or his attorney of record in said judgment, in the same manner as prescribed in section seven hundred and ninety-six and seven hundred and ninety-seven of the code of civil procedure, if the residence or place of business of such creditor, or his attorney, is known, but if unknown and cannot be ascertained after due diligence, or if such creditor is a non-resident of this State, and his attorney is dead, removed from, or cannot be found within the State, upon proof of said facts by affidavit a judge of the court may make an order that the notice of such application be published in a newspaper designated therein once a week for not more than three weeks, which publication shown by the affidavit of the publisher shall be sufficient service upon such judgment creditor, of the application.

(See B., C. & G. Consol. L., 2nd Ed., p. 1660.)

B. Purpose of statute.

The Bankruptcy Law makes the discharge a complete release of all provable debts as soon as granted. The proceeding under this section of the Debtor and Creditor Law to cancel the judgment of record is intended merely to remove from the record the extinct judgment where it otherwise might remain to the annoyance or prejudice of the discharged debtor, or others.⁷³ The application may be made by a grantee of real property upon which the judgment is apparently a lien.⁷⁴

C. Judgments which are subject to discharge.

In general, a discharge in bankruptcy proceedings under the Federal statute releases the bankrupt from all of his provable debts, except taxes, liabilities for obtaining property by false pretenses or false representations, willful or malicious injuries to the person or property of another, alimony due or to become due, for maintenance or support of a wife or child, seduction of an unmarried female, criminal conversation, debts not scheduled unless the creditor has notice of the proceeding; and liabilities created by fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.⁷⁵ Debts arising

73. *Walker v. Harder*, 39 Misc. 749, 80 N. Y. Supp. 948.

74. *Graber v. Gault*, 103 App. Div. 511, 93 N. Y. Supp. 76.

75. Debts dischargeable.— See Collier

on Bankruptcy, 11th Ed., pp. 422-439, discussing section 17 of the Bankruptcy Act as to what debts are dischargeable in the bankruptcy proceedings.

out of contract are discharged and a judgment therefor will be subject to an application under section 150.⁷⁶

The defendant, discharged in bankruptcy, has the right, under section 150, to have the lien of the judgment obtained by a judgment creditor suing to set aside conveyances for fraud, in an action commenced before the discharge in bankruptcy was secured, set aside, but only as to real property subsequently acquired, and the order canceling the judgment should provide that it stand for the purpose of enforcement against real estate owned prior thereto.⁷⁷

The judgments in actions for fraud which are exempted from discharge are in cases in which fraud is the gravamen of the action, and proof of fraud is essential to the recovery; and a judgment in an action in which the right of recovery is based upon an act not essentially fraudulent, although fraud may incidentally be shown, is not exempted.⁷⁸ The judgment in an action for fraud which, under section 17 of the Bankruptcy Law, is not released by a discharge, is one where from the record it appears that fraud was the pith of the action.⁷⁹

A judgment for conversion may be released by a discharge in bankruptcy,⁸⁰ though fraud be charged in connection with the conversion; the fraud which will prevent the operation of the discharge in bankruptcy must be positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, and it is necessary that that fraud should be an essential part of the cause of action, without the proof of which the plaintiff cannot recover. Whether a discharge in bankruptcy releases the liability on a judgment must be determined by the record and not by any allegations or proof outside of it.⁸¹

A discharge in bankruptcy does not authorize the cancellation of a judgment recovered for willful and malicious injury to property.⁸²

76. *Walker v. Muir*, 127 App. Div. 163, 111 N. Y. Supp. 465; *aff'd*, 194 N. Y. 420.

77. *Arnold v. Treviranus*, 78 App. Div. 589, 79 N. Y. Supp. 732.

78. *Collins v. McWalters*, 35 Misc. 648, 72 N. Y. Supp. 203.

79. *Matter of Benoit*, 124 App. Div.

142, 108 N. Y. Supp. 889; *aff'd*, 194 N. Y. 549.

80. *Fechter v. Postel*, 114 App. Div. 776, 100 N. Y. Supp. 207.

81. *Burnham v. Pidcock*, 58 App. Div. 273, 68 N. Y. Supp. 1007.

82. *Stefanini v. Sroka*, 43 Misc. 614, 88 N. Y. Supp. 167.

A discharge in bankruptcy does not discharge the bankrupt's liability to pay alimony, whether accrued at the time of filing the petition or accruing thereafter.⁸³ A judgment for damages for criminal conversation with the wife of the judgment creditor is not to be canceled of record.⁸⁴

A judgment rendered in favor of the plaintiff in an action to recover damages for a breach of promise of marriage is not, although the plaintiff pleaded and proved in aggravation of the damages that she had been seduced by the defendant, a judgment in an action "for willful and malicious injuries to the person or property of another," and is, therefore, within the operation of a discharge in bankruptcy obtained by the defendant.⁸⁵

Although a discharge in bankruptcy relieves the bankrupt from a judgment entered before the petition was filed and the debt on which it is founded, it does not discharge him from the costs accruing upon an appeal taken by him between the filing of the petition and the discharge nor those awarded against him on a further appeal after the discharge.⁸⁶

A court has no power to discharge a judgment against two defendants because one is a bankrupt.⁸⁷ The discharge of a partner upon his individual voluntary petition does not entitle him to have a judgment against him and his copartner on a firm debt canceled.⁸⁸

A decree in bankruptcy proceedings should not be held to be a discharge of a judgment in one State unless it at the same time is held to be a discharge of any and all judgments of other States which are founded primarily upon the same debt or duty and which have such a relation to each other that a payment of one would result in a defense or extinguishment of the others. Hence, a judgment of this State, in an

83. *Maisner v. Maisner*, 62 App. Div. 286, 70 N. Y. Supp. 1107; *Young v. Young*, 35 Misc. 335, 71 N. Y. Supp. 944.

84. *Colwell v. Tinker*, 65 App. Div. 20, 72 N. Y. Supp. 505; *aff'd*, 169 N. Y. 531.

85. *Disler v. McCauley*, 66 App. Div. 42, 73 N. Y. Supp. 270. See, also, *Fin-*

negan v. Hall, 35 Misc. 773, 72 N. Y. Supp. 347.

86. *Aiken, Lambert & Co. v. Haskins*, 34 Misc. 505, 70 N. Y. Supp. 293.

87. *Matter of Quackenbush*, 122 App. Div. 456, 106 N. Y. Supp. 773.

88. *Dodge v. Kaufman*, 46 Misc. 248, 91 N. Y. Supp. 727.

action to enforce a foreign judgment for alimony, is not discharged by a decree in bankruptcy.⁸⁹

A judgment recovered in an action for personal injuries to the plaintiff is not a dischargeable debt in bankruptcy and a motion under section 150 of the Debtor and Creditor Law to cancel the same of record will be denied though the defendant listed said judgment in his schedules in bankruptcy.⁹⁰ A bankrupt is not entitled to have a judgment on a forfeited bail bond discharged of record.⁹¹

A lien of a judgment, recovered within four months before the adjudication of the debtor as a bankrupt, survives his subsequent discharge, although the debt upon which it was recovered was proved in the bankruptcy proceedings, where the trustee in bankruptcy elected not to take the property upon which the judgment was a lien and the interest of the bankrupt therein was not sold in the bankruptcy proceedings.⁹²

D. Judgments procured after discharge.

A defendant who has been discharged in bankruptcy pending the action and has applied for leave to set up such discharge by answer, but has declined to avail himself of the privilege granted, upon certain conditions, may, nevertheless, after final judgment, move under section 150 of the Debtor and Creditor Law, for an order directing the judgment to be canceled and discharged of record.⁹³ If the discharge was pleaded in the original action and the defense improperly disallowed, for in such a case the remedy is by appeal.⁹⁴

Where it appears that a defendant, who has suffered a judgment to be rendered against him upon an inquest taken by default, was discharged in bankruptcy after the service of the answer and before the rendition of the judgment, his motion to vacate the judgment and to be allowed to serve a supplemental answer setting up his discharge in bankruptcy should be granted, upon terms, sufficient time not having

89. *Matter of Williams*, 208 N. Y. 32.

90. *Matter of Halper*, 82 Misc. 205, 143 N. Y. Supp. 1005.

91. *Matter of Weber*, 212 N. Y. 290.

92. *McCarthy v. Light*, 155 App. Div. 36, 139 N. Y. Supp. 853.

93. *Rukeyser v. Tostevin*, 188 App. Div. 629, 177 N. Y. Supp. 291; *Hussey v. Judson*, 43 Misc. 370, 87 N. Y. Supp. 499.

94. *Howe v. Noyes*, 47 Misc. 338, 93 N. Y. Supp. 476.

elapsed to authorize the cancellation of the judgment under section 150.⁹⁵

Where, subsequent to the commencement of an action brought to recover the value of goods sold by the plaintiff to the defendant in reliance upon his alleged fraudulent representations, the defendant obtains a discharge in bankruptcy, and, upon the trial of the action, stipulates to allow the plaintiff to enter judgment against him for the amount claimed if he will withdraw the allegations of fraud, the judgment entered against the defendant pursuant to such stipulation is not affected by the discharge in bankruptcy, and for this reason the defendant is not entitled to have such judgment discharged of record upon an application made under section 150.⁹⁶

E. Creditor having no notice of bankruptcy proceedings.

If the judgment creditor had no notice of the bankruptcy proceedings and the residence of the creditor is not properly stated in the schedule, the judgment will not be vacated.⁹⁷ Thus, ground for retaining the judgment will be found if bankrupt states the address as "unknown" when in fact it was known to him;⁹⁸ or was ascertainable by the exercise of ordinary diligence;⁹⁹ or, if the scheduled address is one at which the creditor never resided;¹ or, in the case with a creditor residing in New York City, if the street address

95. *Kahn & Co. v. Casper*, 51 App. Div. 540, 64 N. Y. Supp. 838.

96. *Stevens v. Meyers*, 72 App. Div. 128, 76 N. Y. Supp. 332.

97. *Woodward v. Schaefer*, 91 N. Y. Supp. 104.

98. *Guasti v. Miller*, 203 N. Y. 259; *aff'd*, 226 U. S. 170, 57 L. ed. 173, 33 Sup. Ct. 49.

Knowledge of residence two years prior.—Where a bankrupt, in the schedule filed by him in the bankruptcy proceedings, states that a certain judgment creditor's address is unknown to him, the fact that it subsequently appears that the bankrupt called at such judgment creditor's house over two years prior to the institution of the bankruptcy proceedings will not render

the discharge in bankruptcy ineffectual to bar the judgment creditor's claim, in the absence of evidence that the statement in the schedule, that the judgment creditor's address was unknown to the bankrupt, was fraudulently inserted, or that at the time the petition in bankruptcy was filed the bankrupt knew that the judgment creditor still lived in the house at which he had called. *Matter of Mollner*, 75 App. Div. 441, 78 N. Y. Supp. 281.

99. *Feldmark v. Weinstein*, 45 Misc. 329, 90 N. Y. Supp. 478; *Schiller v. Weinstein*, 94 N. Y. Supp. 764.

1. *Murphy v. Blumenreich*, 123 App. Div. 645, 108 N. Y. Supp. 175.

with number is not set forth in the schedules;² or if his office or business address was stated in the schedules as his residence.³ If the creditor has actual knowledge of the bankruptcy proceedings, the error or omission in the schedule will not affect the right to discharge the judgment.⁴

The mailing of the statutory notices to the address of the owner of a judgment named in the schedule is a sufficient compliance with the Bankruptcy Law, although such owner has died before the adjudication, letters of administration on her estate not having been issued to her sole legatee, devisee, and executrix until after the discharge in bankruptcy.⁵

F. Order.

On a motion to cancel a judgment upon which a receiver has been appointed, the order should provide that such cancellation of record is not to impair any rights or lien which the receiver may have acquired in the property of the judgment debtor.⁶ The application, if granted, should be without costs.⁷

2. *Cagliostro v. Indelli*, 53 Misc. 44, 102 N. Y. Supp. 918.

3. *Weidenfeld v. Tillinghast*, 54 Misc. 90, 104 N. Y. Supp. 712; *aff'd*, 104 N. Y. Supp. 902.

4. *Vaughn v. Irwin*, 49 Misc. 611, 96 N. Y. Supp. 742.

Partnership.—Where a judgment on a partnership debt is properly scheduled, or the voluntary bankruptcy of an insolvent member of a solvent firm, the judgment creditor having no claim against the insolvent except the firm debt, it will be presumed that the creditor knows that a discharge is sought of the partnership debts also, and when a bankruptcy court, having complete jurisdiction, grants a complete discharge without making any reservation as to partnership debts, such act is *res adjudicata*. *New York Inst. for Instruction of Deaf and Dumb v. Crockett*, 117 App. Div. 269, 102 N. Y. Supp. 412.

In the schedule of a bankrupt the surviving partner of a firm having a judgment against him alone was mentioned, and he was described as residing in a street in New York city in which he did not reside or do business and the city directory disclosed his proper address, but the notices sent by mail not having been returned to the referee in bankruptcy, and the surviving partner having had actual notice of the bankruptcy proceedings, *held*, that the judgment was discharged by the decree in bankruptcy. *Kaufman v. Schreier*, 108 App. Div. 298, 95 N. Y. Supp. 729.

5. *Lent v. Farnsworth*, 94 App. Div. 99, 87 N. Y. Supp. 1112; *aff'd*, 180 N. Y. 503.

6. *Pickert v. Eaton*, 81 App. Div. 423, 81 N. Y. Supp. 50.

7. *Briefer v. Johnson*, 32 Misc. 764, 66 N. Y. Supp. 477.

DECEDENTS' ESTATES*

ARTICLE I.

Action by or against executor or administrator.

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1. Decedent Estate Law, § 117. Administrators to have same rights and liabilities as executors.
2. Actions pertaining to real estate.

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1. Decedent Estate Law, § 112. Executors *de son tort* abolished.
2. Decedent Estate Law, § 114. Liability of executors and administrators of executors and administrators.
3. Decedent Estate Law, § 115. Rights of administrators *de bonis non*.
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5. Authority of representative of representative.
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C. Action by or against foreign executor or administrator.

1. Decedent Estate Law, § 160. Foreign executor or administrator may sue or be sued.
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F. Survival or abatement of actions by death.

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13. Liability of stockholder or officer of corporation.

* For a further discussion of the matters referred to in this Chapter, see Heaton's Surrogates' Courts; Gleason & Otis on Inheritance Taxation; B., C. & G. Consolidated Laws; Thurber's Federal Estate Tax; Schonler on Wills, Executors and Administrators.

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- J. Counterclaim.
- K. Regulations as to parties.
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- L. Pleadings.
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- M. Decedent Estate Law, § 113. Special promise to answer for debt of testator or intestate.
- N. Short statute of limitation on rejected claim.
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 11. Costs against plaintiff suing representative.
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1. Decedent Estate Law, § 149. Decedent's real property not bound by judgment against executor or administrator.
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- R. Contradiction of inventory.
1. Decedent Estate Law, § 157. When inventory may be contradicted.
 2. Decedent Estate Law, § 158. Liability for uncollected demands.
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ARTICLE II.

Action by subscribing witness or child born after the making of will.

- A. Decedent Estate Law, § 28. Action by child born after making of will, or by subscribing witness.
- B. Effect of section.

ARTICLE III.

Action for causing death of decedent.

- A. The right of action and limitation thereof.
 - 1. Decedent Estate Law, § 130. Action for causing death by negligence, etc.
 - 2. History of statute.
 - 3. Statutory nature of action.
 - 4. Governed by what law.
 - 5. Action in this State for injury in another state.
 - 6. General construction of statute.
 - 7. Constitutional protection of cause of action.
 - 8. Effect of Workmen's Compensation Law.
 - 9. When action to be brought.
 - 10. Wrongful act of defendant.
 - 11. Absence of contributory negligence.
 - 12. Death.
 - 13. Necessity that deceased could have maintained action had he survived.
 - 14. Necessity of dependents.
 - 15. Personal transaction with deceased.
- B. By and against whom maintained.
 - 1. In general.
 - 2. Ancillary executor or administrator.
 - 3. Defendants, in general.
- C. Pleadings.
- D. Release or compromise of cause of action.
- E. Joinder of actions.
- F. Abatement and revival.
- G. Security for costs.
- H. Measure and amount of damages.
 - 1. Decedent Estate Law, § 132. Amount of recovery.
 - 2. Measure of damages in general.
 - 3. Damages for death of adult.
 - 4. Damages for death of child.
 - 5. Amount of damages.
 - 6. Interest on verdict.
- I. Evidence as to damages.
 - 1. Income and business of deceased.
 - 2. Habits of deceased.
 - 3. Family relations.
 - 4. Expectancy of deceased.
 - 5. Insurance.
- J. Distribution of recovery.
 - 1. Decedent Estate Law, § 133. Distribution of damages recovered.
 - 2. Nature of recovery.
 - 3. Statutory changes in distribution.
 - 4. Distribution to surviving husband or wife.
 - 5. Recovery under federal statute.

- 6. Creditors.
- 7. Expenses of action.
- 8. Funeral expenses.
- K. Costs.

ARTICLE IV.

Action by creditor against next of kin, legatee or devisee.

- A. Action against next of kin, legatees, etc.
 - 1. Decedent Estate Law, § 103. Action against husband for debts of deceased wife.
 - 2. Decedent Estate Law, § 170. Action against legatees and others to enforce liability for decedent's debt.
 - 3. Decedent Estate Law, § 171. Action may be joint or several.
 - 4. Decedent Estate Law, § 172. In joint action, recovery to be apportioned.
 - 5. Decedent Estate Law, § 173. Recovery in a several action.
 - 6. Decedent Estate Law, § 174. Requisites to recovery in action against legatee.
 - 7. Decedent Estate Law, § 175. Recovery; in action against a preferred legatee.
 - 8. Nature of action.
 - 9. Liability in general.
 - 10. Apportionment of recovery.
 - 11. Presentation of claim to representative.
 - 12. Exhaustion of remedy against estate.
 - 13. Statute of limitations.
- B. Action against heirs and devisees.
 - 1. Decedent Estate Law, § 176. Liability of heirs and devisees for debt of decedent.
 - 2. Decedent Estate Law, § 177. When action therefor may be brought against heirs and devisees.
 - 3. Decedent Estate Law, § 178. Effect of application to sell real property.
 - 4. Decedent Estate Law, § 179. Action must be joint.
 - 5. Decedent Estate Law, § 180. Recovery to be apportioned.
 - 6. Decedent Estate Law, § 181. Requisites to recovery against heirs.
 - 7. Decedent Estate Law, § 182. Requisites to recovery against devisees.
 - 8. Decedent Estate Law, § 185. Judgment; when to be satisfied out of real property.
 - 9. Decedent Estate Law, § 186. When judgment not a lien on real property aliened.
 - 10. Decedent Estate Law, § 187. How judgment taken, when real property aliened.
 - 11. Decedent Estate Law, § 191. Action not suspended by infancy.
 - 12. Decedent Estate Law, § 192. Liability of heir or devisee not affected where will makes specific provision for payment of debt.
 - 13. Liability in general.
 - 14. Nature of action.
 - 15. Joinder of causes of action.
 - 16. Joint liability of heirs.

17. When action to be brought.
 18. Exhaustion of other remedies.
 19. Lands transferred before action.
 20. Specific provision in will for payment of debt.
- C. Matters relating to both classes of actions.
1. Decedent Estate Law, § 183. Deductions for prior recoveries.
 2. Decedent Estate Law, § 184. Complaint to describe land descended or devised.
 3. Decedent Estate Law, § 188. Classification of debts, to be enforced under this article.
 4. Decedent Estate Law, § 189. Defence, by reason of other prior or equal claims.
 5. Decedent Estate Law, § 190. When such a claim is paid.
 6. Decedent Estate Law, § 193. One action, where same person is liable in different capacities.
 7. Complaint.

ARTICLE V.

Action to establish will.

- A. When action lies.
1. Decedent Estate Law, § 200. When action to establish a will may be brought.
 2. Discussion of section.
- B. Sufficiency of proof.
1. Decedent Estate Law, § 204. Proof of lost will in certain cases.
 2. The loss of the will.
 3. Contents of will.
 4. Proof of revocation of will.
- C. Decedent Estate Law, § 210. Receiver of decedent's estate.
- D. Judgment.
1. Decedent Estate Law, § 201. Judgment that will be established.
 2. Decedent Estate Law, § 202. Judgment admitting the will to probate.
 3. Decedent Estate Law, § 203. Contents of judgment; surrogate's duty.
- E. Form of complaint for establishment of will.

ARTICLE VI.

Action to determine validity, construction or effect of devise.

- A. Decedent Estate Law, § 205. Action to determine validity, construction or effect of devise.
- B. Other proceedings for construction of will.
- C. When action lies.
- D. Matters subject to construction.
- E. Form of complaint for construction of will.

ARTICLE I.**ACTION BY OR AGAINST EXECUTOR OR ADMINISTRATOR.****A. Administrators.****1. Decedent Estate Law, § 117. Administrators to have same rights and liabilities as executors.**

Administrators shall have actions to demand and recover the debts due to their intestate, and the personal property and effects of their intestate; and shall answer and be accountable to others to whom the intestate was holden or bound, in the same manner as executors.¹

(See B., C. & G. Consol. L., 2nd Ed., p. 1824.)

2. Action pertaining to real estate.

An administrator, so far as his initiative is concerned, is limited by this section to the collection of debts due the estate and marshalling the personal effects of his intestate. Thus, in the absence of proof that mortgaged premises of which an intestate died seized did not descend to an heir, the administrator cannot be allowed credit in his accounts for payments of interest upon the mortgage.²

B. Executor of executor or executor de son tort.**1. Decedent Estate Law, § 112. Executors de son tort abolished.**

No person shall be liable to an action as executor of his own wrong, for having received, taken or interfered with, the property or effects of a deceased person; but shall be responsible as a wrongdoer in the proper action to the executors, or general or special administrators, of such deceased person, for the value of any property or effects so taken or received, and for all damages caused by his acts, to the estate of the deceased.

(See B., C. & G. Consol. L., 2nd Ed., p. 1820.)

Scope of chapter.—In this chapter are collected matters pertaining to the estates of deceased, other than the matters within the jurisdiction of the Surrogate's Court. It covers the actions maintainable in the Supreme Court. The statutory provisions relating to such actions are contained largely in the Decedent Estate Law.

1. An administrator with the will annexed may enforce a decree against a removed executor for the assets in

his hands. *Clapp v. Meserole*, 1 Keyes, 281. Such an administrator can maintain an action in the Supreme Court and obtain an attachment against an executor who has left the State for conversion of assets of the estate, and recover of those unadministered. *Van Camp v. Searle*, 79 Hun, 134, 61 St. Rep. 349, 29 N. Y. Supp. 757; modified, 147 N. Y. 150.

2. Matter of Roberts, 72 Misc. 625, 132 N. Y. Supp. 396.

2. Decedent Estate Law, § 114. Liability of executors and administrators of executors and administrators.

The executors and administrators of every person, who, as executor, either of right or in his own wrong, or as administrator, shall have wasted or converted to his own use, any goods, chattels, or estate, of any deceased person, shall be chargeable in the same manner as their testator or intestate would have been, if living.

(See B., C. & G. Consol. L., 2nd Ed., p. 1822.)

3. Decedent Estate Law, § 115. Rights of administrators de bonis non.

When administration of the effects of a deceased person, which shall have been left unadministered by any previous executor or administrator of the same estate, shall be granted to any person, such person may appeal from any judgment obtained against such previous executor or administrator of the same estate, or against the original testator or intestate; and shall defend any appeal from any such judgment; and shall have the same remedies, in the prosecution or defense of any action, by or against such previous executors or administrators, and for the collection and enforcing of any judgment obtained by them, as they would have by law.

(See B., C. & G. Consol. L., 2nd Ed., p. 1823.)

4. Decedent Estate Law, § 121. Action or proceeding by executor of executor.

An executor of an executor shall have no authority to commence or maintain any action or proceeding relating to the estate, effects or rights of the testator of the first executor, or to take any charge or control thereof, as such executor.

(See B., C. & G. Consol. L., 2nd Ed., p. 1827.)

5. Authority of representative of representative.

An executor or administrator of a deceased executor or administrator is merely the temporary custodian of such part of the unadministered estate of the first testator as may come into his hands. As he has no power to compel a delivery to himself, he is under no duty to assume possession, and unless he volunteers to do so he cannot be made liable for the default or misappropriation of others.³ A surviving executor and trustee has a right to the exclusive possession of the property of the estate.⁴ This rule is not inconsistent with section 257 of the Surrogate Court Act, giving authority to a surrogate to compel an executor of another executor to account for property received by the latter.⁵

3. *Matter of Hayden*, 204 N. Y. 330;
Matter of Fox, 104 Misc. 43, 171 N. Y.
Supp. 986.

Theological Seminary of Auburn v. Cole, 18 Barb. 370.

5. *Matter of Fithian*, 44 Hun, 457.

4. *Shook v. Shook*, 19 Barb. 653;

6. *Executor de son tort*.

Executors *de son tort* are abolished; and one cannot be required to account as such.⁶ If the executors named in a will do not qualify, but take possession of property of the testator, they take as wrongdoers, and the remedy of a legatee is to have an administrator appointed who will have a right to recover the property or its value.⁷ Before this class of executors were abolished, one named as executor in the will, who never qualified as such, but took possession and disposed of part of the personal property, and paid debts, was chargeable as such.⁸ The title to money or other personal property which a deceased person owned at the time of his death passed to his administrator, in case of intestacy, when appointed, as of the time of the death. If, intermediate the death and the granting of letters, a stranger or any third party, without authority, collected, received or appropriated any of the assets, they became liable to account for the same as administrators *de son tort* to the true personal representatives of the deceased.⁹ But one who was a mere debtor of a decedent in his lifetime, and had in no way interfered with the decedent's estate since his death, could not be treated as an executor *de son tort*, simply because he assumed to make a settlement with the only child of the decedent, where the party asserting the claim sought to repudiate the settlement.¹⁰ Where an executor *de son tort* subsequently took out letters testamentary, his responsibility related back to the death of the testator or to his own acts of interference.¹¹

6. *Muir v. Leake and Wells Orphan House*, 3 Barb. Ch. 477.

An executor who has not taken out letters testamentary cannot be cited to account. *Weaver v. Marvin*, 14 Barb. 376.

7. *Quackenbush v. Quackenbush*, 42 Hun, 329.

8. *Van Horne v. Fonda*, 5 Johns. Ch. 388.

Mingled funds.—A testator bequeathed to one person a legacy, provided the executor should apply so much of the estate as was necessary to the education of another person named. The estate was sufficient for both pur-

poses, but the executor did not keep the funds of the estate separate from his own, but they were mingled with his, and on his death passed to his executor. *Held*, that the executor was liable after demand for the legacy, but the other interested person must be a party to the action. *Theological Seminary of Auburn v. Kellogg*, 16 N. Y. 83.

9. *Truesdell v. Bourke*, 145 N. Y. 612.

10. *Mills v. Mills*, 115 N. Y. 80.

11. *Farrell's Estate*, 1 Tuck. 110; *Rattoon v. Overacker*, 8 Johns. 126.

C. Action by or against foreign executor or administrator.

1. Decedent Estate Law, § 160. Foreign executor or administrator may sue or be sued.

An executor or administrator duly appointed in any other state, territory or district of the United States or in any foreign country may sue or be sued in any court in this State in his capacity of executor or administrator in like manner and under like restrictions as a nonresident may sue or be sued, if, within twenty days after any such executor or administrator shall commence, or appear in, any action or proceeding in any court in this state or within twenty days after he shall be required or directed by summons or otherwise to appear therein, there shall be filed in the office of the clerk of the court, in which such action or proceeding shall be brought or be pending, a copy of the letters testamentary or letters of administration issued to such executor or administrator duly authenticated as prescribed by section forty-five of this chapter; in default whereof all proceedings in such action or proceeding may be stayed until such duly authenticated copy of such letters shall be so filed.

2. Application of statute.

The above statute is a comparatively recent addition to the statute law of this State, being first enacted in 1911.¹² It is remedial and retroactive and a constitutional and proper authorization of an action against foreign executors for the purpose of determining the ownership of property located in our State and within the jurisdiction of our courts, and is broad enough to permit the institution of a stockholder's action against directors of a foreign corporation for procuring a fraudulent transfer to themselves of stock of a domestic corporation then held by a foreign corporation.¹³ Under it a husband, appointed administrator of his wife's estate in a foreign State, may, without obtaining ancillary letters, maintain an action in this State to recover damages for her death.¹⁴ And the executrix of a will duly proved in another State can maintain proceedings in this State to compel an accounting by the executor of the will in which her testator was a devisee, although ancillary letters have not been issued in this State.¹⁵

The personal service of a summons made upon a foreign executor while sojourning in this State may be good.¹⁶ It does not, however, authorize a writ of attachment against

12. See *Dodge v. Holbrook*, 107 Misc. 257, 176 N. Y. Supp. 562.

13. *Holmes v. Camp*, 219 N. Y. 359.

14. *Provost v. International Giant Safety Coaster Co.*, 152 App. Div. 83, 136 N. Y. Supp. 654; *aff'd*, 203 N. Y. 635.

15. *Matter of Nedham*, 192 App. Div. 170, 182 N. Y. Supp. 415.

16. *Thorburn v. Gates*, 103 Misc. 292, 171 N. Y. Supp. 198; *aff'd*, 184 App. Div. 443, 171 N. Y. Supp. 568.

an administratrix appointed in a foreign State, so as to permit the seizure of personal property belonging to the estate located in this State.¹⁷ And it does not authorize a personal judgment against the foreign representative regardless of the domicile of the decedent or the situs of the estate; a foreign representative, merely as such, cannot ordinarily be sued in our courts when there are no assets of the estate within the State.¹⁸

3. Situation before enactment of section.

Before the enactment of the statute giving jurisdiction over foreign representatives, an action could not be maintained, as a general rule, by¹⁹ or against,²⁰ an executor

17. *Bostwick v. Carr*, 165 App. Div. 55, 151 N. Y. Supp. 74.

18. *Helme v. Buckelew*, 229 N. Y. 363, wherein the court discussed the section in the following language:

"I think the true view must, therefore, be that the statute removes disabilities, but does not terminate immunities. These are what they always were. Foreign administrators and executors may sue in the same manner as non-residents, for comity may enlarge the measure of their rights as plaintiffs without encroaching upon the jurisdiction of other courts, or overstepping the limits of our own. Foreign administrators and executors may be *sued* in the same manner as non-residents, but only when the subject-matter subjects them to the jurisdiction, for comity, though it may enlarge their rights, cannot, unless it is also the comity of the domicile, enlarge their liabilities, and there is nothing in the statute that unmistakably reveals a purpose to assume, in disregard of comity, a jurisdiction which the accepted principles and usages prevailing between different sovereignties have heretofore condemned. The statute, therefore, in so far as it touches the liabilities of defendants is effective within a narrow field. The rule which prevailed in equity has gained legislative sanction.

It has also been regulated in respect of matter of procedure. A stay of proceedings may be obtained if a copy of the foreign letters is not filed within the time prescribed. Moreover, the foreign representatives, if sued, are put in the same class as non-residents, with consequent privileges and burdens which we need not now define. To go farther, and hold them subject generally to actions *in personam*, would involve us not only in problems of constitutional power and complications of international usage, but in a cumbrous and inconsistent and unworkable procedure which would disorganize the scheme disclosed in other statutes, and there carefully developed, for the administration of estates. This isolated section which develops no scheme of its own, and which seems to take for granted a scheme into which it fits, did not obliterate the historic landmarks, and leave the fields without a monument."

19. *Helme v. Buckelew*, 229 N. Y. 363; *Middlebrook v. Merchants' Bank*, 3 Keyes, 135.

Action upon a foreign judgment may be brought by a foreign administrator in his individual name. *Nichols v. Smith*, 7 Hun, 580.

20. *Helme v. Buckelew*, 229 N. Y. 363; *Field v. Gibson*, 20 Hun, 274;

or administrator appointed by the courts of another jurisdiction. In order for the courts of this State to take jurisdiction of such an action, it was required that the representative should have brought assets within the State,²¹ or be a resident of the State.²² But a foreign representative having a claim within the jurisdiction of our courts was permitted to assign the claim to a resident, and the latter would be permitted to enforce it.²³ And a foreign administrator could foreclose a mortgage by advertisement.²⁴ An administrator here of a foreign intestate could sue.²⁵

D. Decedent Estate Law, § 155. Action against executor, or administrator who has been superseded.

If an executor or administrator is defendant in an action or special proceeding, pending when his powers cease, the plaintiff may, in a proper case, proceed therein against him, to charge him personally; but a judgment or other determination, thereafter rendered or made against him, is not of any force, as against the estate of the decedent, or a person succeeding to the administration thereof.

E. Action between representatives.

While an action at law cannot be maintained by an executor against his co-executor for the demand due the estate from him individually, a suit in equity may be.²⁶ Thus, it is held that a surviving executor may maintain an action in equity against the foreign executor of a deceased co-executor of a deceased, to compel him to account to the extent of the assets in his hands and for the misconduct and breach of trust of his testator.²⁷ An action may be maintained by executors against a co-executor to compel him to pay a debt he owes the estate, and which is necessary to pay a sum

Metcalf v. Clark, 41 Barb. 45. See, also, Campbell v. Tousey, 7 Cow. 64; McNamara v. Dwyer, 7 Paige, 239; Gulick v. Gulick, 33 Barb. 92.

A suit pending at time of death of a defendant could not be revived by service upon a foreign executor. Matter of Webb, 11 Hun, 124.

21. Gray v. Ryle, 5 Civ. Proc. 387; Matter of Webb, 11 Hun, 124; Secor v. Pendleton, 47 Hun, 281.

22. Campbell v. Tousey, 7 Cow. 64; Montalvan v. Clover, 32 Barb. 190; Gulick v. Gulick, 33 Barb. 92.

23. Middlebrook v. Merchants' Bank, 3 Keyes, 135; Peterson v. Chemical Bank, 32 N. Y. 21; Smith v. Taffany, 16 Hun, 552.

24. Averill v. Taylor, 5 How. Pr. 476.

25. Palmer v. Phoenix Mutual Life Ins. Co., 84 N. Y. 63; Fox v. Carr, 16 Hun, 566.

26. Rogers v. Rogers, 75 Hun, 133, 57 St. Rep. 793, 27 N. Y. Supp. 276; Dean v. Roseboom, 12 Week. Dig. 123; Smith v. Lawrence, 11 Paige, 206.

27. Price v. Brown, 10 Abb. N. C. 67.

decreed by the surrogate to be due from the estate to plaintiffs for moneys paid by them on account of the estate.²⁸ One executor cannot maintain an action to foreclose a mortgage made by his co-executor to the testator; it is assets in the latter's hands to be accounted for by him.^{28a} One of two administrators cannot direct the debtor of an estate to retain the money due from him and not to pay it to the other administrator so as to bar an action by him.²⁹ While an executor having a personal claim against the estate cannot bring an action against himself to enforce the claim, it has been held that he may assign his claim to another who may maintain an action against him as executor.³⁰

F. Survival or abatement of actions by death.³¹

1. Decedent Estate Law, § 116. Actions upon contract by and against executors.

Actions of account, and all other actions upon contract, may be maintained by and against executors, in all cases in which the same might have been maintained, by or against their respective testators.

(See B., C. & G. Consol. L., 2nd Ed., p. 1823.)

2. Decedent Estate Law, § 118. Actions of trespass by executors and administrators.

Executors and administrators shall have actions of trespass against any person who shall have wasted, destroyed, taken or carried away, or converted to his own use, the goods of their testator or intestate in his lifetime. They may also maintain actions for trespass committed on the real estate of the deceased, in his lifetime.

(See B., C. & G. Consol. L., 2nd Ed., p. 1824.)

3. Decedent Estate Law, § 119. Actions of trespass against executors and administrators.

Any person, or his personal representatives, shall have actions of trespass against the executor or administrator of any testator or intestate, who in his lifetime shall have wasted, destroyed, taken or carried away, or converted to

28. *Jenkins v. Jenkins*, 11 Barb. 546.

28a. *Vrooman v. Stimpson*, 7 Week. Dig. 468.

29. *Strever v. Feltman*, 1 T. & C. 277.

30. *Snyder v. Snyder*, 96 N. Y. 88.

31. **Assignability.**—The power to assign and to transmit to personal

representatives are convertible propositions. *People v. Tioga Common Pleas*, 19 Wend. 73; *Butler v. N. Y. & Erie R. R. Co.*, 22 Barb. 110; *Zabriskie v. Smith*, 13 N. Y. 332; *Platt v. Stout*, 14 Abb. Pr. 178; *Meech v. Stoner*, 19 N. Y. 26.

his own use, the goods or chattels of any such person, or committed any trespass on the real estate of any such person.

(See B., C. & G. Consol. L., 2nd Ed., p. 1825.)

4. Decedent Estate Law, § 120. Actions for wrongs, by or against executors and administrators.

For wrongs done to the property, rights or interests of another, for which an action might be maintained against the wrong-doer, such action may be brought by the person injured, or after his death, by his executors or administrators, against such wrong-doer, and after his death against his executors or administrators, in the same manner and with the like effect in all respects, as actions founded upon contracts. This section shall not extend to an action for personal injuries, as such action is defined in section thirty-three hundred and forty-three of the code of civil procedure; except that nothing herein contained shall affect the right of action now existing to recover damages for injuries resulting in death.

(See B., C. & G. Consol. L., 2nd Ed., p. 1825.)

5. Injury to property.

As a general rule, an action for injury to property will survive the death either of the plaintiff or of the wrongdoer.³² The test of survivorship is whether the injury is to pecuniary interests, and it is immaterial whether the wrongdoer has profited by the wrong.³³ Executors may maintain trespass for an injury to the personal property of the testator during his lifetime.³⁴ An action for waste survives to the personal representative of the reversioner.³⁵ A cause of action for fraud and deceit against a third person, who induced the plaintiff to sell goods by falsely representing that the vendees were financially responsible, survives the death of the defendant.³⁶ An action to recover damages for fraudulent representations, whereby plaintiff was induced to purchase stock in a corporation, does not abate on the death of a defendant.³⁷ A right of action against an attorney for negligence survives against his personal representatives.³⁸

32. *Seventh Ward Bank v. Webster*, 67 App. Div. 228, 73 N. Y. Supp. 648; *Dininny v. Fay*, 38 Barb. 18; *Bond v. Smith*, 4 Hun, 48; *Moore v. McKinstry*, 37 Hun, 194; *Snider v. Croy*, 2 Johns. 227.

33. *Mayer v. Ertheiler*, 144 App. Div. 158, 128 N. Y. Supp. 807; *Seventeenth Ward Bank v. Webster*, 67 App. Div. 228, 73 N. Y. Supp. 648.

34. *Van Vechten v. Croy*, 2 Johns. 227; *Heinmuller v. Gray*, 44 How. Pr. 60.

35. *Rutherford v. Aikin*, 3 T. & C. 60.

36. *Mayer v. Ertheiler*, 114 App. Div. 158, 128 N. Y. Supp. 807.

37. *Graves v. Spier*, 58 Barb. 349; *Haight v. Hoyt*, 19 N. Y. 464; *Byxbie v. Wood*, 24 N. Y. 612.

38. *Elder v. Bogardus*, *Lalor*, 116.

6. Personal injuries.³⁹

Actions for "personal injuries" as that term is defined in section 37a of the General Construction Law do not generally survive the death of the wrongdoer or of the person injured.⁴⁰ Thus, actions for libel,⁴¹ slander,⁴² criminal conversation, seduction,⁴³ malicious prosecution, assault, battery, false imprisonment, breach of promise to marry,⁴⁴ negligent injury to person,⁴⁵ are not survivable.

The statute excepts from causes of action which survive those which are based on actionable injuries to the person, not only of the plaintiff but of another. Thus, an action to recover for loss of services of plaintiff's wife, which resulted from her personal injuries, cannot be revived against the personal representative of the wrongdoer.⁴⁶ A cause of action to recover damages for personal injuries, arising in knowingly letting an unhealthy tenement, does not survive the death of the landlord.⁴⁷ An action for damages for

39. Death by wrongful act.—As to the survival of actions under article V of the Decedent Estate Law for injuries for causing the death of a decedent, see article V-F of this chapter.

40. False return by sheriff.—An action against a sheriff for a false return does not survive where the plaintiff dies pending the suit. *Benjamin v. Smith*, 17 Wend. 208.

41. More v. Bennett, 65 Barb. 338.

42. Spooner v. Keeler, 51 N. Y. 527.

Slander as to financial condition.—An action brought by members of a firm by reason of an alleged slander, relating to the financial condition and credit of the firm, does not abate by the death of one of the plaintiffs during its pendency. The entire cause of action vests in the surviving plaintiffs, and may be prosecuted by them. *Shale v. Shantz*, 35 Hun, 622.

43. Halliday v. Parker, 23 Hun, 71.

44. Wade v. Kalbfleisch, 58 N. Y. 232.

Aggravated circumstances.—A cause of action for breach of promise of marriage does not survive the death of the plaintiff, although it is alleged that the

defendant made the promise fraudulently and did not intend to keep it, and seduced her under such promise. *Larocque v. Conheim*, 42 Misc. 613, 87 N. Y. Supp. 625.

45. Lutz v. Third Ave. R. Co., 44 App. Div. 256, 60 N. Y. Supp. 761.

Malpractice.—An action against a physician, alleging malpractice, does not survive. *Best v. Vedder*, 58 How. (N. Y.) 187.

Defective sidewalk.—The remedy of a municipal corporation against a landowner who, by reason of omitting his statutory duty to keep the adjoining sidewalk in repair, had caused a recovery against the city for damages for personal injuries, survives the death of the defendant. *City of Rochester v. Campbell*, 55 Hun, 138, 28 St. Rep. 194, 8 N. Y. Supp. 252; *rev'd* on other grounds, 123 N. Y. 405.

46. Gorfitzer v. Wolffberg, 208 N. Y. 475. Compare *Cregin v. Brooklyn, etc., R. R. Co.* 75 N. Y. 192, decided under an earlier statute. See, also, *Foel v. Town of Tonawanda*, 48 St. Rep. 150, 20 N. Y. Supp. 447.

47. Victory v. Krauss, 41 Hun, 533.

fraud in inducing plaintiff to marry does not survive; it is for injury to the person.⁴⁸ An action for the unauthorized use of a person's name and picture does not survive.⁴⁹ A cause of action for fraud in procuring a release from damages for personal injury does not survive the death of the person defrauded.⁵⁰

7. Equitable actions.

An action of specific performance survives the death of a party. The executor of the vendor may revive such a suit without bringing in the heir-at-law.⁵¹ The death of one of the defendants does not abate the action, and the plaintiff can recover against the survivors.⁵² The administrator of a purchaser of land under a contract of sale may sue the heirs of the deceased owner to compel them to carry out the contract.⁵³

An action of accounting may be continued after the death of a party.⁵⁴ An action of foreclosure will survive the death of the plaintiff.⁵⁵ Such an action, commenced by the testator against the mortgagor, who is one of his executors, does not abate by his death. His co-executor must revive the suit against him.⁵⁶

Upon the death of the owner of premises, the defendant in an action to foreclose a mechanic's lien, the action may be continued against his successors in interest, without prejudice to the proceedings already had.⁵⁷

An action against an elevated railroad for an injunction may be revived on death of the plaintiff.⁵⁸ Where plaintiff, on procuring an injunction, gave the usual undertaking, and defendant, having obtained judgment, died, it was held that an order of revival was not necessary, as the

48. *Price v. Price*, 75 N. Y. 244.

49. *Wyatt v. Hall's Portrait Studio*, 71 Misc. 199, 128 N. Y. Supp. 247.

50. *Ishie v. Norton Co.*, 183 App. Div. 94, 170 N. Y. Supp. 655.

51. *Daniel v. Brodie*, 2 Edw. 275.

52. *Patterson v. Copeland*, 52 How. (N. Y.) 460.

53. *Wheeler v. Crosby*, 20 Hun, 140.

54. *Halstead v. Cockroft*, 40 Super.

Ct. 519.

55. *Jay v. De Groot*, 1 Hun, 118; *Robinson v. Brisbane*, 7 Hun, 180.

56. *MacGregor v. MacGregor*, 35 N. Y. 218.

57. *Perry v. Levenson*, 82 App. Div. 94, 81 N. Y. Supp. 586; *aff'd*, 173 N. Y. 559.

58. *Sanders v. N. Y. Elevated R. R. Co.*, 27 St. Rep. 795, 7 N. Y. Supp. 641.

executor could obtain all his rights by an action on the undertaking.⁵⁹

8. Matrimonial actions.⁶⁰

An action for a divorce or separation dies with the plaintiff, and cannot be revived.⁶¹ Thereafter an order previously made cannot be enforced.⁶² Where an action for a separation, brought against a husband, abates with the death of the husband, an order, made before such death, for the payment by the defendant of a sum of money to the plaintiff to carry on the action, ceases to be operative.⁶³

9. Contract or implied contract.

A cause of action arising out of contract survives the death of the plaintiff, and passes to his administrator. Thus, an action to recover taxes paid by the lessor, which the lessee had agreed to pay, may be continued.⁶⁴ Where a cause of action, though sounding in tort, is founded on an implied contract, the plaintiff has the right to waive the tort and bring his action on the contract, and the action survives against the personal representatives.⁶⁵

10. Replevin.

An action of replevin does not abate by death of plaintiff.⁶⁶ An action in the nature of replevin, brought by an assignee for the benefit of creditors, to recover damages from a sheriff for the tortious taking of assets, does not abate by death of plaintiff.⁶⁷

11. Ejectment.

Where after issue joined, and before trial of an action of ejectment, brought by a grantee in the name of his grantors,

59. *Grissler v. Stuyvesant*, 1 Hun, 116, but in *Kelsey v. Jewett*, 34 Hun, 11, it was held otherwise.

60. **Matrimonial actions.**—As to the effect of the death of a party to a matrimonial action, see, *infra*, Matrimonial Actions, article XVII-C.

61. *Hopkins v. Hopkins*, 21 Week. Dig. 174.

62. *Hopkins v. Hopkins*, 21 Week. Dig. 174.

63. *Kellogg v. Stoddard*, 89 App.

Div. 137, 84 N. Y. Supp. 1015.

64. *Holsman v. St. John*, 90 N. Y. 461.

65. *People v. Starkweather*, 40 Super. Ct. 453.

66. *Lahey v. Brady*, 1 Daly, 443; *Potter v. Van Vranken*, 36 N. Y. 619. And see Civil Practice Act, § 1131; *infra*, Vol. 3, Replevin.

67. *Emerson v. Bleakely*, 5 Abb. Pr. (N. S.) 350.

one of the plaintiffs dies, the remedy for the defect is to amend the complaint and proceed *de novo*.⁶⁸ An action to recover possession of land in which plaintiff's intestate had a life estate survives as to damages, and a supplemental complaint may be filed.⁶⁹

12. Dower.

An action for dower abates upon the death of the widow before the entry of an interlocutory judgment, and cannot be revived and carried on by her personal representatives, notwithstanding she had served and duly executed and acknowledged a consent to accept a gross sum in lieu of dower.⁷⁰ Upon the death of a widow whose complaint in an action for dower has been dismissed, and an additional allowance granted to defendant, and who dies before the entry of judgment, her personal representative may continue the action, at least for the purpose of reviewing the right to the additional allowance.⁷¹

13. Liability of stockholder or officer of corporation.

The liability of a stockholder is in the nature of a liability arising out of contract, and the cause of action survives the death of the stockholder and may be enforced against his personal representatives.⁷² In an action by a stockholder against the directors of a corporation for deceit to recover damages caused by false statements in the prospectus published by the defendants which induced the plaintiff to purchase his shares of stock, the cause of action does not abate by the death of the plaintiff.⁷³ Action against a nonresident for an alleged illegal declaration of dividends survives the death of the defendant.⁷⁴ An action under the former corporation laws to charge trustees of a manufacturing corporation for its debt, by reason of default in filing annual

68. *Doherty v. Matsell*, 17 Abb. N. C. 377.

69. *De Lisle v. Hunt*, 36 Hun, 620.

70. *Keen v. Fish*, 33 Hun, 28; *aff'd* without opinion, 89 N. Y. 645.

71. *Armstrong v. Trustees of Union College*, 55 App. Div. 302, 66 N. Y. Supp. 942, 8 Ann. Cas. 332.

72. *Cochran v. Wiechers*, 119 N. Y. 399, 29 St. Rep. 388.

73. *Squiers v. Thompson*, 73 App. Div. 552, 76 N. Y. Supp. 734, 11 Ann. Cas. 160; *aff'd*, 172 N. Y. 652.

74. *German-American Coffee Co. v. Johnston*, 168 App. Div. 31, 153 N. Y. Supp. 866.

report, did not abate by the death of the plaintiff, although it did abate by death of defendant.⁷⁵

14. Death before service of process.

Where a defendant dies after the delivery of the summons to sheriff, but before the service, the action cannot be continued against his personal representatives.⁷⁶ And, where an action was commenced by personal service on some defendants and had not been completed as to others served by publication when plaintiff died, it was held that it was properly continued as to the former in the name of the executrix, although as to the latter defendants the action was suspended.⁷⁷

15. Death of one of joint parties.

Where one of several defendants dies, if the cause of action survives, the court has power to require his personal representatives to be substituted even after judgment, in order to allow amendment and a new trial.⁷⁸ A pending suit may properly be revived against the executor of the survivor of the original defendants.⁷⁹ When one of two defendants in an action dies, his executors cannot be substituted, unless they could have joined had the suit been brought after the death of the testator.⁸⁰ Where several part owners of a vessel sue for its conversion, and one of them dies, the action survives to the other plaintiffs.⁸¹ In an action brought by a partnership, the cause of action does not go to the deceased plaintiff, but remains in the survivors.⁸² Where, pending an appeal from a judgment in favor of copartners, one of them collusively enters satisfaction, which is set aside as to the other partner only, and the latter dies, the action survives to his representatives.⁸³ The liability of the estate of a joint tort

75. *Stokes v. Stickney*, 96 N. Y. 323; *Brackett v. Griswold*, 103 N. Y. 425; *Blake v. Griswold*, 104 N. Y. 613; *Zoller v. O'Keefe*, 15 Abb. N. C. 483; *Bonnell v. Griswold*, 15 Abb. N. C. 470; *Bank of California v. Collins*, 5 Hun, 209; *Reynolds v. Mason*, 54 How. Pr. 213; *aff'd*, 6 Week. Dig. 531.

76. *Palmer v. Ensign*, 19 Alb. L. J. 399.

77. *Reilly v. Hart*, 130 N. Y. 625, 42

St. Rep. 655.

78. *Underwood v. Sutcliffe*, 21 Hun, 357.

79. *Scholey v. Halsey*, 72 N. Y. 578.

80. *Hauck v. Craighead*, 67 N. Y. 432.

81. *Bucknam v. Brett*, 36 Barb. 59.

82. *Williamson v. Moore*, 5 Sandf.

647; *Taylor v. Church*, 9 How. Pr. 190.

83. *Hackett v. Belden*, 40 How. Pr.

289.

feasor who dies pending the action is just the same as that of the executor of one who dies after having been sued with others upon contract, and the procedure to enforce that liability is the same in either case.⁸⁴

16. Stipulation that action shall survive.

When it is stipulated that an action for a personal tort shall not abate by the death of the plaintiff, his executors may revive the suit.⁸⁵ In an action for personal injury caused by defendant's negligence the defendant may lawfully stipulate, as a condition of obtaining a postponement, that neither the cause nor the cause of action shall abate in case the plaintiff dies before a verdict.⁸⁶

17. Death of representative.

The death or removal of an executor or administrator does not abate an action or special proceeding brought by him or in his name, but it is continued by his successor who is substituted by order of the court.⁸⁷ One who succeeds another in the administration has an election to continue an action commenced by the former representative.⁸⁸ But the substitution of a successor in office is authorized only where the cause of action survives.⁸⁹ The personal representatives of a deceased administrator cannot continue an action commenced by him for damages for causing the death of his intestate, though such administrator was one of those entitled to the damages, but the successor of the administrator is the proper party.⁹⁰

Proceedings instituted by the next of kin of one whose will has been admitted to probate do not abate by reason of the death of contestant.⁹¹

Where two executors file their accounts at the same time as executors, and one of the executors dies pending the proceedings for the settlement of the accounts, all his interest in the estate vests in the surviving executor, and it becomes

84. *Lane v. Fenn*, 76 Misc. 48, 51, 134 N. Y. Supp. 92.

85. *Cox v. N. Y. C. & H. R. R. Co.*, 11 Hun, 631.

86. *McGuire v. N. Y. C. R. R. Co.*, 6 Daly, 70.

87. Decedent Estate Law, § 145.

88. *Bain v. Pine*, 1 Hill, 615. See

Livermore v. Bainbridge, 49 N. Y. 125.

89. *Hughes v. Rathbone*, 3 Alb. L. J.

71.

90. *Hodges v. Webber*, 65 App. Div. 170, 72 N. Y. Supp. 508, 32 Civ. Pro. 208.

91. *Van Alen v. Hewins*, 5 Hun, 44.

the duty of the latter to complete the distribution of the estate, and, therefore, proceedings for an accounting so far as the survivor is concerned still exist and should be continued by filing upon the record a suggestion of the death and an order continuing the proceedings against the co-executor.⁹² Where one of the two executors was temporary administrator before probate of the will, and filed his accounts at the same time the two filed theirs as executors, it was held that the proceeding for the judicial settlement of his accounts as temporary administrator abated at his death before confirmation of the report of the referee, and the right of the surrogate to enter any personal decree against him in respect to his accounts as executor abated.⁹³

G. Disaffirmance of fraudulent acts of deceased.

Chapter 314 of the Laws of 1858 permitted an executor or administrator, as well as certain other representatives, to disaffirm fraudulent transfers made by their predecessor.⁹⁴ This statute is now consolidated in section 268 of the Real Property Law and section 7 of the Personal Property Law. In reality it gives the representative greater power to attack a fraudulent conveyance by a deceased than was formerly enjoyed by a creditor, for the creditor first had to procure a judgment and execution, while the representative need not go through this procedure.⁹⁵

A person who, in fraud of the rights of the creditors, has received any property of a decedent, is liable to the executor or administrator therefor.⁹⁶ Under the statute an administrator may disaffirm a chattel mortgage executed by deceased in fraud of creditors, and may maintain an action against the mortgagee for property taken by him under the mortgage.⁹⁷ An administrator may bring an action to set aside, as in fraud of the rights of creditors of his intestate,

92. *Matter of Steencken*, 51 App. Div. 417, 64 N. Y. Supp. 660, 30 Civ. Proc. 329.

93. *Matter of Steencken*, 51 App. Div. 417, 64 N. Y. Supp. 660, 30 Civ. Proc. 329.

94. *Matter of Raymond*, 27 Hun, 511.

95. *Southard v. Benner*, 72 N. Y.

424; *Reynolds v. Ellis*, 103 N. Y. 115; *Null v. Phelps*, 20 Misc. 488, 46 N. Y. Supp. 662; *Barton v. Hosner*, 24 Hun, 467.

96. *National Bank of West Troy v. Levy*, 127 N. Y. 550.

97. *Potts v. Hart*, 99 N. Y. 168.

deposits made by the estate in banks in the name of his wife.⁹⁸ It is the duty of an administrator to pursue real estate of a decedent and reclaim it for the benefit of persons interested, and no one creditor can appropriate it for his sole benefit, and the surrogate may compel an executor to act, even though he is one of the fraudulent grantees.⁹⁹

It is the right and duty of an administrator or executor of a deceased debtor, whose estate is insolvent, to impeach a sale of personal property by the deceased with intent to defraud creditors, and recover the same from the fraudulent vendee. If the executor or administrator collude with the fraudulent vendee, or, after reasonable request, refuse to bring suit, a creditor may maintain an action making such executor a defendant.¹

An administrator may bring an action to set aside, as fraudulent as against creditors, a conveyance made by his intestate, where it appears that there are creditors whose debts were in existence at the time of the making of the conveyance of the personal property wherewith to satisfy their claims. Where, in such an action, it appears that the property has passed from the hands of the fraudulent grantee to a *bona fide* purchaser, a recovery may be had against such fraudulent grantee for the damages sustained by the estate.²

The statute confers no power upon them to bring an action to remove cloud upon title.³

Where, after the death of an insolvent debtor, money belonging to the estate has been paid over in fraud of creditors, though in fulfillment of a promise made by decedent in his lifetime, it is recoverable by his executor under the statute.⁴

The creditor of a decedent may sue on his own behalf and for the benefit of all other creditors of the decedent to set aside conveyances formerly made by the decedent for the purpose of defrauding creditors without a prior demand

98. Block v. Amsden, 108 Misc. 318, 177 N. Y. Supp. 604.

99. Lichtenburg v. Herdtfelter, 3 St. Rep. 91, 103 N. Y. 302.

1. Bale v. Graham, 11 N. Y. 237.

2. Baston v. Horner, 29 Hun, 467.

3. Rosseau v. Bleau, 131 N. Y. 177.

4. Truesdell v. Bourke, 80 Hun, 55, 61 St. Rep. 600, 29 N. Y. Supp. 849; rev'd, 145 N. Y. 612.

on the debtor's executor to bring the suit.⁵ But, if the plaintiff is not a creditor or a representative, he cannot maintain the action.⁶

The statute has no application to an action by a *cestui que trust* against an executor or trustee of an express trust and his fraudulent grantee or vendee to annul a fraudulent conveyance of the trust property. Such a suit may be maintained without authority of any statute.⁷

H. When action should be brought in representative capacity.

1. Decedent Estate Law, § 140. Executor and administrator; how to sue or be sued.

An action or special proceeding, hereafter commenced by an executor or administrator, upon a cause of action, belonging to him in his representative capacity, or an action or special proceeding, hereafter commenced against him, except where it is brought to charge him personally, must be brought by or against him in his representative capacity.

2. Obligation against or in favor of decedent.

Under section 140 of the Decedent Estate Law, when an obligation due the deceased in his lifetime survives his death, and the executor or administrator of his estate attempts to enforce it, the action should be brought in the representative capacity of the representative.⁸ To bind the estate of a deceased party it is not sufficient that the party who is the representative is a party to the suit; such person must be made a party distinctly in his representative capacity.⁹

A claim for the wrongful conversion of property of a testator during his lifetime belongs to the executor, and can only be enforced by action by him.¹⁰ On a life policy, payable to the executors of the insured for the benefit of the father of the insured, the executor is trustee of an express trust and may sue.¹¹

5. *Calkins v. Stedman*, 146 App. Div. 202, 130 N. Y. Supp. 932. And see chapter on Judgment Creditors.

6. *Ga Nun v. Palmer*, 159 App. Div. 86, 89, 144 N. Y. Supp. 457; modified, 216 N. Y. 604.

7. *Agne v. Schwab*, 123 App. Div. 746, 108 N. Y. Supp. 487.

8. *Hone v. De Peyster*, 106 N. Y. 645; *Bingham v. Marine National Bank*, 41 Hun, 377, 17 Abb. N. C. 431,

2 St. Rep. 638; aff'd, 112 N. Y. 661; *Blood v. Kane*, 23 St. Rep. 298, 6 N. Y. Supp. 353; *Gross v. Gross*, 26 Misc. 385, 56 N. Y. Supp. 219.

9. *Fisher v. Hubbell*, 65 Barb. 74; *Bostwick v. Brush*, 4 St. Rep. 100.

10. *Whitney v. Coapman*, 39 Barb. 482.

11. *Grattan v. National Life Ins. Co.*, 15 Hun, 74.

All the executors who have taken out letters must join as plaintiffs;¹² but executors who have not qualified need not join.¹³ Two executors may sue upon a note given to one of them in his individual name, but in settlement of a claim of the estate, without any indorsement.¹⁴

The production of letters in due form issued by a court having jurisdiction is sufficient proof of plaintiff's representative character.¹⁵

In an action against several persons in a representative capacity the plaintiff may have judgment against such as he proves chargeable, though he fail to show the liability of all.¹⁶

3. Against representative for obligation arising from administration of estate.

Section 140 of the Decedent Estate Law does not apply to a claim which was not in existence at the time of the death of the deceased.¹⁷ If, in the administration of the estate, there arises an obligation on account of a contract made by the representative, it is deemed his personal obligation which is to be enforced by a proceeding against him in his individual capacity.¹⁸ An executor may disburse and use the

12. *Seranton v. Farmers and Mechanics' Bank*, 33 Barb. 527.

13. *Moore v. Willett*, 2 Hilt. 522.

14. *Leland v. Manning*, 4 Hun, 7.

15. *Flinn v. Chase*, 4 Den. 85; *Farley v. McConnell*, 7 Lans. 428; *aff'd*, 52 N. Y. 630; *Parhan v. Moran*, 4 Hun, 717; *aff'd*, 71 N. Y. 596; *Maloney v. Woodin*, 11 Hun, 202.

16. *Judson v. Gibbons*, 5 Wend. 224.

17. *Buckland v. Gallup*, 105 N. Y. 453; *Gross v. Gross*, 26 Misc. 385, 56 N. Y. Supp. 219.

18. *Parker v. Day*, 155 N. Y. 383; *O'Brien v. Jackson*, 167 N. Y. 31; *Leavitt v. Scholes Co.*, 210 N. Y. 107; *Moran v. Morrill*, 78 App. Div. 440, 80 N. Y. Supp. 120; *aff'd*, 177 N. Y. 563; *Chisholm v. Toplitz*, 82 App. Div. 346, 82 N. Y. Supp. 1081; *aff'd* without opinion, 178 N. Y. 599; *Williamson v. Stevens*, 84 App. Div. 518, 82 N. Y. Supp. 1047; *Hall v. Richardson*, 22 Hun, 444; *Delaware*,

Lackawanna, etc., R. R. Co. v. Gilbert, 44 Hun, 201; *aff'd* on opinion below, 112 N. Y. 673; *Blood v. Kane*, 23 St. Rep. 298; *Matter of Woodard*, 13 St. Rep. 161; *Ferris v. Disbrow*, 22 Week. Dig. 330. Compare *Willis v. Sharp*, 43 Hun, 435; *aff'd*, 113 N. Y. 586.

A judgment against an executor in his individual capacity must distinctly show that he is adjudged liable. *Warren v. Banning*, 50 St. Rep. 810, 21 N. Y. Supp. 883.

Replevin.—A testator made an assignment of certain paintings to the plaintiff, the instrument evidencing the same stating that the testator held the property as agent for plaintiff; and certain others were made the subject of a gift *inter vivos* to the plaintiff. The testator's will made other disposition of the paintings. The executor refused to deliver the paintings to the plaintiff, claiming them as part of the estate. The plaintiff brought an

funds of the estate for purposes authorized by law, but may not bind the estate by an executory contract, and thus create a liability not founded upon a contract or obligation of the testator.¹⁹

Contracts of executors, although made in the interest and for the benefit of the estate they represent, if made upon a new and independent consideration, as for services rendered, goods or property sold and delivered, or other consideration, moving between the promisee and the executors as promisors, are the personal contracts of the executors and do not bind the estate, although the executors could properly pay for the same and be allowed the amount as a legitimate expenditure on a settlement of their accounts.²⁰ An executor is liable personally upon a note given by him in extinguishment of a debt of the estate represented by him, although signed by him as executor.²¹ If the negligence of the representative in the conduct of the decedent's business causes personal injury to another, the action must be against him individually.²²

Where plaintiff delivered a chattel to an executor for the purpose of inventorying it, as alleged by the executor, but without intent to admit it belonged to the estate, it was held

action to recover the paintings from the executor. It was held that the action was one in replevin, and not for conversion, and therefore the executor was properly sued in his representative capacity; and that his holding of the property did not become wrongful until after the property had been demanded by the plaintiff. *Moran v. Morrill*, 78 App. Div. 440, 80 N. Y. Supp. 120; *aff'd* without opinion, 177 N. Y. 563.

Personal promise of administrator.—

A promise made by an administrator who had reserved out of the estate a certain sum with which to pay a transfer tax and who desired to settle with the next of kin and obtain his discharge, that if they would waive a formal judicial settlement and execute a release in full, in case no transfer

tax was assessed, he would pay to each their proper proportion of such sum, may be regarded, when the release is executed and the tax is not assessed, as his personal promise, for which the execution of the release furnishes a good consideration, and in an action to enforce it his discharge as administrator constitutes no defense. *Thompson v. Thompson*, 180 N. Y. 311.

19. *Ferrin v. Myrick*, 41 N. Y. 315; *Reynolds v. Reynolds*, 3 Wend. 244; *Dermott v. Field*, 7 Cow. 58.

20. *Mander v. Cromwell*, 24 Civ. Pro. 368, 12 Misc. 316, 33 N. Y. Supp. 719.

21. *Cary v. Gregory*, 38 Super. Ct. 127; *Bloodgood v. Gregory*, 38 Super. Ct. 132.

22. *McCue v. Finck*, 20 Misc. 506, 46 N. Y. Supp. 242.

that she may prosecute an action against the executor in his representative capacity.²³

The funeral expenses of a decedent are a charge against his estate, and his administrator is liable therefor in an action brought against him in his representative capacity, although the undertakers were not employed under an express contract and there is no proof as to who employed them.²⁴

4. By representative for claim arising from administration.

So far as concerns claims arising out of the administration of the estate, a distinction is to be drawn between actions against the representative, and those which he maintains. In an action against him, he is to be sued in his individual capacity.²⁵ But, when he seeks to enforce the obligation, he may sue either as the representative of the estate or individually.²⁶ The action in the individual capacity is technically the proper form of action,²⁷ and many of the earlier cases will sustain the erroneous theory that it is the only form of action;²⁸ but under the later decisions his recovery is not defeated because he maintains the action in his representative capacity.²⁹

The fact that the plaintiff entitles the actions as by himself individually and as executor does not disclose a mis-

23. *Van Slooten v. Wheeler*, 27 N. Y. Supp. 666, 59 St. Rep. 147.

24. *Patterson v. Buchanan*, 40 App. Div. 493, 58 N. Y. Supp. 179.

25. See the preceding paragraph.

26. *Leavitt v. Scholes Co.*, 210 N. Y. 107; *Varnune v. Taylor*, 59 Hun, 554, 37 St. Rep. 796, 14 N. Y. Supp. 242; *Bright v. Currie*, 5 Sandf. 433.

27. *Valentine v. Jackson*, 9 Wend. 302; *Merritt v. Seaman*, 6 N. Y. 168; *Patterson v. Patterson*, 59 N. Y. 574; *Lyon v. Marshall*, 11 Barb. 241. See, also, *Holbrook v. White*, 13 Wend. 591; *Babcock v. Booth*, 2 Hill, 181.

Where an executor has loaned moneys of the estate in his individual capacity and takes a mortgage payable to him individually, the cause of action accrues to him personally. *Caulkins v. Bolton*, 98 N. Y. 511,

modifying 31 Hun, 458.

28. *Burhans v. Blanchard*, 1 Den. 626; *Spencer v. Strait*, 40 Hun, 463; *Kettleman v. Bradt*, 1 St. Rep. 619. See, also, *Thompson v. Whitmarsh*, 100 N. Y. 35; *Ehrman v. Bassett*, 159 App. Div. 752, 144 N. Y. Supp. 976.

29. *Leavitt v. Scholes Co.*, 210 N. Y. 107.

Unadministered assets.—An administrator, appointed to administer upon the assets left unadministered at the death of an executor of a testator, may maintain an action in his capacity against the executor of such former executor to recover the assets. It is not material whether such assets have been in part administered. *Walton v. Walton*, 2 Abb. (N. S.) 428, 1 Keyes, 15.

joinder of actions by him individually, with one by him as executor, and the complaint is not demurrable on that ground, where the plaintiff claims only a single right of recovery which he seeks to enforce as executor and for the benefit of the estate he represents, and it is apparent that whether he recovers in his own name, or as representative of the estate, he can recover only one amount, and the recovery will be for the benefit of the estate to which the money belongs.³⁰

An executor who makes a lease of premises belonging to the estate may recover thereon in his individual capacity.³¹ Where an administrator contracts in regard to the real estate of his intestate, with which officially he has no concern, the contract affects him personally only, and he can sue only in his individual capacity.³² But an executor, when empowered by the will to sell land, may recover possession of title deeds from the wrongdoer.³³

5. Amendment as to capacity of representative.

If the action is wrongfully brought against the representative, the action cannot be converted into one against him individually.³⁴ And if an executor wrongfully brings an action in his individual capacity, the court cannot confer jurisdiction by adding the word "executor."³⁵ But, where a complaint shows a cause of action in favor of plaintiff, in his individual capacity, the word "executor" in the title and statement in the complaint that he is the executor of the will of the deceased person named do not prevent a recovery by him individually; the descriptive words may be rejected.³⁶

I. Joinder of personal and representative actions.

1. Decedent Estate Law, § 141. When personal and representative causes of action may be joined.

An action may be brought against an executor or administrator, personally, and also in his representative capacity, in either of the following cases:

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|---|---|
| 30. <i>Moss v. Cohen</i> , 158 N. Y. 240. | 71 N. Y. Supp. 745. Compare <i>Ferris v. Disbrow</i> , 22 Week. Dig. 330. |
| 31. <i>Kingsman v. Ryckman</i> , 5 Daly, 13. | 36. <i>Litchfield v. Flint</i> , 104 N. Y. 543; <i>Wick v. Jewett</i> , 9 St. Rep. 477; <i>Schmittler v. Simon</i> , 101 N. Y. 554; <i>Williamson v. Stevens</i> , 84 App. Div. 518, 82 N. Y. Supp. 1047. |
| 32. <i>Loew v. Christ</i> , 13 App. Div. 624, 42 N. Y. Supp. 963. | |
| 33. <i>Mills v. Mead</i> , 7 Hun, 36. | |
| 34. <i>Austin v. Munro</i> , 47 N. Y. 360. | |
| 35. <i>Taylor v. Jackson</i> , 35 Misc. 300. | |

1. Where the complaint sets forth a cause of action against him in both capacities, or states facts, which render it uncertain in which capacity the cause of action exists against him.

2. Where the complaint sets forth two or more causes of action against the defendant, in different capacities, all of which grow out of the same transaction, or transactions connected with the same subject of action; do not require different places or modes of trial; and are not inconsistent with each other.

In a case specified in this section, a judgment for the plaintiff for a sum of money must distinctly show whether it is awarded against the defendant personally or in his representative capacity.

2. Decedent Estate Law, § 142. Separate dockets and executions.

In a case specified in the last section, or where costs, to be collected out of the individual property of an executor or administrator, are awarded in an action by or against him in his representative capacity, so much of the judgment, as awards a sum of money against him personally, may be separately docketed, and a separate execution may be issued thereupon; as if the judgment contained no award against him in his representative capacity.

3. Action against representative.

Under section 141, an action under certain conditions may be maintained against an executor or administrator, both in his individual and in his representative capacity.³⁷ This practice may be followed if he is liable in both capacities,³⁸ or when it is uncertain in which capacity the cause of action exists against him.³⁹ And generally he may be sued in both capacities in case of two or more causes of action which grow out of the same transaction or transactions connected with the same subject of action.⁴⁰ When thus sued, there

37. *Perkins v. Slocum*, 82 Hun, 366, 31 N. Y. Supp. 474.

Funeral expenses.—Where the complaint sets forth a cause of action against a person, both as administrator and personally, there is no misjoinder where defendant is sued individually and as administratrix for the funeral expenses of her husband, although an administrator cannot be charged in his representative capacity for the funeral expenses of decedent, the liability therefor being only personal. *Murphy v. Naughton*, 68 Hun, 424, 23 N. Y. Supp. 52.

38. *Gibson v. Blakley*, 85 Hun, 305, 32 N. Y. Supp. 1005, 66 St. Rep. 489.

39. *Newcomb v. Lottimer*, 19 N. Y.

Supp. 381; *Noble v. Hoff*, 155 N. Y. Supp. 560.

Revocation of arbitration.—An administrator who had agreed to submit to arbitration a matter relative to his intestate's estate, and subsequently wrongfully withdraws the submissions, may, in view of the uncertainty as to whether he is liable in his representative or individual capacity for such wrongful withdrawal, be sued in both capacities, though it would seem that he is liable only individually. *Magoun v. Magoun*, 84 App. Div. 232, 82 N. Y. Supp. 820.

40. *Rogers v. Wheeler*, 89 App. Div. 435, 85 N. Y. Supp. 981.

are in fact two distinct individuals against whom the action is brought. One is against the defendant individually and another is against him as representing the estate of the decedent. The defendant in such case is entitled to appear in his several capacities and by different attorneys.⁴¹

Where it is sought to recover a debt due from the decedent, from an executrix in her representative capacity to the extent that the personal property in her hands may suffice to pay the claim, and, as to any remainder, to recover it out of the real estate which passed to her individually as sole devisee, section 141 authorizes an action against an executrix personally and also in her representative capacity.⁴²

An action will lie by a bank against executors to recover the amount of an over-credit given the testator by mistake, part of which was paid to him in his lifetime and the residue to his executors after his decease.⁴³ A demand for rent against executors of a tenant, accruing during the lifetime of the tenant and during their own occupation, may be sued for in one action.⁴⁴ A count on a contract made by an administrator as such, on which he is not personally liable, may be joined with one on a promise by the intestate, and such promise by the intestate may be laid in the same count.⁴⁵

But, except in the cases permitted by section 141, a claim against a representative is not to be joined with one against him individually.⁴⁶ A complaint against a defendant individually and as administrator is defective, if no cause of action is stated against the defendant individually.⁴⁷ In a suit against an administrator, a suit on a cause of action arising after the death of the testator cannot be joined with

41. *Roche v. O'Connor*, 95 App. Div. 496, 88 N. Y. Supp. 968.

42. *Crano v. Moore*, 50 App. Div. 361, 64 N. Y. Supp. 3, 63 N. Y. Supp. 585.

43. *Tradesmen's Bank v. McFeely*, 61 Barb. 522.

44. *Rugsley v. Aikin*, 11 N. Y. 494.

45. *Rugsley v. Aikin*, 11 N. Y. 494.

46. *McCue v. Finck*, 20 Misc. 506, 46 N. Y. Supp. 242; *McMahon v. Allen*, 12 How. Pr. 39.

47. *Romig v. Sheldon*, 124 N. Y.

Supp. 26.

Costs.—Where a complaint against a defendant, individually and as administrator, states facts sufficient to constitute a cause of action against him individually, but not as administrator, it is proper to allow costs on sustaining a demurrer on the ground that the complaint fails to state facts sufficient to charge defendant as administrator. *Murphy v. Naughton*, 68 Hun, 424, 52 St. Rep. 756, 23 N. Y. Supp. 52.

one on a cause of action arising in his lifetime.⁴⁸ In an action against an executor, counts which require different judgments cannot be joined.⁴⁹

4. Action by representative.

A plaintiff cannot generally unite a cause of action accruing to him individually with one accruing in his representative capacity.⁵⁰ But a plaintiff has been permitted to unite a cause of action as executor with one as devisee, where both accrued under a contract made by the testator with defendant, and grew out of the same matter.⁵¹

5. Judgment.

The last sentence of section 141 as to the judgment showing whether it is awarded against the defendant personally or in his representative capacity is obeyed in case the judgment distinctly shows or expresses the capacity or capacities in which the defendant is adjudged liable.⁵²

J. Counterclaim.

In an action against an executor or administrator in his representative capacity, the defendant may set forth as a counterclaim a demand belonging to the decedent.⁵³ And in an action by the representative, the defendant may set up as a counterclaim a demand against the decedent belonging at the time of his death to the defendant, as if the action had been brought by the decedent in his lifetime.⁵⁴ A claim which is not due until after the death of the decedent is not one which could have been set forth as a counterclaim in an action by the decedent in his lifetime, and under a verbal construction of section 269 of the Civil Practice Act, cannot

48. *Demott v. Field*, 7 Cow. 58; *Reynolds v. Reynolds*, 3 Wend. 244; *Latting v. Latting*, 4 Sandf. Ch. 31; *Myer v. Cole*, 12 Johns. 349; *Austin v. Munro*, 4 Lans. 67, 47 N. Y. 360.

49. *Clark v. Coles*, 50 How. Pr. 178.

50. *Hall v. Hall*, 20 Barb. 441; *Brigham v. Marine National Bank*, 41 Hun, 379.

51. *Armstrong v. Hall*, 17 How. Pr. 76.

52. *Leggett v. Pelletreau*, 213 N. Y. 237.

53. Civil Practice Act, § 268.

54. Civil Practice Act, § 269.

City Court.—In an action brought in the City Court of New York by an executor as such, a counterclaim existing against plaintiff in his representative capacity may be set up. *Oakes v. Harway*, 6 Civ. Pro. 357.

be interposed as a counterclaim to a complaint of the representative.⁵⁵

Where an executor or administrator has sold, on credit, property of the estate, he may bring an action in his own name to recover the debt, and in such an action a debt against the decedent may not be made the subject of a counterclaim.⁵⁶

Prior to the adoption of the Code of Civil Procedure an administrator could sue in his own name upon a cause of action which had accrued in favor of the estate, since the death of the intestate, and hence could set off such a demand against a claim alleged against him individually.⁵⁷

An executor against whom, as such, a contractor has brought an action to recover damages for the breach of a building contract made by the testatrix, cannot interpose as counterclaims judgments recovered against the contractor by third parties which have been assigned to the executor, as such judgments are held by him in his individual and not in his representative capacity.⁵⁸

K. Regulations as to parties.

1. Decedent Estate Law, § 143. Regulations, when some of the executors are not summoned.

In an action or special proceeding against two or more executors or administrators, representing the same decedent, all are considered as one person; and those who are first served with process, or first appear, must answer the plaintiff. Separate answers, by different executors or administrators cannot be required or allowed, except by direction of the court. Judgment in favor of the plaintiff may be entered, and, in a proper case, execution may be issued against all the defendants as if all had appeared. But this section does not affect the plaintiff's right to bring into court all the executors or administrators who are parties.

2. Decedent Estate Law, § 144. Executors who have not qualified not necessary parties.

One of two or more executors to whom letters testamentary have not been issued is not a necessary party to an action or special proceeding in favor of or against the executors in their representative capacity.

55. *Jaeger v. Bowery Bank*, 8 Misc. 150, 59 St. Rep. 385, 29 N. Y. Supp. 303.

56. *Thompson v. Whitmarsh*, 100 N. Y. 35.

57. *Silvernail v. Felts*, 18 Wkly. Dig. 124.

58. *Weeks v. O'Brien*, 25 App. Div. 206, 49 N. Y. Supp. 344.

3. Separate appearances.

Under section 143, where both executors of an estate are made parties to the suit, and one of them has entered a general appearance, both are thereby bound.⁵⁹ Section 143 so far as it provides that two or more executors are considered as one person, and that those who are first served must appear and answer for all is but a re-enactment of similar provisions in the Revised Statutes. It does not change the rule that in an action for or against executors all the qualified and acting executors must be made parties.⁶⁰ In an action against several executors, such of them as are first served or first appear are entitled to answer for the estate; collusion between the plaintiff and executor who first answers does not give his co-executors a right to answer without leave of the court.⁶¹

An executor who was not served with summons, but who has appeared by counsel upon a reference of the cause and participated upon a trial of issues raised by answer of his co-executor, may be allowed, upon application to the court, to serve a separate answer raising new issues upon terms and without prejudice to the proceedings already had.⁶²

4. All executors as necessary parties.

Although the common-law rule that all executors must join in an action, those who prove the will as well as those who renounce, has been changed by statute so far as to except those to whom letters testamentary have not been issued and who have not qualified, an executor who has proved the will, and to whom letters have been issued jointly with another, is a necessary party to a suit brought by the latter.⁶³ When two executors are appointed by the will of a non-resident, and both qualify at testator's residence, but only one takes out letters here, the other is not a necessary party.⁶⁴ One

59. *Montgomery v. Boyd*, 78 App. Div. 64, 79 N. Y. Supp. 879.

60. *Simpson v. Simpson*, 44 App. Div. 492, 60 N. Y. Supp. 879; *Matter of Ehret*, 70 Misc. 576, 127 N. Y. Supp. 934.

61. *Salters v. Pruyn*, 15 Abb. Pr. 224.

62. *Guernsey v. Cheyne*, 18 Abb. N. C. 361.

63. *Scranton v. Farmers and Mechanics Bank*, 33 Barb. 527. See, also, *Moore v. Willett*, 2 Hilt. 522.

64. *Lawrence v. Townsend*, 88 N. Y. 24.

named as executor, but who has not qualified, may maintain an action on his own behalf as an individual against an executor qualifying.⁶⁵

L. Pleadings.

1. Decedent Estate Law, § 150. Want of assets not to be pleaded by executor or administrator.

In an action against an executor or administrator, in his representative capacity, wherein the complaint demands judgment for a sum of money, the existence, sufficiency, or want of assets, shall not be pleaded by either party; and the plaintiff's right of recovery is not affected thereby, except with respect to the costs to be awarded, as prescribed by law. A judgment in such an action is not evidence of assets in the defendant's hands.

2. Decedent Estate Law, § 156. False pleading by executor or administrator.

An executor or administrator cannot be made personally liable to the adverse party, for a debt or for damages, by reason of his having made a false allegation in pleading.

3. Allegation of representative capacity.

In an action by an executor or administrator, he should aver his appointment in this State.⁶⁶ It should appear that

65. *Hunter v. Hunter*, 19 Barb. 631.

66. *Campbell v. Tousey*, 7 Cow. 64; *McNamara v. Dwyer*, 7 Paige, 239; *Morrell v. Dickey*, 1 Johns. Ch. 153; *Vroom v. Van Horne*, 10 Paige, 549; *Williams v. Storrs*, 6 Johns. Ch. 353; *Smith v. Webb*, 1 Barb. 230; *Vermilya v. Beatty*, 6 Barb. 429; *Robbins v. Wells*, 26 How. Pr. 15. The time and place of granting letters should be stated. *Rightmyer v. Raymond*, 12 Wend. 51; *Morgan v. Lyon*, 12 Wend. 265; *Sheldon v. Hoy*, 11 How. Pr. 11; *Beach v. King*, 17 Wend. 197; *Gillett v. Fairchild*, 4 Den. 80; *Chautauqua Bank v. White*, 6 N. Y. 236; *Wheeler v. Dakin*, 12 How. Pr. 37; *Forrest v. Mayor*, 13 Abb. Pr. 350.

Amendment.—An error in the description of the representative character of plaintiff is amendable. *Risley v. Wightman*, 13 Hun, 163.

A demurrer on the ground that plaintiff, an administrator, has not legal capacity to sue was ineffectual where it did not appear on the face of the complaint that there was defect in his appointment. *Secor v. Tradesmen's National Bank*, 92 App. Div. 294, 87 N. Y. Supp. 181.

Under the Code of Civil Procedure, an allegation, in an action to recover for the death of plaintiff's intestate, that the plaintiff had been "duly" appointed administratrix, while defective in law, was not open to attack by demurrer for insufficiency, and the defect was waived for failure to demur upon the ground that the plaintiff had not legal capacity to sue. *Boyle v. Southern R. Co.*, 36 Misc. 289, 73 N. Y. Supp. 465. A good pleading was not rendered demurrable because it unnecessarily described plaintiff as an

the plaintiff sues in his representative capacity.⁶⁷ The body of the complaint should state the facts, in an issuable form, as to the representative capacity if the suit is so intended.⁶⁸ An averment of representative capacity, and that the action is brought as such, is sufficient.⁶⁹ Styling the plaintiffs "executors" is not, however, a sufficient averment of their title.⁷⁰ And the word "executor" in a summons and complaint may be treated as mere surplusage where nothing appears therein indicating that suit is in a representative capacity.⁷¹ Where there are no allegations as to representative capacity in the complaint, the word "executor" with-

executor, but did not allege his appointment. *Murray v. Church*, 1 Hun, 49; *aff'd*, 58 N. Y. 621.

Proof of allegation.—Under a complaint, alleging the death of intestate and due and legal appointment of administrator, the letters of administration are sufficient to prove the allegation. *Belden v. Meeker*, 47 N. Y. 307; *Parham v. Moran*, 7 Hun, 717; *aff'd*, 71 N. Y. 596; *Farley v. McConnell*, 7 Lans. 428; *aff'd*, 52 N. Y. 630. Letters granted after suit may be given in evidence to sustain allegation of representative capacity. *Osgood v. Franklin*, 2 Johns. Ch. 1; *aff'd*, 14 Johns. 527; *Maloney v. Woodin*, 11 Hun, 202.

67. *Welles v. Webster*, 9 How. Pr. 251.

In an action for the debt of the testator, the complaint may allege the defendants sue "as" executors, or may set forth their representative character. *Yates v. Hoffman*, 5 Hun, 113.

68. *Forrest v. Mayor*, 13 Abb. 350.

Attack on appointment.—After the issue of letters, with the will annexed, upon the estate of one who has died in a foreign country, the validity of the will cannot be attacked by one against whom an action is brought for a debt due the estate. *Sullivan v. Fostick*, 10 Hun, 173. It is no defense to an action brought by an administrator that the proper parties were not

cited on his appointment. *James v. Adams*, 22 How. Pr. 409.

Probate of will.—Where letters to foreign executors were granted by the surrogate it is not requisite in a suit by them to allege the probate of the will. *Leland v. Manning*, 4 Hun, 7.

Time and manner of appointment.—In an action upon a purchase-money mortgage, given by an executor, as such, it is unnecessary to allege the time and manner of his appointment. *Skelton v. Scott*, 18 Hun, 375; *Kingsland v. Stokes*, 58 How. Pr. 1, 61 How. Pr. 494.

69. *Fowler v. Westervelt*, 40 Barb. 374; *Welles v. Webster*, 9 How. Pr. 251.

70. *Forrest v. New York*, 13 Abb. 350.

71. *Bannon v. McGrave*, 45 Super. Ct. 517.

The complaint, in an action by an attorney, named the defendants, in the title, as "executor and executrix," and alleged that defendants "executrix and executors under the last will and testament of H." employed him to render certain services which he performed, and that the defendants promised to pay for the same, *held*, that there is a cause of action stated against them in their individual capacity, the allegations that the defendants were the executors and executrix under the will

out the word "as" will be considered as *descriptio personæ*.⁷² If the capacity in which plaintiff sues appears in the body of the complaint, it is sufficient, even if it does not appear in the title.⁷³ The court will look to the whole of the complaint to determine whether a person named as executor sues in his representative or individual capacity.⁷⁴ And where the complaint shows by its averments that plaintiff was acting in his representative capacity, the omission in the title of the word "as" does not prevent him from maintaining the action in his representative capacity.⁷⁵

Where an action is brought against the executors in their representative capacity, the court has no power at the trial to convert the action into one against them individually.⁷⁶ A complaint against executors, seeking to charge them in their representative capacity, cannot be sustained, if the facts alleged show only a personal liability on their part.⁷⁷

In an action against an executrix, an allegation "that the defendant is the duly qualified and acting executrix of the estate of said E., deceased, by the due consideration and order of the Surrogate's Court of the county of New York," inferentially sets forth that the decedent left a last will, that it was duly admitted to probate, that the defendant was therein named as executrix and that she was duly appointed and qualified as such.⁷⁸

In an action to charge executors upon a contract made by a decedent, where the complaint alleged that the decedent left a will, which was admitted to probate without alleging that any one was appointed executor, or that letters testamentary were issued, it was held to not sufficiently set forth the representative capacity of the defendant.⁷⁹

being merely *descriptio personæ* and not affecting the capacity in which they are sued. *Genet v. De Graef*, 27 App. Div. 238, 50 N. Y. Supp. 442.

^{72.} *Merritt v. Seaman*, 6 N. Y. 168; *Stilwell v. Carpenter*, 62 N. Y. 639; *Butterfield v. Macomber*, 22 How. Pr. 150; *Sheldon v. Hoy*, 11 How. Pr. 11; *Hallett v. Harrower*, 24 N. Y. 537; *Murray v. Hendrickson*, 6 Abb. 96; *Root v. Price*, 22 How. Pr. 372.

^{73.} *Cordier v. Thompson*, 8 Daly, 173.

^{74.} *Stilwell v. Carpenter*, 62 N. Y. 639; *Patterson v. Copeland*, 52 How. Pr. 460.

^{75.} *Beers v. Shannon*, 73 N. Y. 292.

^{76.} *Austin v. Munro*, 47 N. Y. 360; *Zimmer v. Chew*, 34 App. Div. 504, 54 N. Y. Supp. 685.

^{77.} *Bartlett v. Hatch*, 17 Abb. 461.

^{78.} *Paehe v. Oppenheim*, 84 N. Y. Supp. 926.

^{79.} *Kley v. Higgins*, 59 App. Div. 581, 69 N. Y. Supp. 826.

Where a complaint in an action of foreclosure alleges the making of the bond and mortgage to plaintiff's testatrix and properly alleges her death, the probate of her will and that in said will the plaintiffs were appointed executors and that "on said 15th day of February, 1896, that letters testamentary were duly issued to these plaintiffs who had duly qualified as such on the same day," it sufficiently appears from the complaint that the plaintiffs have legal capacity to sue, although there is no allegation that they were appointed by the determination of any surrogate.⁸⁰

4. Want of assets.

It is not error in an action against an executor to exclude evidence showing that decedent left no assets.⁸¹ An executor cannot be heard to excuse non-compliance with a decree directing the payment of money by claiming that he has not the amount in his hands.⁸² Where a representative gives a note in payment of a claim against the estate, the presumption arises that the representative has assets of the estate with which to pay the claim.⁸³ An administrator is personally liable for the rent of leasehold property of which his intestate died seized, to the extent of the rents and profits he has received from the premises; the fact that the rents and profits are not sufficient to pay the rent is matter of defence, the law, *prima facie*, supposing them sufficient.⁸⁴

M. Decedent Estate Law, § 113. Special promise to answer for debt of testator or intestate.

No executor or administrator shall be chargeable upon any special promise to answer damages, or to pay the debts of the testator or intestate, out of his own estate, unless the agreement for that purpose, or some memorandum or note thereof, be in writing, and signed by such executor or administrator, or by some other person by him thereunto specially authorized.

(See B., C. & G. Consol. L., 2nd Ed., p. 1822.)

80. *Erenner v. McMahon*, 20 App. Div. 3, 46 N. Y. Supp. 643.

81. *Beardslee v. Hemingway*, 65 Hun, 400, 47 St. Rep. 922, 20 N. Y. Supp. 214.

82. *Matter of Waring*, 1 App. Div. 29, 36 N. Y. Supp. 529.

83. *Jenkins v. Phillips*, 41 App. Div. 389, 58 Supp. 788.

84. *Miller v. Knox*, 49 N. Y. 232.

N. Short statute of limitations on rejected claim.⁸⁵**1. Surrogate Court Act, § 211. Rejected claim to be tried on judicial settlement; limitation of action by creditor.**

If the executor or administrator doubts the justice or validity of any claim presented to him, he shall serve a notice in writing upon the claimant that he rejects said claim, or some part of it, which he specifies. Unless the claimant shall commence an action for the recovery thereof against the executor or administrator within three months after the rejection, or, if no part of the debt is then due, within two months after a part thereof becomes due, said claimant, and all the persons claiming under him, are forever barred from maintaining such action, and in such case said claim shall be tried and determined upon the judicial settlement.

2. History of section.

The theory of a short statute of limitations upon a claim rejected by an executor or administrator is derived from section 1822 of the Code of Civil Procedure. That section provided a six months' limitation on such a claim and barred after that time, not only an action, but also any other remedy to enforce payment of the claim out of the decedent's property. Section 1822 of the Code was repealed by implication by the enactment of chapter 433 of the Laws of 1914, which revised the practice in Surrogate Courts.⁸⁶ Under such revision, the section above quoted became section 2681, and section 211 of the new Surrogate Court Act is but a re-enactment thereof. When section 1822 of the Code of Civil Procedure was in force, the courts frequently discussed questions relating to the consent which was filed under such section and which permitted the claim to be heard upon judicial settlement. Also interesting questions arose as to the remedies which were barred by the short statute. The decisions on these points are now obsolete.

3. Construction of new statute.

So far as the Statute of Limitations in section 211 of the Surrogate Court Act is concerned, the section is to receive a strict construction.⁸⁷ It indicates a legislative intent not to bar the claimant from anything except the bringing of an action on his claim and leaves him open to pursue his remedy

85. Other Statutes of Limitations.—
See section 57, Civil Practice Act, as to limitation of action against representatives.

86. Carpenter v. Newland, 92 Misc. 596, 156 N. Y. Supp. 438.

87. Matter of Messing, 95 Misc. 1, 160 N. Y. Supp. 218.

in the Surrogate's Court.⁸⁸ The word "shall" in the last clause of section 211 is a word of permission enlarging rather than restricting the claimant's rights. It only applies where the claimant assumes the initiative in prosecuting his claim and does not deprive him of the right to interpose a counter-claim when an executor or an administrator becomes an actor.⁸⁹ To set the statute in operation two things are necessary: First, the claim must be exhibited to the executor. "Exhibited" as here used means a presentation of the claim to the executor in writing and a demand for its payment. Second, notice of rejection must be served upon the claimant.⁹⁰

4. Construction of old statute.

Decisions under the former statute, in certain cases, are valuable.⁹¹ It was not a good reply to the answer of such executor setting up the short Statute of Limitations to allege that after the notice was given negotiations were carried on between the parties looking to a settlement of the claim, for such negotiations did not stay the running of the statute.⁹² The rejection of a claim against the estate of a deceased person presented by a minor did not set in motion the short Statute of Limitations formerly contained in section 1822 of the Code of Civil Procedure, but her special guardian, upon the judicial settlement of the estate, could present the claim and prosecute any remedies appropriate to its enforcement and collection.⁹³ A mere verbal presenta-

88. *Matter of Messing*, 95 Misc. 1, 160 N. Y. Supp. 218.

89. *Carpenter v. Newland*, 92 Misc. 596, 156 N. Y. Supp. 438.

90. *Diehl v. Becker*, 227 N. Y. 318.

91. **Sufficiency of notice of rejection.** See *Dawbarn v. Fleischmann*, 146 App. Div. 57, 130 N. Y. Supp. 397; *Van Ness v. Kanyon*, 208 N. Y. 228.

Funeral expenses.—Although a claim arising after the death of the decedent is not governed by the same rule as one arising under a contract made by executors or administrators upon a new and independent consideration, yet the object of the statute of limitations is to facilitate the early settlement of estates and should be held applicable

to a claim for funeral expenses, at least in a case where the claimant had elected to present his claim to the administrators, with will annexed, after they had advertised for claims. *Koons v. Wilkins*, 2 App. Div. 13, 37 N. Y. Supp. 640.

92. *Dawbarn v. Fleischmann*, 146 App. Div. 57, 130 N. Y. Supp. 397; *Snell v. Dale*, 43 St. Rep. 498, 17 N. Y. Supp. 575. See also, *Diehl v. Becker*, 186 App. Div. 16, 174 N. Y. Supp. 100; *aff'd*, 227 N. Y. 318.

93. *Matter of Cashman*, 62 Misc. 598, 116 N. Y. Supp. 1128; *Matter of Brooks*, 65 Misc. 439, 121 N. Y. Supp. 1092.

tion of a claim was not a compliance with the provisions of the statute.⁹⁴ To set the short Statute of Limitations running against an action to recover a rejected claim against a decedent's estate there must have been a written claim exhibited to the executor or administrator, and absolutely rejected by him.⁹⁵ And the rejection of claim otherwise than in writing was of no effect.⁹⁶ The notice of rejection could be served upon the attorney who presented the claim for the claimant.⁹⁷ A party presenting a claim, which is rejected, cannot evade the statute of limitations, by the successive presentation of claims founded on the same transaction and varying in form or detail.⁹⁸ A claim once barred by that statute could not be revived by the administrator to the prejudice of the parties in interest, by failure to reject a second presentation.⁹⁹ An executor was bound to interpose the defense of the Statute of Limitations.¹ Executors have no authority to allow a claim which is barred by the Statute of Limitations.²

O. Costs.

1. Civil Practice Act, § 1499. Costs and disbursements in action against executor or administrator.

Where a judgment for a sum of money only is rendered against an executor or administrator in an action brought against him in his representative capacity, costs shall not be awarded against him, except that where it appears that the plaintiff's demand was presented within the time limited by a notice, published as prescribed by law, requiring creditors to present their claims, and that the payment thereof was unreasonably resisted or neglected, the court may award costs and disbursements or disbursements without costs against the executor or administrator, to be collected either out of his individual property or out of the property of the decedent as the court directs, having reference to the facts which appear upon the trial. Where the action is brought in the supreme court or any county court, the facts must be certified by the judge or referee before whom the trial took place.

94. *King v. Todd*, 27 Abb. N. C. 149, 21 Civ. Pro. R. 114; *Matter of Estate of Morton*, 7 Misc. 343; 28 N. Y. Supp. 82; *Niles v. Croker*, 88 Hun, 312, 34 N. Y. Supp. 761.

95. *Ulster County Savings Institution v. Young*, 161 N. Y. 23.

96. *Matter of Dorland*, 100 Misc. 236, 166 N. Y. Supp. 616.

97. *Lockwood v. Dillenbeck*, 104 App. Div. 71, 93 N. Y. Supp. 321; *Heinrich*

v. Heidt, 106 App. Div. 179, 94 N. Y. Supp. 423.

98. *Titus v. Poole*, 145 N. Y. 414.

99. *Gardner v. Pitcher*, 109 App. Div. 106, 95 N. Y. Supp. 678; *aff'd*, 185 N. Y. 534.

1. *Miller v. Longshore*, 147 App. Div. 214, 131 N. Y. Supp. 1041.

2. *Matter of Osterhoudt*, 15 Misc. 566, 38 N. Y. Supp. 179, 72 St. Rep. 808.

2. Civil Practice Act, § 1462. Costs in action by or against executor, administrator, trustee or person authorized by statute to sue or be sued.

In an action brought by or against an executor or administrator in his representative capacity or the trustee of an express trust, or a person expressly authorized by statute to sue or to be sued, costs must be awarded as in an action by or against a person prosecuting or defending in his own right, except as otherwise prescribed in the last preceding section; but they are exclusively chargeable upon, and collectible from the estate, fund, or person represented, unless the court directs them to be paid by the party personally for mismanagement or bad faith in the prosecution or defence of the action.

3. Presentation of claim.

Under the present practice, as outlined in section 1461 of the Civil Practice Act, two things must concur before one suing an executor or administrator will be allowed costs. In the first place, the plaintiff must have presented his claim within the time limited by the published notice to creditors.³ Secondly, the representative must have unreasonably resisted or neglected the payment of the claim.⁴ To lay a foundation for a judgment for costs against executors, the claim presented must be substantially the one on which plaintiff recovers.⁵ The fact that executors have never advertised for creditors does not necessarily entitle a creditor to recover costs against them.⁶

4. Unreasonable resistance by representative.

In an action against an executor or administrator, the plaintiff, though successful, will not be entitled to costs against the representative, unless the latter has unreasonably resisted or neglected the payment of the claim.⁷ If the

3. *Nichols v. Moloughney*, 85 App. Div. 1, 82 N. Y. Supp. 949; *Cornwell v. Sheldon*, 134 App. Div. 58, 118 N. Y. Supp. 707; *Horton v. Brown*, 29 Hun, 654; *aff'd*, 102 N. Y. 698; *Supplee v. Sayre*, 51 Hun, 30, 3 N. Y. Supp. 627; *Miles v. Crocker*, 88 Hun, 312, 34 N. Y. Supp. 761, 68 St. Rep. 579; *King v. Todd*, 21 Civ. Pro. R. 114; *Bradley v. Burwell*, 3 Den. 261; *King v. Todd*, 15 N. Y. Supp. 156, 27 Abb. N. C. 149.

4. See the following paragraph.

5. *Genet v. Binsse*, 3 Daly, 239.

6. *Van Vleeck v. Burroughs*, 6 Barb. 341; *Bullock v. Bogardus*, 1 Den. 276; *Snyder v. Young*, 4 How. Pr. 217.

7. *Matter of Raab*, 47 App. Div. 33, 62 N. Y. Supp. 332; *Fredenburgh v. Biddlecombe*, 17 Wkly. Dig. 25.

Appeal.—Where the Court of Appeals has reversed a judgment against executors and orders a new trial with costs to abide the event, and a second trial resulted unsuccessfully for them, the Special Term has no power to award costs against them. *Benjamin v. Ver Nooy*, 168 N. Y. 578.

recovery is materially less than the amount of the claim as presented, the representative will be deemed justified in litigating it, and costs will not be granted.⁸ Where a claim is reduced one-third, no costs should be allowed against an executor either below or on appeal.⁹ Payment of a claim against a decedent's estate cannot be deemed to have been unreasonably resisted or neglected by the executor where upon a jury trial subsequently brought to enforce the claim it was reduced forty per cent.¹⁰ Costs are properly refused where the claimant recovers only a tenth of his claim,¹¹ or where the claim is reduced from \$2,500 to \$900,¹² or from \$306 to \$93.¹³ But a reduction of \$17 on a claim of \$196, is not such as to justify a denial of costs.¹⁴

Costs are properly awarded against an administrator payable out of the estate, when he has no defence upon the merits, but simply sets up the short Statute of Limitations.¹⁵ It is not an unreasonable resistance of a claim which was barred by the Statute of Limitations, unless there had been a payment thereon by the deceased, whose estate the executor represented, and of which he had no personal knowledge, to require the proof thereof to be submitted to a court, in an action in which he voluntarily appeared, in order that no charge of want of fidelity to the estate could be made.¹⁶ It cannot be said that a claim is unreasonably resisted so as to render a representative liable for costs, where he has succeeded on two trials.¹⁷ The refusal, by an executor, to pay a claim largely in excess of a bill previously rendered, is not

8. *Johnson v. Myers*, 103 N. Y. 666; *Ryan v. McElroy*, 15 App. Div. 216, 44 N. Y. Supp. 196; *Cornwell v. Sheldon*, 134 App. Div. 58, 118 N. Y. Supp. 707; *Sutton v. Newton*, 22 Wkly. Dig. 140.

Voluntary reduction.—Where, upon the trial of an action on a disputed claim, the plaintiff voluntarily consents to a material reduction of his claim, it cannot be said the defense was unreasonable. *Healey v. Malcolm*, 75 App. Div. 422, 78 N. Y. Supp. 315.

9. *Webster v. Nichols*, 21 Wkly. Dig. 566.

10. *Holcombe v. Nettleton*, 41 Misc. 504, 85 N. Y. Supp. 12.

11. *Rauth v. Davenport*, 18 N. Y. Supp. 721, 45 St. Rep. 926, 22 Civ. Pro. R. 121.

12. *Wells v. Disbrow*, 48 St. Rep. 746, 20 N. Y. Supp. 518.

13. *Healy v. Murphy*, 21 Civ. Pro. R. 13, 16 N. Y. Supp. 541.

14. *Dukelow v. Searles*, 48 St. Rep. 91, 20 N. Y. Supp. 348.

15. *Gardner v. Pitcher*, 109 App. Div. 106, 95 N. Y. Supp. 673; *aff'd*, 185 N. Y. 534.

16. *Chesebro v. Hicks*, 66 How. Pr. 194.

17. *Vaughn v. Strong*, 66 Hun, 273, 49 St. Rep. 317, 21 N. Y. Supp. 550.

unreasonable so as to charge the estate with costs of an unreasonable defence.¹⁸

5. How liability for costs determined.

A claimant who is successful in his action against an executor or administrator, is not entitled to costs as of course.¹⁹ He cannot tax costs until they are allowed by the court.²⁰ If costs are included without leave of the court, they will be stricken out on motion.²¹ But a judgment will not be set aside, when it appears the right of costs was clearly established, because it was entered without an order.²²

The facts are to be certified by the judge or referee before whom the trial took place; and costs cannot generally be allowed without such a certificate.²³ A certificate by a referee

18. *Harrison v. Ayes*, 18 Hun, 366.

19. *German-American Provision Co. v. Garrone*, 73 App. Div. 409, 77 N. Y. Supp. 134; *Bailey v. Schmidt*, 19 St. Rep. 50, 5 N. Y. Supp. 405.

20. *Morgan v. Skidmore*, 3 Abb. N. C. 92; *Smith v. Randall*, 67 Barb. 377; *Mesereau v. Ryerss*, 12 How. (N. Y.) 300; *Knapp v. Curtiss*, 6 Hill, 386; *Howe v. Lloyd*, 2 Lans. 335; *Fish v. Crane*, 9 Abb. 252.

Waiver.—Taxing costs against an executor without an order is an error not waived by appeal. *Howe v. Lloyd*, 2 Lans. 335.

21. *Snyder v. Young*, 4 How. (N. Y.) 217.

Laches in striking out costs.—A motion to strike unwarranted costs from a judgment against executors will not be denied for laches if the plaintiff has not been prejudiced by the delay, for the motion attacks the judgment on its merits in so far as it awards costs, and does not relate to a mere irregularity. *Cornwell v. Sheldon*, 134 App. Div. 58, 118 N. Y. Supp. 707.

22. *Hess v. Nellis*, 65 Barb. 440.

23. *Lounsbury v. Sherwood*, 53 App. Div. 318, 65 N. Y. Supp. 676; *Darde v. Conklin*, 73 App. Div. 590, 77 N. Y. Supp. 39; *Whitcomb v. Whitcomb*, 92

Hun, 443, 36 N. Y. Supp. 607, 71 St. Rep. 661.

Certificate set aside.—A certificate made by the trial judge to the effect that payment of the claim against an estate has been unreasonably resisted should be set aside where it appears that upon the trial the claimant consented to a material reduction of his claim. *Healy v. Malcolm*, 75 App. Div. 422, 73 N. Y. Supp. 315.

Appeal.—Where the action was brought in the Supreme Court and the trial justice did not make the certificate required by section 1461, but the plaintiff included costs in the judgment on a verbal statement of the judge that she was entitled thereto, the fact that the judgment was affirmed on an appeal by the defendant does not bar a subsequent motion to strike the unauthorized costs from the judgment, for the question of costs was not brought up for review. *Cornwell v. Sheldon*, 134 App. Div. 58, 118 N. Y. Supp. 707.

Insufficient certificate.—In an action against an administrator to recover a sum of money only, tried before a referee, a certificate which fails to state that plaintiff's demand was presented within the time limited by the notice to creditors, but which merely

may be a paper separate from his report, and he may execute it after he has made his report.²⁴

An award of costs against an executor without a certificate of the trial judge, showing the facts upon which such an award must be based, is error. The evidence on the trial and its result may be taken into account, but cannot serve without the prescribed certificate.²⁵ The claimant must show affirmatively that the facts of the case justify the allowance of costs;²⁶ but, in a proper case it is the duty of the court to allow such costs.

The word "may," in the clause of section 1461, which states that "the court may award the costs against the executor," is deemed equivalent to the word "shall."²⁷ The question whether or not costs should be awarded against an executor must be determined from evidence received at the trial, and the facts on which the executor's liability depends are properly pleaded in a complaint, and should not be stricken out on motion.²⁸ The right of the plaintiff to costs should be determined by the facts which appear upon the trial, and evidence of the allegations in the complaint as to situation should be received as proper evidence tending to show whether the plaintiff is within section 1461, not to aid the jury in finding a verdict, but to enable the court to decide whether costs should be awarded against the defendant.²⁹

6. Recovery less than fifty dollars.

It has been held that the holder of a disputed claim against an estate which has been rejected and referred, must recover more than \$50 in order to be entitled to costs. If he recover less than that sum, the defendant, an executor, is entitled to costs under section 1437 of the Civil Practice Act. It seems that the proper course of the holder of such claim is to bring his action thereon in the Justices' Court.³⁰

certifies that the case was difficult and extraordinary and that the administrator did not file the specified consent, is insufficient to entitle plaintiff to an extra allowance. *Lightfoot v. Davis*, 112 N. Y. Supp. 289.

24. *Brainard v. De Graef*, 29 Misc. 560, 61 N. Y. Supp. 953.

25. *Matson v. Abbey*, 141 N. Y. 179.

26. *Ehrenreich v. Lichtenberg*, 29

Misc. 305, 60 N. Y. Supp. 513.

27. *Carter v. Barnum*, 24 Misc. 220, 53 N. Y. Supp. 539.

28. *Schenck v. Rickaby*, 14 N. Y. Supp. 444, 26 Abb. N. C. 364.

29. *Schenck v. Rickaby*, 20 Civ. Proc. 384.

30. *Lamphere v. Lamphere*, 54 App. Div. 17, 66 N. Y. Supp. 270.

7. Disputed claim submitted to surrogate.

In all cases where disputed claims are submitted to the surrogate for determination on a judicial settlement, the allowance or disallowance of costs to the claimant is in the discretion of the surrogate, as prescribed in article 15 of the Surrogate Court Act.⁴¹

8. Actions commenced before death of decedent.

Section 1461 does not apply to actions commenced against the decedent in his lifetime.³² In such cases, plaintiff is entitled to recover costs against the estate.³³

9. Action arising out of settlement of estate.

Claims against a representative arising out of the administration of the estate are, as a general rule, against him individually. Section 1461 has no application to a claim of this class.³⁴ In an action against executors for services rendered to them as such, they are personally liable for costs.³⁵ An order for costs is not necessary in an action against executors on a debt incurred by them.³⁶

Where a cause of action accrues to the personal representative of the decedent, as distinguished from a cause of action which accrued to the decedent, whether the personal representative prosecutes the action in his name individually or in his representative capacity, it is to be deemed, for the purpose of taxation of costs, an action by him individually, and if the action be brought in his representative capacity, and he be unsuccessful, the costs may be taxed against him individually without an application to the court.³⁷

An action brought in the name of an administrator claiming to recover as such upon a cause of action arising after the death of the decedent, although concerning the property of the deceased, is an action in favor of the administrator

31. *Matter of Coonley*, 38 Misc. 219, 77 N. Y. Supp. 269; *Matter of Ingraham*, 35 Misc. 577, 72 N. Y. Supp. 62.

32. *Lemen v. Wood*, 16 How. Pr. 285; *Tindall v. Jones*, 19 How. Pr. 469; *Benedict v. Caffé*, 3 Duer. 669; *Merritt v. Thompson*, 27 N. Y. 225.

33. *Mitchell v. Mount*, 17 Abb. 213; *Lefever v. Van Vechten*, 3 How. Pr. 201.

34. *O'Brien v. Jackson*, 42 App. Div. 171, 58 N. Y. Supp. 1044; *rev'd*, 167 N. Y. 31.

35. *Smith v. Patten*, 9 Abb. (N. S.) 205.

36. *Smith v. Patten*, 9 Abb. (N. S.) 205.

37. *Leavitt v. Scholes Co.*, 210 N. Y. 107.

individually, and he is liable for costs if he is defeated in the action, and in a clear case a judgment may be entered against him for costs without application to the court.³⁸

An administrator who sues to recover for a conversion of the decedent's estate, occurring after his death, is personally liable for costs of the action without order of the court.³⁹

10. Equitable actions.

Section 1461 has no reference to actions against executors or administrators for equitable relief.⁴⁰ Costs in equity suits, even against executors, are in the discretion of the court.⁴¹ A judgment in foreclosure for deficiency, including costs, against an executor, is not a "judgment for the sum of money only," so as to authorize an award of costs against him.⁴²

11. Costs against plaintiff suing representative.

An action brought against an executor to recover general legacies with interest and costs, which is defended by the executor on the ground that the legacies were revoked by a codicil to the will, is an action at law, and if it is decided in favor of the defendant, the latter is entitled to costs as a matter of right.⁴³ An executor who is successful in resisting a claim against the estate is entitled to costs.⁴⁴ Section 1461 relates only to costs against defendants in such proceedings, and will not affect the rule of costs against the plaintiffs.⁴⁵

12. Costs in favor of defendant sued by representative.

Where defendant, in an action brought by an executor as such, recovers judgment on a set-off, he is entitled to costs. Section 1461 regulates only the rule of costs in actions brought against executors.⁴⁶ Where executors fail to

38. *Mullen v. Quinn*, 88 Hun, 128, 68 St. Rep. 680, 34 N. Y. Supp. 625.

39. *Feig v. Wray*, 3 Civ. Pro. R. 159.

40. *McBride v. Chamberlain*, 56 St. Rep. 431, 26 N. Y. Supp. 94.

41. *Van Riper v. Poppenhausen*, 43 N. Y. 68.

42. *Richards v. Stillman*, 57 App. Div. 182, 68 N. Y. Supp. 188; *aff'd* without opinion, 172 N. Y. 632.

43. *Ladies' Union Benevolent Society v. Van Natta*, 96 App. Div. 99, 88 N. Y. Supp. 1083.

44. *Winne v. Hills*, 91 Hun, 89, 36 N. Y. Supp. 683.

45. *Babbage v. Webster*, 54 St. Rep. 863, 25 N. Y. Supp. 300; *Agar v. Tibbetts*, 30 St. Rep. 456, 9 N. Y. Supp. 591.

46. *Cohn v. Husson*, 5 N. Y. Supp. 7.

recover in a suit brought by them for rent alleged to be due under a lease given by their testator, which claim did not exist at the time of the testator's death, and the defendants are awarded costs, the judgment is entitled to priority in payment, being an expense of administration, even though the estate is insolvent.⁴⁷

13. Personal liability of representative for costs.

In an action by or against an executor or administrator, costs will be charged against the estate, unless the court directs them to be paid by the representative personally for mismanagement or bad faith in the prosecution or defense of the action.⁴⁸ An executor or administrator is personally liable for costs only when found, on due proof, guilty of mismanagement or bad faith, and an order of the court must be obtained so charging him.⁴⁹ Costs awarded to the plaintiff in an action against an executor are presumed to be payable out of the estate, not by the defendant personally, and an order is necessary to charge him personally.⁵⁰

Where an executor has brought an action in bad faith, he is properly charged individually with costs.⁵¹ Where a trustee has received funds and disbursed them so that he has no funds in hand to pay costs, the court may allow a judgment to be entered against him personally, as it was his duty to hold sufficient funds.⁵² In all causes of action, where the same arises against the executor after the death of the testator, the claim is against the executor, and costs must be *de bonis propriis*.⁵³ The refusal of executors to acquiesce in an adverse determination by the Appellate

47. *Matter of Friedlander*, 160 App. Div. 475, 145 N. Y. Supp. 679.

48. *Matter of Carnegie Trust Co.*, 161 App. Div. 280, 146 N. Y. Supp. 809; *Theriot v. Prince*, 12 How. Pr. 451; *Ackerman v. Emott*, 4 Barb. 626.

Appeal.—An order denying a motion to set aside an execution for costs against plaintiffs, personally, is appealable. *Slocum v. Barry*, 34 How. Pr. 320.

49. *Hone v. De Peyster*, 106 N. Y. 645, 11 St. Rep. 309; *Sabsevit v. Gabrilowitz*, 148 N. Y. Supp. 615; *Al-*

ger v. Conger, 17 Hun, 45; *Lindsay v. Deafendorf*, 43 How. Pr. 90; *Marsh v. Hussey*, 4 Bosw. 614; *Woodruff v. Cook*, 14 How. Pr. 481; *Dodge v. Crandal*, 30 N. Y. 294; *Slocum v. Barry*, 38 N. Y. 46.

50. *Lindsay v. Deafendorf*, 43 How. Pr. 90; *Fish v. Crane*, 9 Abb. (N. S.) 252; *Berwick v. Halsey*, 4 Redf. 18.

51. *Garlock v. Vandervort*, 128 N. Y. 374.

52. *Butler v. B. and A. R. R. Co.*, 24 Hun, 99.

53. *Ferrin v. Myrick*, 41 N. Y. 322.

Division, although the correctness of such determination was quite clear, does not establish that they were guilty of bad faith and mismanagement in the prosecution of the appeal, within the meaning of section 1462.⁵⁴ One who commences a suit as administrator does not become personally liable for costs by the fact of his ceasing to be administrator pending the action.⁵⁵

14. Extra allowance.

There is authority to the effect that, in a proper case, an additional allowance may be made to the plaintiff in an action against an executor or administrator.⁵⁶

P. Judgment and execution against executor.

1. Decedent Estate Law, § 149. Decedent's real property not bound by judgment against executor or administrator.

Real property, which belonged to a decedent, is not bound, or in any way affected, by a judgment against his executor or administrator, and is not liable to be sold by virtue of an execution issued upon such a judgment, unless the judgment is expressly made, by its terms, a lien upon specific real property therein described, or expressly directs the sale thereof.

2. Decedent Estate Law, § 151. Leave to issue execution against executor or administrator.

Except as provided in this section, an execution shall not be issued, upon a judgment for a sum of money, against an executor or administrator, in his representative capacity, until an order permitting it to be issued has been made by the surrogate from whose court the letters were issued. Such an order must specify the sum to be collected, and the execution must be endorsed with a direction to collect that sum. If a judgment be jointly against an executor or administrator in his representative capacity and one or more other parties, execution may be issued thereon, without such order, against such other party or parties, but it must have endorsed thereon a direction not to levy against any property to the possession of which such executor or administrator as such is or may be entitled.

3. Decedent Estate Law, § 152. How leave procured; order; and contents thereof.

At least six days' notice of the application for an order specified in the last section, must be personally served upon the executor or administrator, unless it appears that service cannot be so made with due diligence; in which case

54. *Harrington v. Strong*, 49 App. Div. 39, 63 N. Y. Supp. 257.

55. *Baxter v. Davis*, 3 Abb. (N. S.) 249.

56. *Weeks v. Coe*, 76 App. Div. 310, 78 N. Y. Supp. 477; *Fisher v. Bennett*, 21 Misc. 178, 47 N. Y. Supp. 114; *Niblo v. Binse*, 47 Barb. 435.

notice must be given to such persons, and in such manner as the surrogate directs, by an order to show cause why the application should not be granted. Where it appears that the assets, after payment of all sums chargeable against them for expenses, and for claims entitled to priority as against the plaintiff, are not, or will not be, sufficient to pay all the debts, legacies or other claims of the class to which the plaintiff's claim belongs, the sum, directed to be collected by the execution, shall not exceed the plaintiff's just proportion of the assets. In that case, one or more orders may be afterwards made in like manner, and one or more executions may be afterwards issued, whenever it appears that the sum directed to be collected by the first execution is less than the plaintiff's just proportion.

4. Decedent Estate Law, § 154. Execution on former judgment.

An execution may be issued, in the name of an executor or administrator, in his representative capacity, upon a judgment recovered by any person who preceded him in the administration of the same estate, in any case where it might have been issued in favor of the original plaintiff, and without a substitution.

5. Other statutes.

An execution against the real or personal property in the hands of an executor or administrator must substantially require the sheriff to satisfy the judgment out of that property.⁵⁷ Special provisions are also to be found in the Civil Practice Act relative to the issuance of an execution by a representative when the decedent was a judgment creditor in his lifetime.⁵⁸ Likewise a special practice is prescribed when a judgment was recovered against the decedent before his death and it is sought to issue an execution against the property coming into the hands of the representative.⁵⁹

6. Necessity of order.

An execution to be satisfied out of the property of an estate can only be issued by express order and after notice under sections 151 and 152.⁶⁰ All judgments against an

57. Civil Practice Act, § 646.

58. Civil Practice Act, § 651.

Action by representative.—An executor may bring an action upon a judgment in favor of his testator against the judgment debtor, without leave of the court, notwithstanding he has a right to have execution on the judgment. *Freeman v. Dutcher*, 15 Abb. N. C. 431.

59. Civil Practice Act, §§ 655, 656.

60. *Schmidt v. Langhaar*, 88 N. Y. 503; *Sym's Executor, etc., v. Mayor of New York*, 105 N. Y. 153; *Matter of Quakenboss*, 38 Misc. 66, 76 N. Y. Supp. 964; *Cook v. Ryan*, 29 Hun, 249; *Matson v. Abby*, 70 Hun, 475, 24 N. Y. Supp. 284, 53 St. Rep. 794.

Supplementary proceedings upon the judgment are not authorized by these statutes. *Collins v. Beebe*, 27 St. Rep. 4, 7 N. Y. Supp. 442, 54 Hun, 318.

executor or administrator, however arising, are subjected to the requirements of such sections.⁶¹ An attorney is not entitled to issue an execution upon his judgment for legal services recovered against the administratrix in her representative capacity, without first obtaining an order from the surrogate.⁶² An execution issued under section 83 of the Surrogate Court Act, upon a decree of a Surrogate's Court, has been said not to require leave of the court.⁶³ And the provisions under consideration have been thought inapplicable to a judgment in an action originally commenced against a decedent.⁶⁴

7. Nature of proceeding before Surrogate.

The application to the surrogate for leave to issue the execution is a special proceeding in the Surrogate's Court; it is a *de novo* proceeding in that court for relief against executors of an estate under the jurisdiction of that court, and upon a judgment not taken in that court, but in another court. Such a proceeding must be started by the filing of a verified petition and followed by the issuance of a citation or of an order to show cause.⁶⁵

8. Petition and notice.

The petition for leave to issue the execution must be verified;⁶⁶ and it must contain an allegation of the existence of assets applicable to the judgment.⁶⁷ The petition on an application to the surrogate for leave to issue execution on a judgment against an executor is sufficient when it alleges that the assets are sufficient to satisfy the judgment. The duty of making it appear that it is improper to allow the applicant to issue execution because of insufficiency of assets to pay the other creditors, rests upon the executor.⁶⁸ No notice need be given of the presentation of the proposed petition to the surrogate; upon its presentation the surro-

61. *Sartorelli v. Ezagni*, 64 Misc. 115, 118 N. Y. Supp. 46.

62. *Matter of Sartorelli v. Ezagni*, 64 Misc. 115, 118 N. Y. Supp. 46.

63. *Peyser v. Wendt*, 2 Dem. 221; *Joel v. Bitterman*, 2 Dem. 242.

64. *Thatcher v. Bancroft*, 15 Abb. 243.

65. *McGinn v. Lighthouse*, 137 N. Y. Supp. 110; *Matter of Mahoney*, 88 App. Div. 140, 84 N. Y. Supp. 329.

66. *Matter of Howell*, 2 Redf. 299.

67. *Melcher v. Fisk*, 4 Redf. 22.

68. *Matter of Steinau*, 23 App. Div. 550, 48 N. Y. Supp. 886.

gate issues a citation to all parties interested, unless they appear voluntarily; in which case they will be bound by the decree, though no citation is issued.⁶⁹ The personal representatives and parties in interest are entitled to notice.⁷⁰ Motion papers, to set aside an order granting leave to issue an execution against an executor, may be served on the attorney, where the judgment-creditor is a nonresident.⁷¹

9. Function of Surrogate.

Before an execution can issue against the property of the estate, the other parties in interest must be heard in the court in which the estate is being administered, and the surrogate must determine what the rights of this creditor are as against the rights of other creditors, and must see that the creditors entitled to priority, if there be any such, and other creditors of the same class, are not prejudiced by the application of the property of the estate to the satisfaction of a particular judgment.⁷² The court of law adjudges the legal rights of the parties and whether the creditor is entitled to enforce the judgment against the personal representative. The surrogate then passes upon the rights of the creditor in view of the conflicting or equal claims of others upon the estate.⁷³ He cannot receive evidence as to the legality or propriety of the judgment.⁷⁴

The granting of the order is to some extent within the discretion of the surrogate;⁷⁵ but, if sufficient assets clearly appear, the surrogate should allow the execution to issue.⁷⁶ On the other hand, if the proceeding develops no assets in the hands of the representative which might properly be applied on the judgment, it is error for the surrogate to permit the execution.⁷⁷ Before an execution issues it should appear there were assets sufficient to pay all the debts of the decedent, or there should be a direction that a just pro-

69. *Kerr v. Kreuder*, 28 Hun, 452.

70. *Marine Bank of Chicago v. Van Brunt*, 49 N. Y. 160.

71. *Matter of McCann*, 4 Redf. 115.

72. *Matter of Sartorelli v. Ezagni*, 64 Misc. 115, 118 N. Y. Supp. 46.

73. *Marine Bank of Chicago v. Van Brunt*, 49 N. Y. 160.

74. *Freeman v. Nelson*, 4 Redf. 374; *Glacius v. Fogel*, 4 Redf. 516; *Keyser v. Kelly*, 4 Redf. 157.

75. *Mount v. Mitchell*, 31 N. Y. 356.

76. *Smith v. Howell*, 2 Redf. 325.

77. *St. John v. Voorhes*, 19 Abb. Pr. 53.

portion of the assets be applied to payment of the judgment.⁷⁸

The petitioner must show either that the executor has funds of the estate on hand applicable to the payment of the judgment, which he refuses to so apply, or that funds of the estate have been misapplied which should have been devoted to the payment of the judgment.⁷⁹ The surrogate cannot authorize executions to issue, where the assets are sufficient to pay but a small proportion of the claims of the class to which such judgment belongs, and the court is unable to determine, from the evidence submitted, the amount for which execution should issue.⁸⁰

The proceeding to obtain an order to issue execution in such case seems necessarily to involve an accounting of some kind, for it is necessary to show that the executor has assets above expenses and above prior claims, and also what is plaintiff's just proportion of such assets.⁸¹ On an application to issue execution on a judgment obtained against executors, the surrogate has the power to require an intermediate accounting to determine as to the amount of assets in the hands of the executors.⁸²

It is not an answer for the representative to allege that he has not in hand money to pay the claim, for he may have part of it; he must state the amount of assets of the estate, their condition, expenses and state of the fund.⁸³ The creditor need not ask for an accounting where one has been rendered.⁸⁴ An appeal from a judgment granted against an

78. *Matter of Boyle*, 29 St. Rep. 946, 9 N. Y. Supp. 473.

79. *Matter of Estate of Gall*, 40 App. Div. 114, 57 N. Y. Supp. 835; *Matter of Warren*, 105 App. Div. 582, 94 N. Y. Supp. 286.

80. *In re Hesdra Estate*, 23 N. Y. Supp. 842.

81. *Matter of Hodgman*, 31 St. Rep. 479, 10 N. Y. Supp. 491.

Prior accounting.—The decree of the Surrogate's Court against the administratrix of a deceased trustee, in a proceeding for judicial settlement of the accounts of such trustee, is not conclusive evidence that there are suf-

ficient assets in her hands as administratrix of such trustee to satisfy the sum directed to be paid by the decree, and an execution cannot issue upon the decree against the individual property of the administratrix without leave of the surrogate. *Matter of Seaman*, 63 App. Div. 49, 71 N. Y. Supp. 376.

82. *Matter of Congregational Unitarian Society*, 34 App. Div. 387, 54 N. Y. Supp. 269.

83. *Estate of Wilson*, 3 Law Bull. 87; *Keyser v. Kelly*, 4 Redf. 157.

84. *Smith v. Howell*, 2 Redf. 325.

executor in his representative capacity is no bar to a motion for leave to issue execution, if no undertaking is given.⁸⁵

A surrogate's order granting leave to issue execution against executors is a sufficient adjudication of the existence of assets.⁸⁶

10. Lien of judgment on real estate.

A judgment recovered against executors does not become a lien upon the real estate of their testator. It is not even evidence against the persons entitled thereto, and in no way binds them.⁸⁷ Executions authorized by these sections are only such as can be issued against personal assets, which are in the possession or under the control of the executors or administrators, and have no relation whatever to real estate.⁸⁸ An execution cannot issue against a decedent's real property on a judgment against his personal representatives.⁸⁹ The real property of a decedent is not bound or in any way affected by the judgment against his executor or administrator, and is not liable to be sold by virtue of an execution thereon, unless by the specific terms of the judgment affecting the particular property.⁹⁰ A judgment recovered against executors for work and materials furnished under a contract with them for improvements upon a parcel of property of the estate other than that foreclosed, is not a lien upon and is not payable out of the surplus moneys arising on a sale in foreclosure.⁹¹

Q. Action by legatee or distributee against executor.

1. Decedent Estate Law, § 146. Action upon refusal to pay legacy or distributive share.

If, after the expiration of one year from the granting of letters testamentary or letters of administration, an executor or administrator refuses, upon demand, to pay a legacy, or distributive share, the person entitled

85. Estate of Morey, 10 St. Rep. 693.
See Keyser v. Kelley, 4 Redf. 157.

86. Matter of Weil's Estate, 110 App. Div. 67, 96 N. Y. Supp. 1017; Matter of Clark, 2 Abb. N. C. 208.

87. Platt v. Platt, 105 N. Y. 496, citing Ferguson v. Brooms, 1 Bradf. 10; Dodge v. Thompson, 13 Wkly. Dig. 104; Sharpe v. Freeman, 45 N. Y. 802; Dodge v. Stevens, 94 N. Y. 209.

88. Lichtenberg v. Herdtfelder, 103 N. Y. 302.

89. James v. Beesley, 4 Redf. 236; Matter of Jansen, 9 N. Y. Supp. 451.

90. Hoxie v. Kennedy, 15 Civ. Pro. 185.

91. Mander v. Low, 12 Misc. 316, 33 N. Y. Supp. 719, 24 Civ. Pro. 368, 67 St. Rep. 544.

thereto may maintain such an action against him, as the case requires. But for the purpose of computing the time, within which such an action must be commenced, the cause of action is deemed to accrue, when the executor's or administrator's account is judicially settled, and not before.

2. Decedent Estate Law, § 147. Action by infant for legacy or distributive share; guardian's bond.

The guardian *ad litem* of an infant, in whose favor an action is brought, as prescribed in the last section, must, unless he is also the general guardian, execute and file with the clerk, before the commencement of the action, a bond to the infant, with at least two sufficient sureties, in a penalty fixed by a judge of the court, conditioned that the guardian will duly account to the infant, when he attains full age, or, in case of his death, to his personal representatives, for all money or property, which the guardian may receive, by reason of the legacy or distributive share.

3. Decedent Estate Law, § 148. When action barred by judgment against heir or devisee.

A final judgment against an heir or devisee bars an action against the executor or administrator of the decedent, for the same cause, and every other remedy to enforce payment thereof out of the decedent's property, unless an execution against property, issued upon the judgment has been returned wholly or partly unsatisfied, or sufficient real property to satisfy the judgment has not descended, or been devised, to the judgment debtor. But, if the judgment was recovered for a debt or legacy, expressly charged upon the estate descended or devised, the bar is absolute.

4. Decedent Estate Law, § 153. Security before grant of order.

Where a judgment has been rendered against an executor or administrator, for a legacy or distributive share, the surrogate, before granting an order permitting an execution to be issued thereupon, may, and in a proper case must, require the applicant to file in his office an undertaking to the defendant, in such a sum and with such sureties as the surrogate directs, to the effect that if, after collection of any sum of money by virtue of the execution, the remaining assets are not sufficient to pay all sums for which the defendant is chargeable for expenses, claims entitled to priority as against the applicant, and the other legacies or distributive shares, of the class to which the applicant's claim belongs, the plaintiff will refund to the defendant the sum so collected, or such ratable part thereof, with the other legatees or representatives of the same class, as is necessary to make up the deficiency.

5. Essentials of action.

One of the elements of an action by one entitled to a legacy or distributive share is that there has been a demand upon the representative and a refusal to pay. In such an action it must be alleged and proved that the executor

refused to pay the legacy upon proper demand, that being a condition precedent to a right of action.⁹² An issue as to the demand and refusal should be submitted to the jury.⁹³

A legatee, whose legacy is by will made a lien upon the real property devised thereunder, must, in an action brought against the devisee's successors in title and the holder of a mortgage executed by the devisee, prove as a part of her substantive case that the legacy is a subsisting lien and remains unpaid, in order to establish the lien of the legacy and to have the land sold in satisfaction thereof. This is so whether the action is brought under the statute or is an action in equity.⁹⁴

The statute does not embrace special proceedings, but relates to actions only.⁹⁵ A legatee may sue to recover specific securities given him by legacy.⁹⁶ It is no defense to the action that the executor has paid the legacy to another person.⁹⁷

6. Joinder of parties.

One legatee can sue for his legacy without joining other legatees, unless he is a residuary legatee.⁹⁸ Where the executor of a debtor's estate is also administrator of the creditor's estate, a legatee may maintain an action for the construction of the wills, an accounting and the payment of his legacy, joining other creditors having claims of equal degree, but the executor of the debtor's estate must be distinctly made a party as such.⁹⁹

A legatee, as such, cannot maintain an action against a debtor of the testator.¹ In an action for a legacy, which is alleged to have been paid to a stranger, the latter is not a

92. *Beers v. Strong*, 128 App. Div. 20, 112 N. Y. Supp. 382.

93. *Beers v. Strong*, 128 App. Div. 20, 112 N. Y. Supp. 382; *Kennagh v. McGolgan*, 21 St. Rep. 326, 4 N. Y. Supp. 230.

94. *Conkling v. Weatherwax*, 90 App. Div. 585, 86 N. Y. Supp. 139; *aff'd*, 181 N. Y. 258.

95. *Matter of Perry*, 37 St. Rep. 576, 15 N. Y. Supp. 535; *Matter of Nicholls*,

8 N. Y. Supp. 7.

96. *Sere v. Coit*, 5 Abb. 481.

97. *Weeks v. Ostrander*, 52 Super. Ct. 512.

98. *Tonnelle v. Hall*, 3 Abb. 205; *Trustees Auburn Theological Seminary v. Kellogg*, 16 N. Y. 83; *Cromer v. Pinckney*, 3 Barb. Ch. 466.

99. *Fisher v. Hubbell*, 7 Lans. 481.

1. *Whitney v. Coapman*, 39 Barb. 482.

necessary party.² Where the fund is insufficient to pay all legacies in full, all interested should be made parties.³

The mere failure of an executor to pay to a legatee the full amount of his legacy will not, in absence of proof of improper conduct, authorize an action to be brought against him individually therefor.⁴

Persons entitled to personal property on the expiration of a trust for life cannot on the termination of the trust maintain an action in their own names against persons to whom the trust funds have been wrongfully transferred by the executors, if there is no allegation that debts and other legacies have been paid, and that the executors have accounted, or that the residuary estate to which the plaintiffs are entitled has been set apart for them, or that the executors have completed their functions and have become trustees.⁵

One of two claimants to a specific legacy is not bound by a judgment in an action to which he is not a party, against the executors of the will, to recover the same legacy for the estate of the other claimant. The executors do not, in such an action, represent the absent claimant, as they are simply stakeholders as to the legacy, and the estate is not increased or diminished by the determination of the controversy between the parties; so held where one of the defendant's executors in the former action was also a coplaintiff, being an executor of the will of the deceased legatee under the latter will, and, therefore, the person chiefly interested in sustaining the judgment in favor of the plaintiffs in that action.⁶

7. Effect of proceeding in Surrogate Court.

An action under the Decedent Estate Law, while pending and undetermined, is a bar to a proceeding in Surrogate's Court to compel the payment of a legacy. The Supreme Court has concurrent jurisdiction with the Surrogate's Court to enforce the payment of legacies, and an action for that purpose, while pending under this section and unde-

2. *Gleason v. Thayer*, 24 Barb. 82. 160, 123 N. Y. Supp. 166.

3. *Towner v. Tooley*, 38 Barb. 598.

6. *Weeks v. Weeks*, 16 Abb. N. C.

4. *Hurlbut v. Durant*, 21 Hun, 481. 143.

5. *Hart v. Goadby*, 138 App. Div.

terminated, bars a proceeding for an accounting before the surrogate.⁷

Where a final decree has been entered in the Surrogate's Court directing administrators to distribute an estate and they fail to do so, the administrator of a deceased legatee entitled to be paid may sue in the Supreme Court to enforce the surrogate's decree.⁸ It is not necessary to allege that the Surrogate's Court has made an order that the legacy should be paid to plaintiff, or that the plaintiff has given security required to be given to entitle him to receive a legacy in a proceeding before the surrogate, or that it has not been paid into Surrogate's Court.⁹

8. When action to be brought.

The action is not to be commenced until one year has expired since the granting of the letters. The statute intends that the executor shall have an opportunity to realize the assets of the estate and adjust its liabilities before he shall be vexed by suits of legatees.¹⁰ For the purposes of the Statute of Limitations, the cause of action accrues when the executor's or administrator's account is judicially determined. And it is at least six years thereafter before the claim is barred.¹¹

Where an account shows that various payments must be made before a residuary legatee's interest can be ascertained, such interest is not barred, although the will was probated more than twenty years before the accounting.¹² It has been said that there is no statute of limitations relating to charges on real estate for the payment of legacies.¹³

The provision that the Statute of Limitations begins to run only when the executor's account is judicially settled applies only to an action, not to a special proceeding insti-

7. *Wall v. Bulger*, 12 St. Rep. 215; *Lewis v. Maloney*, 12 Hun, 207; *Pittman v. Johnson*, 35 Hun, 41; *aff'd*, 102 N. Y. 742.

8. *Koenig v. Wagener*, 126 App. Div. 772, 111 N. Y. Supp. 116.

9. *Wall v. Bulger*, 46 Hun, 346.

10. *Leonard v. Harvey*, 63 App. Div. 294, 71 N. Y. Supp. 546; *modified*, 173 N. Y. 352.

11. *American Bible Society v. Hebard*, 51 Barb. 552; *Quackenbush v. Quackenbush*, 42 Hun, 329. See, also, *Matter of May*, 31 St. Rep. 50, 9 N. Y. Supp. 785; *Matter of Kirkpatrick*, 9 Misc. 228, 30 N. Y. Supp. 283.

12. *Matter of May*, 9 N. Y. Supp. 785, 31 St. Rep. 50.

13. *Shannon v. Strader*, 36 Hun, 47.

tuted under the Surrogate Court Act to compel payment of a legacy where the six-year statute begins to run at the time the legacy is payable.¹⁴

9. Interest.

Interest is allowable upon general legacies only from the expiration of one year from the time letters testamentary are granted.¹⁵ But where a legacy to an infant, as to whom the testator is *in loco parentis*, is made payable when the infant becomes of age, and such legatee has no other provision in his lifetime, or any maintenance allotted by the will, the legacy carries interest from the time of the death of the testator. It is not intended from the application of the rule that the testator should have been under a legal obligation to support the legatee. It is sufficient that he has voluntarily assumed such a relation. The general guardian of an infant legatee can maintain an action to recover a legacy bequeathed to the infant by the will of the defendant's testator.¹⁶

R. Contradiction of inventory.

1. Decedent Estate Law, § 157. When inventory may be contradicted.

In an action or special proceeding, to which an executor or administrator is a party, wherein the question whether he has administered the estate of the decedent, or any part thereof, is in issue, or is the subject of inquiry, and the inventory of assets, filed by him, is given in evidence, either party may rebut the same, by proof, either

1. That any property was omitted in the inventory, or was not returned therein at its true value; or

2. That any property has perished, or has been lost, without the fault of the executor or administrator; or has been fairly sold by him, at private or public sale, at a less price than the value so returned; or that, since the return of the inventory, it has deteriorated or enhanced in value.

2. Decedent Estate Law, § 158. Liability for uncollected demands.

In such an action or special proceeding, the executor or administrator shall not be charged with a demand or right of action, included in the inventory, unless it appears that the same has been collected, or might have been collected, with due diligence.

14. *Matter of Tom's Estate*, 84 Misc. 312, 147 N. Y. Supp. 550; *Matter of Dunham*, 22 Abb. N. C. 479, following *Matter of Van Dyke*, 44 Hun, 394.

15. *Kerr v. Dougherty*, 17 Hun, 341; *aff'd*, 79 N. Y. 327.

16. *Thomas v. Bennett*, 56 Barb. 197; *Hauenstein v. Kull*, 59 How. Pr. 25; *Coakley v. Mahar*, 36 Hun, 157; *Bayer v. Phillips*, 10 Civ. Pro. 227; *Perkins v. Stimmel*, 42 Hun, 520.

3. Decedent Estate Law, § 159. The last two sections qualified.

The last two sections do not vary any rule of evidence respecting any proof, which an executor or administrator may now make.

4. Prima facie value of inventory.

Statements in the inventory are only presumptive evidence against the person filing it; they are simply *prima facie* evidence of the value of the assets, and the statute provides that such presumption may be overcome and the statements in the inventory explained.¹⁷ It is *prima facie* evidence both as to the extent and value of the personal property left by the decedent and casts the burden upon one seeking to impeach it to show either that articles were omitted therefrom, or that a greater sum was realized than the appraised value.¹⁸ It is thought that these three sections apply only to cases where the executor sets up what is equivalent to the former plea *plene administravit*, and not to an accounting; the question in the latter case being, not whether he has administered the estate, but how he has managed it.¹⁹

The diligence required by section 158 is such as a good business man would exercise in the management of his own property under like circumstances. An executor having notice that there is a debt due the estate is bound to active diligence for its collection; he may not wait for a request from the distributees. In case the debt is lost through his negligence, he becomes liable as for a *devastavit*. It seems that if the case is one of such doubt that an indemnity is proper, he must at least ask for it; at any rate he takes the risk of showing that the debt was not lost through his negligence. The Statute of Limitations does not begin to run in favor of an executor, as against a claim for damages occasioned by his negligence in collecting a debt due the estate, from the time of the probate of the will, but at best only from the time of the loss.²⁰

17. Matter of Maack's Estate, 13 N. Y. Supp. 571.

Misc. 368, 35 N. Y. Supp. 109.

19. Thorne v. Underhill, 1 Dem. 306.

18. Matter of Rogers, 153 N. Y. 316;
Matter of Shipman, 82 Hun, 108, 31

20. Harrington v. Keteltas, 92 N. Y.
40.

ARTICLE II.

ACTION BY SUBSCRIBING WITNESS OR CHILD BORN AFTER THE
MAKING OF WILL**A. Decedent Estate Law, § 28. Action by child born after making of will, or by subscribing witness.**

A child, born after the making of a will, who is entitled to succeed to a part of the real or personal property of the testator, or a subscribing witness to a will, who is entitled to succeed to a share of such property, may maintain an action against the legatees or devisees, as the case requires, to recover his share of the property; and he is subject to the same liabilities, and has the same rights, and is entitled to the same remedies, to compel a distribution or partition of the property, or a contribution from other persons interested in the estate, or to gain possession of the property, as any other person who is so entitled to succeed.

(See B., C. & G. Consol. L., 2nd Ed., p. 1755.)

B. Effect of section.

A will is not revoked by the advent of an after-born child of testator, but the child as heir is put to his or her special statutory action under this section, and only the Supreme Court may determine whether or not the action will lie.²¹ The child cannot contest the probate of the will, as he could a will made before the marriage of the testator, but he takes in opposition to the terms of the will.²²

Where a testator, whose will authorized his executor to sell all his real and personal estate and dispose of the proceeds, after the making thereof had a child born, and thereafter died leaving said child his only heir-at-law and "unprovided for by any settlement, and neither provided for nor mentioned in any way in his will," it was held that under the statute the whole real estate descended to the child the same as if the father had died intestate; that he did not take under the will or subject to any of its provisions, and that where the executor sold the real estate, the remedy of the child was not confined to a pursuit of the proceeds of the sale, but that she could maintain ejectment to recover the property.²³

21. *Matter of Sauer*, 89 Misc. 105,
151 N. Y. Supp. 465.

22. *Matter of Gall*, 5 Dem. 374.

23. *Smith v. Robertson*, 89 N. Y.
555.

A. The right of action and limitation thereof.**1. Decedent Estate Law, § 130. Action for causing death by negligence, etc.**

The executor or administrator duly appointed in this State, or in any other State, territory or district of the United States, or in any foreign country, of a decedent who has left him or her surviving a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent by reason thereof if death had not ensued. Such an action must be commenced within two years after the decedent's death. When the husband, wife or next of kin, do not participate in the estate of decedent, under a will appointing an executor, other than such husband, wife or next of kin, who refuses to bring such action, then such husband, wife or next of kin shall be entitled to have an administrator appointed for the purpose of prosecuting such action for their benefit.²⁴

2. History of statute.

At common law the right of action for an injury to the person abated on the death of the party injured, and where death resulted, whether instantaneously or not, from such injury, no action could be maintained by the personal repre-

24. Next of kin defined.—The term "next of kin," as used in the last three sections of this article, includes all those entitled under the provisions of law relating to the distribution of personal property, to share in the unbequeathed assets of a decedent, after payment of debts and expenses, other

than a surviving husband or wife, except if decedent leaves surviving a father and mother but no widow, child, or descendant, it shall mean both the father and the mother. Decedent Estate Law, § 134. It may include a grandchild. *Matter of Donovan*, 111 Misc. 533, 183 N. Y. Supp. 778.

ARTICLE III.**ACTION FOR CAUSING DEATH OF DECEDENT***

* This subject is treated in a work entitled "Death by Wrongful Act," by Francis B. Tiffany, which gives references to the statutes of the different States upon this subject and also authorities. The subject is necessarily treated in all works on negligence, including among others, *Shearman and Redfield on the Law of Negligence*. *Ray's Negligence of Imposed Duties*. *Buswell's Law of Personal Injuries*, *Black on Proof and Pleading in Accident Cases*, *Booth on Street Railways*, *Jones on Negligence of Municipal Corporations*, *Patterson's Railway Accident Law*, *Beach on Contributory Negligence*. *McKinney on Fellow Servants*, *Bailey's Master's Liabilities for Injuries to Servant*, *Thomas on Negligence*, giving rules, decisions and opinions, and *Leavitt on Negligence*, the latter having special reference to the law of negligence in this State.

sentatives to recover the damages suffered by the decedent.²⁵ In a civil court, the death of a human being could not be complained of as an injury. This condition existed until 1846, when what was known as "Lord Campbell's Act" was passed in England; and our statute, which was originally passed in 1847, was founded on the English act. Upon the enactment of the Code of Civil Procedure, the statute became sections 1902-1905 thereof, where it remained until the repeal of the Code of Civil Procedure, when it was placed in the Decedent Estate Law.

3. Statutory nature of action.

Section 130 of the Decedent Estate Law gives a cause of action that is new and distinct from the common-law action for damages on account of personal injuries based on negligence.²⁶ It is not merely a remedial statute, for it creates a new cause of action.²⁷ Up to the time of the death, the deceased person may have had an action against the defendant for the injuries he sustained, but that right of action expires upon his death; and by the statute a new right of action is afforded to his representatives.²⁸ The cause of action is purely statutory.²⁹ It is created by the statute and is original and not derivative. It is not a part of and has no relation to the estate of the decedent.³⁰ It is not founded upon the violation of any natural right known to the common law. It is a new cause of action which is wholly distinct from and not a reviver of the cause of action which, if he had survived, the decedent would have for his bodily

25. *Crowley v. Panama R. R. Co.*, 30 Barb. 99; *Mahler v. Norwich, etc., Co.*, 35 N. Y. 352; *McDonald v. Mallory*, 77 N. Y. 546; *Green v. Hudson*, 2 Keyes, 294; *Debevoise v. N. Y., L. E., etc., R. R. Co.*, 98 N. Y. 377.

26. *Matter of Snedeker v. Snedeker*, 164 N. Y. 58; *Kelleher v. New York Central, etc., R. Co.*, 212 N. Y. 207.

27. *Whitford v. Panama R. Co.*, 23 N. Y. 465.

Action relating to decedent's estate.—The action to recover damages for the benefit of the next of kin is not an action relating to decedent's estate un-

der sections 151 and 152 of the Decedent Estate Law. *Matter of Jansen's Estate*, 9 N. Y. 451.

28. *Whitford v. Panama R. Co.*, 23 N. Y. 465; *Weber v. Third Ave. R. Co.*, 12 App. Div. 512, 42 N. Y. Supp. 789.

29. *Matter of Brennan*, 160 App. Div. 401, 145 N. Y. Supp. 440; *Boffee v. Consolidated Teleg. & Elec. Subway Co.*, 171 App. Div. 392, 157 N. Y. Supp. 318; *Cunningham v. City of New York*, 141 N. Y. Supp. 1000.

30. *Hamilton v. Erie R. R. Co.*, 219 N. Y. 343.

injury. This cause of action is in the nature of a property right arising out of the interest which one has in the life of another upon whom one is or may be dependent or to whose services he is entitled.³¹ The action is given, not for the purpose of general administration, but for the exclusive use of specified beneficiaries.³²

4. Governed by what law.

The right of action and amount of damages are governed by the law in force at the time of death and not that of the time when the accident causing the death occurred, since it depends upon the death and is independent of the cause of action accruing to the injured person, which dies with him.³³ If, after the injury but before the death of the deceased, the Legislature changes the statute and makes a new distribution of the recovery, the statute in force at the time of the death governs the distribution.³⁴ It does not give a remedy for injuries received without the State and resulting in death.³⁵ The statute has no extraterritorial effect.³⁶ If the accident occurred in another jurisdiction, the right to recover damages depends upon the statute law of such jurisdiction.³⁷ But, if the death occurs on the high seas, on board a vessel hailing from and registered in a port within the State, and at the time employed by the owners in their own business, the statute of the State may apply.³⁸

5. Action in this state for injury in another state.

An action is maintainable in this State by the personal representatives of one whose death resulted from an injury received in another State, through the negligence of defend-

31. *Matter of Brennan*, 160 App. Div. 401, 145 N. Y. Supp. 440.

32. *Hegerich v. Keddle*, 99 N. Y. 268.

33. *Weber v. Third Ave. R. R. Co.*, 12 App. Div. 512, 42 N. Y. Supp. 789.

34. *Matter of Brennan*, 160 App. Div. 401, 145 N. Y. Supp. 440; *Matter of Marble*, 88 Misc. 339, 151 N. Y. Supp. 953.

35. *Marshall v. Sherman*, 148 N. Y. 25; *Whitford v. Panama R. R. Co.*, 23 N. Y. 465; *Crowley v. Panama R. R. Co.*, 30 Barb. 99; *Vanderwerken v.*

N. Y. & H. R. R. Co., 6 Abb. 239; *Mahler v. Norwich, etc., Co.*, 45 Barb. 226; *rev'd*, 35 N. Y. 352.

36. *Debevoise v. N. Y., L. E., etc., Co.*, 98 N. Y. 377.

37. *Frounfelker v. D., L. & W. R. Co.*, 73 App. Div. 350, 76 N. Y. Supp. 745; *Schwertfeger v. Scandinavian American Line*, 186 App. Div. 89, 174 N. Y. Supp. 147; *aff'd*, 226 N. Y. 696.

38. *McDonald v. Mallory*, 77 N. Y. 546.

ant, where it is alleged and it appears that the laws of that State are similar to the laws of this State giving to the personal representatives a right of action, but not otherwise. In such cases it is not essential that statutes should be precisely the same, but the existence of such a statute should be proved. The action may be maintained by an administrator appointed in this State.³⁹ The cause of action and right to maintain it depend upon the foreign law, but the procedure is according to our practice.⁴⁰ An action under the statute of a foreign State can be maintained in this State only by such parties as are designated by the statute giving the right of action. Hence, an action under the statute of Pennsylvania may be brought in this State in the name of the widow, she being the proper party under the statutes of that State.⁴¹

6. General construction of statute.

The act is liberally construed.⁴² It should be so construed as to give, rather than to withhold, the remedy intended to be provided.⁴³

7. Constitutional protection of cause of action.

It is provided by article I, section 18, of the State Constitution that, "The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation." This provision of the Constitution did not operate retrospectively, and hence did not affect causes of action which had accrued before it went into effect.⁴⁴ The section was not intended to change the law

39. *Leonard v. Columbia, etc., Co.*, 84 N. Y. 48; *Johnson v. Phoenix Bridge Co.*, 197 N. Y. 316; *Strauss v. N. Y., N. H. & Hartford R. R. Co.*, 91 App. Div. 583, 87 N. Y. Supp. 67; *Zeikus v. Florida East Coast Railway Co.*, 144 App. Div. 91, 128 N. Y. Supp. 933; *Loucks v. Standard Oil Co.*, 92 Misc. 475, 156 N. Y. Supp. 7; *rev'd*, 172 App. Div. 227, 159 N. Y. Supp. 282; *rev'd*, 224 N. Y. 99.

40. *Kiefer v. Grand Trunk Ry. Co.*,

12 App. Div. 28, 42 N. Y. Supp. 171; *aff'd* on opinion below, 153 N. Y. 688.

41. *Wooden v. Western New York, etc., R. R. Co.*, 35 St. Rep. 685, 12 N. Y. Supp. 908.

42. *Oldfield v. N. Y. C. & H. R. R. Co.*, 3 E. D. Smith, 103; *Beach v. Bay State, etc., Co.*, 30 Barb. 433.

43. *Lang v. Houston St. R. Co.*, 75 Hun, 151, 27 N. Y. Supp. 90; *aff'd*, 144 N. Y. 717.

44. *Isola v. Weber*, 147 N. Y. 329.

previously existing relative to such actions except that it authorized a recovery of pecuniary damages actually sustained in excess of the limit of \$5,000 which had previously existed. The provision was not intended to change the power of the Supreme Court to supervise and in proper cases to reduce verdicts.⁴⁵ The "right of action" referred to in the constitutional section is the right which is vested in the representative; and the Legislature is not precluded from changing the distribution of the recovery.⁴⁶

8. Effect of Workmen's Compensation Law.

The statutory provisions under consideration are not repealed by the Workmen's Compensation Law. They remain in force and are applicable to all cases not included within the scope of the Compensation Law.⁴⁷ Section 29 of the Workmen's Compensation Law, providing that "such a cause of action assigned to the State may be prosecuted or compromised by the Commission," does not operate to repeal by implication the provisions of section 130 in so far as the cause of action relates to claims to compensation under said law, especially where there is no conflict between the two statutes.⁴⁸ The Workmen's Compensation Law cannot be said to infringe section 18 of article I of the State Constitution because the Compensation Law is expressly authorized by section 19.⁴⁹ The remedy provided by the Workmen's Compensation Law is exclusive, and an administratrix representing only adult brothers and sisters of an intestate, who left no widow or next of kin entitled to compensation under that statute, cannot maintain an action under the Decedent Estate Law.⁵⁰ A complaint under the Decedent Estate Law which shows that the injury arose out of and in the course of the decedent's employment, but does not allege that the defendant failed to comply with such law, is defective.⁵¹

45. *Medinger v. Brooklyn Heights R. R. Co.*, 6 App. Div. 42, 39 N. Y. Supp. 613.

46. *Matter of Meng*, 227 N. Y. 264.

47. *Basso v. Clark & Son, Inc.*, 108 Misc. 78, 177 N. Y. Supp. 484; rev'd on other grounds, 189 App. Div. 944, 178 N. Y. Supp. 877.

48. *Travelers Ins. Co. v. Padula Co.*,

184 App. Div. 791, 170 N. Y. Supp. 869; rev'd, 224 N. Y. 397.

49. *Travelers Ins. Co. v. Padula*, 224 N. Y. 397.

50. *Shanahan v. Monarch Engineering Co.*, 219 N. Y. 469.

51. *Culhane v. Economical Garage*, 195 App. Div. 108, 186 N. Y. Supp. 454.

9. When action to be brought.

The action can be brought only by a personal representative of the decedent; an action brought before the appointment of a representative is premature, and the complaint will be dismissed.⁵² But the action must generally be brought within two years after the decedent's death.⁵³ The general provisions of the Civil Practice Act dealing with the limitation of actions apply to actions brought under section 130 of the Decedent Estate Law.⁵⁴ Thus section 23 of the Practice Act allowing the commencement of a new action within one year, although the Statute of Limitations on the original cause of action has expired, applies to this action, where the dismissal of the complaint at the close of plaintiff's evidence has been affirmed on appeal without granting a new trial.⁵⁵ But no action is maintainable under section 130 unless the decedent, at the time of his death, could have maintained an action. Accordingly, where the cause of action was barred by the Statute of Limitations at the date of the decedent's death, no action can be maintained by his representative.⁵⁶

52. *Boffee v. Consolidated Telegraph & Electrical Subway Co.*, 171 App. Div. 392, 157 N. Y. Supp. 318; *aff'd*, 226 N. Y. 654.

Filing petition on same day.—An action to recover damages for death caused by negligence cannot be brought before the plaintiff has been granted letters of administration even though she filed a petition for letters on the day the action was brought. Moreover, the Surrogate, on subsequently granting letters, has no power to grant them *nunc pro tunc* as of the date of the petition therefor, and such order is insufficient to support an action for death caused by negligence. *Smith v. New York Central R. R. Co.*, 183 App. Div. 478, 171 N. Y. Supp. 64.

53. *Bonnell v. Jewett*, 24 Hun, 524; *Londrigan v. N. Y. & H. R. R. Co.*, 5 Civ. Pro. 76.

Action on bond.—Although a contractor engaged in blasting has given a bond as security against loss or dam-

age to persons or property resulting from explosives, the administrator of a person who was killed by a blast cannot recover against the surety, where the action was not commenced within two years after the death as required by section 130. A recovery for such death after the expiration of two years cannot be justified on the theory that the action is against the surety on a sealed instrument as to which the twenty years statute of limitations applies. *Fallert v. Massachusetts Bonding & Insurance Co.*, 172 App. Div. 690, 158 N. Y. Supp. 658; *aff'd*, 225 N. Y. 647.

54. *Boffe v. Consolidated Telegraph & Electrical Subway Co.*, 171 App. Div. 392, 157 N. Y. Supp. 318; *aff'd*, 226 N. Y. 654.

55. *Hoffman v. Delaware & Hudson Co.*, 163 App. Div. 50, 148 N. Y. Supp. 509.

56. *Kelleher v. New York Central, etc., R. Co.*, 212 N. Y. 207.

10. Wrongful act of defendant.

The action is maintainable on proof of the "wrongful act, neglect or default" of the defendant. As a practical proposition it is generally maintained on an allegation of negligence.⁵⁷ It is not material that the act causing death was not intentional.⁵⁸ But the action lies where the injury was inflicted intentionally.⁵⁹ Where the act which caused the death is not shown to be the act of the defendant there can be no recovery.⁶⁰

No action lies by a mother for the recovery of damages sustained by her by reason of her dead child's character being maligned.⁶¹ No action lies by a tenant to recover damages for the death of a child alleged to have been caused by reason of the landlord's breach of contract to heat the premises. Such action is unknown to the common law, and is not within the statute.⁶²

The burden of proof is, of course, upon the plaintiff to prove the material facts alleged in the complaint. The negligence of the defendant must be affirmatively established.⁶³ A scintilla of evidence, or mere surmise that there may have been negligence on the part of the plaintiff, is not enough to send a case to the jury.⁶⁴ It is not necessary to give

57. *Massoth v. D. & H. C. Co.*, 64 N. Y. 524; *Milliman v. N. Y. C. R. R. Co.*, 66 N. Y. 642; *Sauter v. N. Y. C. R. R. Co.*, 66 N. Y. 50; *Salter v. Utica*, etc., R. R. Co., 88 N. Y. 42; *Van Norden v. Robinson*, 45 Hun, 567.

58. *Baker v. Bailey*, 16 Barb. 54.

59. *Kain v. Larkin*, 56 Hun, 79, 9 N. Y. Supp. 89, 29 St. Rep. 643.

60. *King v. City of Troy*, 21 Wkly. Dig. 558; *McDermott v. N. Y. C. & H. R. R. Co.*, 8 Wkly. Dig. 531.

Examination before trial.—In an action brought under this section, it was held that plaintiff was entitled to examine the officers of the defendant railroad company as to the identity of the train which killed the intestate, and whether such train was operated and controlled by the defendant or some other railroad corporation under a traffic or other contract; but it was held plaintiff was not entitled to ex-

amine the officers of the company for the purpose of ascertaining evidence contained in public statutes, ordinances, maps, and certificates filed in public offices and open to inspection. *Muldoon v. N. Y. C. & H. R. R. Co.*, 98 App. Div. 169, 91 N. Y. Supp. 65.

61. *Sorensen v. Balaban*, 11 App. Div. 164, 42 N. Y. Supp. 654.

62. *Dancy v. Walz*, 112 App. Div. 355, 98 N. Y. Supp. 407.

63. *Massoth v. D. & H. Canal Co.*, 6 Hun, 314; s. c., 64 N. Y. 524; *Cleveland v. N. J. S. Co.*, 68 N. Y. 306; *DeGraff v. N. Y. C. R. R. Co.*, 76 N. Y. 125; *Barringer v. N. Y. C. R. R. Co.*, 18 Hun, 398; *Painton v. Northern*, etc., R. R. Co., 83 N. Y. 7; *Derrenbasher v. Lehigh*, etc., Co., 87 N. Y. 636.

64. *Casey v. N. Y. C. R. R. Co.*, 25 Wkly. Dig. 568.

positive and direct proof of defendant's negligence; proof of circumstances from which it may be fairly inferred is sufficient.⁶⁵ The fact that a passenger vessel deviated from her voyage and was wrecked raises a presumption of negligence.⁶⁶

11. Absence of contributory negligence.

In an action based on the negligence of the defendant, the representative cannot recover if the deceased was guilty of negligence which contributed to his injury.⁶⁷ But under section 131 of the Decedent Estate Law, the contributory negligence of the deceased is defense to be pleaded and proved by the defendant. But negligence and contributory negligence are generally questions for the jury.⁶⁸

Where an action is brought by a husband, as administrator, to recover for the negligent killing of his wife, his contributory negligence is not a defense, even though he is the sole beneficiary.⁶⁹ Negligence of the sole next of kin which contributes to the injury, if not imputable to the decedent, is not a bar to the action.⁷⁰

The fact that the mother of a minor under sixteen years of age consented to his employment in a dangerous occupation, contrary to section 483 of the Penal Law, does not prevent her from maintaining an action as his administratrix to recover for his death caused by the negligence of the master who employed him, especially if there be other next of kin of the decedent.⁷¹

12. Death.

The statute applies, whether the death was instantaneous or where it was consequential. The action is equally main-

65. *Jones v. N. Y. C. R. R. Co.*, 62 How. Pr. 450; *Hart v. Hudson River Bridge Co.*, 80 N. Y. 622.

66. *Marckwald v. Oceanic, etc., Co.*, 11 Hun, 462.

67. *Belton v. Baxter*, 54 N. Y. 245; *Cosgrove v. N. Y. C. R. R. Co.*, 87 N. Y. 88; *Wendell v. N. Y. C. R. R. Co.*, 91 N. Y. 420; *Nugent v. Vander-veer*, 39 Hun, 322.

68. *Stackus v. N. Y. C. R. R. Co.*, 79 N. Y. 464; *Hart v. Hudson River*

Bridge Co., 80 N. Y. 622; *Payne v. Troy & B. R. R. Co.*, 83 N. Y. 572.

69. *McKay v. Syracuse Rapid Transit Railway Co.*, 208 N. Y. 359.

70. *Lewin v. Lehigh Valley R. R. Co.*, 52 App. Div. 69, 65 N. Y. Supp. 49; *aff'd*, 165 N. Y. 667; *Matter of Brennan*, 160 App. Div. 401, 145 N. Y. Supp. 440.

71. *Stenson v. Flick Construction Co.*, 146 App. Div. 66, 130 N. Y. Supp. 555; *appeal dismissed*, 203 N. Y. 553.

tainable in both cases.⁷² The fact that the death did not occur within a year and a day from the time of the act does not affect the case, for the rule as to death within a year and a day does not apply in civil actions.⁷³ But the burden is upon the representative to show that the wrongful act, neglect or default of which complaint is made, was the actual cause of the death of the decedent.⁷⁴ He must show that the defendant's negligence was the proximate cause of the death.⁷⁵

The plaintiff does not meet the burden of showing that death was caused by an injury consisting of a compound fracture of the decedent's leg, by the mere testimony of the ambulance surgeon as to his condition at the time of the accident nine days before his death, for he may have died from any number of intervening causes in no way connected with the accident.⁷⁶ A mistake of a competent medical attendant in treating a person, though the immediate cause of death, is not a defense to an action for negligence for an injury.⁷⁷

Where one who, through negligence, received injuries to the knee and thigh, not necessarily fatal, dies shortly afterward of delirium tremens, it is for the jury to say whether the death resulted from the defendant's negligence, where the evidence showed that, while delirium tremens can only occur when there is a previous alcoholic condition, a severe injury of the character suffered may precipitate delirium tremens in one who would not otherwise have been afflicted thereby.⁷⁸

13. Necessity that deceased could have maintained action had he survived.

The action lies under circumstances where the deceased could have maintained an action had he survived.⁷⁹ But, if

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| 72. <i>Brown v. Buffalo, etc., R. R. Co.</i> , 22 N. Y. 191. | Div. 135, 114 N. Y. Supp. 519. |
| 73. <i>Schlichting v. Wintgen</i> , 25 Hun, 626. | 76. <i>Moscarello v. Haines</i> , 130 App. Div. 135, 114 N. Y. Supp. 519. |
| 74. <i>Schoen v. Dry Dock, etc., R. R. Co.</i> , 31 St. Rep. 400, 9 N. Y. Supp. 709. | 77. <i>Sauter v. N. Y. C. R. R. Co.</i> , 66 N. Y. 50. |
| Injury causing insanity.— <i>Koch v. Fox</i> , 71 App. Div. 288, 75 N. Y. Supp. 913. | 78. <i>McCahill v. New York Transportation Co.</i> , 135 App. Div. 322, 120 N. Y. Supp. 1; aff'd, 201 N. Y. 221. |
| 75. <i>Moscarello v. Haines</i> , 130 App. | 79. <i>Keller v. N. Y. C. R. R. Co.</i> , 24 How. Pr. 172. |

the decedent could not have maintained an action for the injury, the representative cannot recover.⁸⁰ Thus, the action cannot be maintained on a basis of seduction, where the decedent could not have maintained the action, had she survived.⁸¹ Where one injured recovers therefor in his lifetime, his personal representatives cannot also maintain the action under the statute. It was not intended to impose a double liability.⁸² But the fact that the decedent had, before his death, brought an action for his injuries does not bar an action against another party by his administrator under section 130.⁸³

14. Necessity of dependents.

In passing the original act, the Legislature was doubtless influenced by the evident justice of compelling wrongdoers to compensate families dependent in a greater or less degree for support on the deceased. But the statute is not thus limited, and it is not required that the decedent should have been a husband, parent or protector.⁸⁴ The fact that children of a person killed are of full age and living away from home and supporting themselves will not alone prevent a recovery.⁸⁵ The fact that the beneficiaries are nonresident aliens does not bar the action.⁸⁶

15. Personal transaction with deceased.

Section 347 of the Civil Practice Act (formerly section 829 of the Code of Civil Procedure), excluding personal transactions with the deceased, forbids the defendant in this action from testifying to personal transactions or communications between himself and the decedent.⁸⁷

80. *Quin v. Moore*, 15 N. Y. 432; *Hodge v. Rutland R. R. Co.*, 112 App. Div. 142, 97 N. Y. Supp. 1107.

81. *Larocque v. Conheim*, 42 Misc. 613, 87 N. Y. Supp. 625.

82. *Littlewood v. Mayor*, 89 N. Y. 24.

83. *Casey v. Auburn Telephone Co.*, 131 N. Y. Supp. 1.

84. *Quin v. Moore*, 15 N. Y. 432.

85. *Lockwood v. N. Y., L. E. & W. R. R. Co.*, 98 N. Y. 523.

86. *Alfson v. Bush Co.*, 182 N. Y. 393; *Tanas v. Municipal Gas Co.*, 88 App. Div. 251, 84 N. Y. Supp. 1053; *Matter of Paola*, 36 Misc. 514, 73 N. Y. Supp. 1062.

87. *Abelein v. Porter*, 45 App. Div. 307, 61 N. Y. Supp. 144.

B. By and against whom maintained.**1. In general.**

The action is to be brought by an executor or administrator of the deceased.⁸⁸ The father may sue as administrator of his infant son.⁸⁹ Limited letters of administration may be granted under sections 89 and 122 of the Surrogate Court Act for the purpose of permitting an administrator to prosecute an action arising under this section.⁹⁰ Such letters do not restrict the person to whom they are granted to the prosecution of any particular person for causing the death of the intestate, though the petition undertakes to specify the person through whose negligence it happened, but the administrator may prosecute his action against any person liable.⁹¹

2. Ancillary executor or administrator.

An ancillary executor may sue to recover damages by reason of death from wrongful act.⁹² There is nothing in the statute from which it can be inferred that the right of action was only intended to be given in case the person killed was a citizen of or left property in the State of New York.⁹³ Under section 160 a husband, appointed administrator of his wife's estate in a foreign State, may, without obtaining ancillary letters, maintain the action in this State.⁹⁴

3. Defendants, in general.

Natural persons as well as corporations are liable under the statute.⁹⁵ In a proper case the action may be maintained against the State.⁹⁶ And a municipal corporation may be liable in such an action, although in such a case it will be

88. *Safford v. Drew*, 3 Duer, 627; *Lee v. Dill*, 39 Barb. 516; *Tilley v. H. R. R. Co.*, 24 N. Y. 471; *Matter of Snedeker v. Snedeker*, 47 App. Div. 471, 63 N. Y. Supp. 580; aff'd, 164 N. Y. 58.

89. *McMahon v. Mayor*, 33 N. Y. 642.

90. *Matter of Belotti*, 87 Misc. 81, 150 N. Y. Supp. 421.

91. *Matter of Halligan's Estate*, 50 Misc. 481, 100 N. Y. Supp. 622.

92. *Lang v. Houston*, West Street &

P. F. R. R. Co., 75 Hun, 151, 27 N. Y. Supp. 90; aff'd, 144 N. Y. 717.

93. *Lang v. Houston St. R. R. Co.*, 75 Hun, 151, 27 N. Y. Supp. 90; aff'd, 144 N. Y. 717.

94. *Provost v. International Giant Safety Coaster Co.*, 152 App. Div. 83, 136 N. Y. Supp. 654; aff'd on opinion below, 208 N. Y. 635.

95. *Baker v. Bailey*, 16 Barb. 54.

96. *Bowen v. State of New York*, 108 N. Y. 166.

found necessary to serve a notice of the claim upon the municipal authorities.⁹⁷

The receiver of an insolvent railroad company operating the road, in the absence of evidence that he assumed to act other than as such officer of the court, is not liable personally on an action for negligence causing the death of a passenger, where no personal negligence is imputed to him;⁹⁸ but where such receiver assumes the management of other property, over which the court has no control, he is responsible individually for its careful and proper management.⁹⁹

A charity patient in a hospital has precisely the same right of action for malpractice as one who pays for attendance; but it seems that a public charitable hospital is not liable for injuries sustained by an inmate from the actual negligence of a medical attendant if it is shown that the institution exercised due care in the selection.¹ An action against a hospital for breach of contract in failing and refusing to care for and protect an infant is maintainable.² But a charitable corporation is not liable for the death of an inmate, caused by falling from the window ledge, while he was engaged in cleaning a window under the direction of a servant of the corporation whose competency is not questioned.³

A complaint alleging a special contract by a hospital corporation to watch over the plaintiff's insane wife, and that the defendant made a breach of the contract by negligently failing to keep such watch, whereby the wife threw herself out of the window and was killed, constitutes an action *ex delicto* and not *ex contractu*, as the husband's action, if any, arises out of a domestic relation, and as the wrong resulted in death, the action does not survive under the common law and the complaint states no cause of action. Neither does such an action lie under section 130, which is the sole authority for a wrong causing death.⁴

97. *Barnes v. City of Brooklyn*, 22 App. Div. 520, 48 N. Y. Supp. 36.

98. *Cardot v. Barney*, 63 N. Y. 281.

99. *Kain v. Smith*, 80 N. Y. 458.

1. *Harris v. Woman's Hospital*, 27 Abb. N. C. 37, 14 N. Y. Supp. 881.

2. *Roche v. St. John's Riverside Hospital*, 96 Misc. 289, 160 N. Y. Supp. 401; *aff'd*, 176 App. Div. 885, 161 N.

Y. Supp. 1143.

3. *Cunningham v. Sheltering Arms*, 61 Misc. 501, 115 N. Y. Supp. 576; *aff'd*, 135 App. Div. 178, 119 N. Y. Supp. 1033.

4. *Duncan v. St. Luke's Hospital*, 113 App. Div. 68, 98 N. Y. Supp. 867; *aff'd*, 192 N. Y. 580.

C. Pleadings.

The complaint need not refer to the statute, but should state a time when the injury occurred, and state all the facts requisite to bring the case within the statute.⁵ It is not necessary that the complaint show that the action was commenced within two years after the death of the decedent.⁶

But, if the complaint show that the action was not begun in time, or if the summons by its date show that it was not issued within two years of the death, the plaintiff shows affirmatively that he has no cause of action.⁷

The complaint must allege that the intestate left him surviving some person or persons who would be entitled to the benefit of the recovery, if one should be had, and a complaint which does not contain an allegation that he left either a widow or next of kin is insufficient.⁸

It is not necessary to allege that damages have been sustained by plaintiff by reason of the negligence of the defendant or by reason of the death of the intestate, since the law supplies the necessary implication justifying the award of nominal damages.⁹ The complaint is amendable the same as complaints in other actions.¹⁰

It is not necessary that the complaint allege the absence of contributory negligence on the part of the decedent, as the statute places the burden of allegation and proof on such issue on the defendant.¹¹

The defendant need not allege in his answer that the death occurred in another State; the plaintiff must allege and prove that the death occurred within this State, or within a State having a similar statute in such case.¹² A defendant cannot plead his own previous ignorance as an excuse for his inability to perform a distinct and affirmative duty.¹³

5. *Brown v. Harmon*, 21 Barb. 508; *Brennan v. Lachat*, 6 St. Rep. 278.

6. *Sharro v. Inland Lines, Ltd.*, 214 N. Y. 107; *Agresta v. Federal Steam Navigation Co.*, 169 App. Div. 467, 155 N. Y. Supp. 343.

7. *Pernisi v. Schmalz' Sons, Incorporated*, 142 App. Div. 53, 126 N. Y. Supp. 880.

8. *Pizzi v. Reid*, 36 Misc. 123, 72 N. Y. Supp. 1053; *rev'd*, 72 App. Div. 162, 76 N. Y. Supp. 306; *Kenney v.*

N. Y. C. R. R. Co., 15 Civ. Proc. 347.

9. *Kenney v. New York Central & Hudson R. R. Co.*, 49 Hun, 535, 2 N. Y. Supp. 512.

10. *King v. Mail & Express Co.*, 113 App. Div. 90, 98 N. Y. Supp. 891.

11. Decedent Estate Law, § 131.

12. *Debevoise v. N. Y. & L. E. R. R. Co.*, 98 N. Y. 377.

13. *Bills v. N. Y. C. R. R. Co.*, 84 N. Y. 5.

A foreign corporation sued here may plead the Statute of Limitations.¹⁴ Where the defendant answers by setting up a release, the plaintiff claiming the release to have been procured by fraud should so allege by way of reply.¹⁵

D. Release or compromise of cause of action.

Inasmuch as this action is wholly statutory, the right of action cannot be barred by release from or payment to a person who does not at the time have authority to bring an action, or in a legal sense represent the cause of action. A compromise of such claim made by a person having no present interest is not a bar to an action by the same person, brought in his representative capacity after he has been appointed administrator.¹⁶ If a surviving husband or wife or one of the next of kin assumes to receive a sum of money in settlement of the claim before letters of administration are issued, the action is not thereby released.¹⁷ And, if the action is compromised by the widow of the decedent, suing as administratrix and thereafter a posthumous child is born, the compromise may be set aside upon the petition of the child through a guardian *ad litem*.¹⁸

The right of next of kin to sue for fraud of defendant in procuring a release from the plaintiff of a cause of action for the death of plaintiff's son resulting from defendant's negligence is unaffected by sections 130-134.¹⁹

The Imperial Russian consul-general is not authorized by either international law or by treaty with Russia to settle and release a cause of action accruing to beneficiaries thereof.²⁰

14. *Londrighen v. N. H. R. R. Co.*, 12 Abb. N. C. 273. N. Y. 668.

15. *Ishie v. Norton Co.*, 183 App. Div. 94, 170 N. Y. Supp. 655.

16. *Stuber v. McEntee*, 142 N. Y. 200, 58 St. Rep. 455, 31 Abb. N. C. 246.

Next of kin.—Release of cause of action by sole next of kin of decedent after assigning his interest to the administratrix. See *Bruck v. New York Central & H. R. R. Co.*, 165 App. Div. 621, 151 N. Y. Supp. 236; rev'd, 219

Stuber v. McEntee, 142 N. Y. 200; *Matter of Snedeker v. Snedeker*, 47 App. Div. 471, 63 N. Y. Supp. 580; aff'd, 164 N. Y. 58.

18. *Matter of Anderson*, 84 App. Div. 550, 82 N. Y. Supp. 763.

19. *Rice v. Postal Telegraph-Cable Co.*, 174 App. Div. 39, 160 N. Y. Supp. 172; aff'd, 219 N. Y. 629, 114 N. E. 1081.

20. *Hamilton v. Erie R. R. Co.*, 219 N. Y. 343.

Where an express messenger was killed while on defendant's train, the express company and the defendant having a contract releasing the railroad company from liability for any damage done to the agents of the express company, whether in their employ as messengers or otherwise, it was held that, in the absence of evidence of an agreement on the part of the deceased or of knowledge on his part of this agreement by his employer, the express company could not waive the right of the intestate to protection against negligent wrong at the hands of the defendant, or discharge the defendant from cause of action which belonged only to the intestate or his personal representative.²¹

E. Joinder of actions.

A person cannot sue as administrator of two decedents in one action to recover damages for causing their deaths.²²

F. Abatement and revival.

The cause of action does not survive against the representatives of the wrong-doer, the action being for negligence of their decedent.²³

An action brought by the sole administrator and next of kin of a decedent for negligently causing the death of his intestate survives the death of such sole administrator and next of kin, and his personal representative may be substituted as plaintiff therein, since the right of action given by that section is to recover damages for wrongs done to the property, rights or interests of the beneficiaries thereof and not for injuries to the person of the decedent, and, therefore, is a property right which is not affected by the beneficiary's death but becomes a part of his estate.²⁴

The personal representatives of the deceased administrator are not entitled to continue an action commenced by such administrator to recover damages for the death of his intestate, although such deceased administrator was one of the persons who would be entitled to any recovery had

21. *Kenney v. N. Y. C. & H. R. R. Co.*, 54 Hun, 143, 7 N. Y. Supp. 255; *aff'd*, 125 N. Y. 422.

22. *Danaher v. City of Brooklyn*, 4 Civ. Proc. 286.

23. *Hegerich v. Keddle*, 99 N. Y. 258; *Clough v. Gardiner*, 111 Misc. 244, 182 N. Y. Supp. 803.

24. *Matter of Meekin v. B. H. R. R. Co.*, 164 N. Y. 145.

in the action. The proper practice in such case is to have a successor of the deceased administrator appointed, and to continue the action in the name of such successor.²⁵

Where the sole next of kin consisted of the father and mother and the father died before the action came to trial, it was held that the death of the father did not terminate the right to maintain the action, but that the measure of recovery therein was limited to such damages as the father had suffered down to the time of his death.²⁶

The cause of action does not abate against a corporation upon its dissolution, but may be continued by an order of the court against the receiver of the corporation.²⁷

G. Security for costs.

In an action by an administratrix to recover damages resulting from the death of her intestate, an affidavit of the defendant's attorney alleging that from a statement of the case made to him by the defendant he believes that the defendant has a good and substantial defence upon the merits, does not justify the court, in exercising the discretionary power conferred upon it by section 1523 of the Civil Practice Act, by requiring the plaintiff to give security for the costs, especially where it appears that the plaintiff is the real party in interest and is a very poor person, and that the cause of action is the principal asset of the intestate's estate.²⁸

H. Measure and amount of damages.

1. Decedent Estate Law, § 132. Amount of recovery.

The damages awarded to the plaintiff may be such a sum as the jury upon a writ of inquiry, or upon a trial, or, where issues of fact are tried without a jury, the court or the referee, deems to be a fair and just compensation for the pecuniary injuries, resulting from the decedent's death, to the person or persons, for whose benefit the action is brought. If the decedent leaves surviving a father and a mother, the death of such father prior to the verdict shall not affect the amount of damages recoverable. When final judgment for the plaintiff is rendered, the clerk must add to

25. *Hodges v. Webber*, 65 App. Div. 170, 72 N. Y. Supp. 508.

26. *Pitkin v. N. Y. C. & H. R. R. Co.*, 94 App. Div. 31, 87 N. Y. Supp. 906.

27. *People v. Troy Steel & Iron Co.*,

24 Civ. Pro. 201, 63 St. Rep. 787, 82 Hun, 303, 31 N. Y. Supp. 337.

28. *McNeil v. Merriam*, 57 App. Div. 164, 68 N. Y. Supp. 165, followed, *Davidson v. Bose*, 57 App. Div. 212, 68 N. Y. Supp. 316.

the sum so awarded, interest thereupon from the decedent's death, and include it in the judgment. The inquisition, verdict, report or decision, may specify the day from which interest is to be computed; if it omits so to do, the day may be determined by the clerk, upon affidavits.

2. Measure of damages in general.

The measure of damages in this action is the pecuniary loss sustained by the surviving husband or wife or the next of kin.²⁹ The question to be decided by the jury in determining the amount of damages is, what was the reasonable expectation of pecuniary benefit to the next of kin, by inheritance or otherwise, from the continuance in life of the deceased, worth in money.³⁰ What is a just and fair compensation for the pecuniary injury in a given case under this statute can be determined by no rule. Each case presents a different state of facts either in character, capacity or condition of the deceased, or in the age, sex, circumstances and condition of the next of kin, all of which elements are to be considered as the basis for an allowance for damages.³¹ The jury cannot give vindictive damages,³² or damages to compensate the surviving relatives for mental anguish or grief,³³ or damages for suffering of the deceased prior to his death.³⁴ Nor can the jury consider the advantages which result to the next of kin.³⁵ The funeral expenses of the deceased are a proper item of damages.³⁶ As the action is expressly authorized by statute, the plaintiff is entitled to recover at least nominal damages, though he proves no pecuniary loss.³⁷ The jury are required to

29. *Smith v. Lehigh Valley R. R. Co.*, 177 N. Y. 379; *Seiurba v. Metropolitan St. R. Co.*, 73 App. Div. 170, 76 N. Y. Supp. 772; *De Luna v. Union Railway Co. of New York City*, 130 App. Div. 386, 114 N. Y. Supp. 893; *Lehman v. City of Brooklyn*, 29 Barb. 234; *Thomas v. Utica, etc.*, R. R. Co., 6 Civ. Proc. 353.

30. *Thomas v. Utica, etc.*, R. R. Co., 6 Civ. Proc. 353.

31. *Klemm v. N. Y. C. & H. R. R. Co.*, 78 Hun, 277, 28 N. Y. Supp. 861.

32. *Lehman v. City of Brooklyn*, 29 Barb. 234.

33. *Smith v. Lehigh Valley R. R. Co.*, 177 N. Y. 379; *Dorman v. Broad-*

way Co., 1 N. Y. Supp. 334.

34. *Dorman v. Broadway Co.*, 1 N. Y. Supp. 334.

35. *Terry v. Jewett*, 17 Hun, 395; *aff'd*, 78 N. Y. 338.

36. *Murphy v. N. Y. C. R. R. Co.*, 88 N. Y. 445.

37. *Quin v. Moore*, 15 N. Y. 432; *Thomas v. Utica, etc.*, R. R. Co., 6 Civ. Proc. 353.

The absence of proof of special pecuniary damages will not justify the court in nonsuiting the plaintiff, or in directing the jury to find nominal damages. *Ryall v. Kennedy*, 40 Super. Ct. 347; *aff'd*, 67 N. Y. 379.

judge as to amount of damages, not merely to guess, and such basis for their judgment as the facts naturally capable of proof can give is required. The age, sex, the general health and intelligence of the person killed, the situation and condition of the survivors and their relation to the deceased, should all be given and considered.³⁸ The damages do not, necessarily, depend on the pecuniary condition of the next of kin of the deceased, nor on the legal duty or obligation of the deceased if he had lived. The damages are not confined to present loss or injury, but may include such as the jury may, upon the evidence, believe and find, in the future result from the death as the proximate cause of it. The prospective injuries may be in the loss of aid, care and attention, whether by services or money, or either, and by advice, direction and protection.³⁹

3. Damages for death of adult.

In an action for the death of a parent or husband or wife, the jury may consider such damages as arise from the loss of personal care, intellectual culture and moral training which would have been received from the deceased,⁴⁰ and such loss is a proper ground for substantial damages.⁴¹ The jury may consider the value of his support to his wife and children during his probable life.⁴² The fact that the children of the deceased are of full age and supporting themselves away from home does not necessarily deprive them of damages.⁴³ The right to maintain the action does not depend upon the right of support, and the fact that the only person dependent on deceased was one he was not bound to support is not material.⁴⁴ The pecuniary injury sustained by a husband from the loss of his wife, who was his housekeeper, consists of the loss of his wife's services, the expense incident to and running from the injury and the loss of his wife's society.⁴⁵ A widow is entitled to recover substantial

38. *Houghkirk v. D. & H. R. R. Co.*, 92 N. Y. 219.

39. *Carpenter v. Buffalo, etc., R. R. Co.*, 38 Hun, 116.

40. *McIntyre v. N. Y. C. R. R. Co.*, 37 N. Y. 287.

41. *Tilley v. H. R. R. Co.*, 24 N. Y. 471; *Tilley v. H. R. R. Co.*, 29 N. Y. 252.

42. *Althorf v. Wolf*, 2 Hilt. 344; *aff'd*, 22 N. Y. 355.

43. *Lockwood v. N. Y., L. E. & W. R. R. Co.*, 98 N. Y. 523.

44. *Palmer v. N. Y. C. R. R. Co.*, 5 St. Rep. 436.

45. *Klemm v. N. Y. C. & H. R. R. Co.*, 78 Hun, 277, 28 N. Y. Supp. 861.

damages, although she was married to her husband after the accident resulting in his death.⁴⁶

4. Damages for death of child.

In an action to recover the damages sustained by a parent on account of the loss of a minor child, the plaintiff is entitled to recover at least nominal damages.⁴⁷ But he is not necessarily limited to nominal damages, though he proves no definite pecuniary loss.⁴⁸ The basis of damage is the supposed pecuniary value to the parents of the life of the infant.⁴⁹ The recovery should include damages for the loss of the child's services,⁵⁰ and, in some cases, also the prospective loss of assistance.⁵¹ He may also recover expenses for nursing, medical attendance, funeral expenses, etc.⁵² It may be shown that the parent had no means of his own and that the deceased son contributed to his support.⁵³ The jury is not bound to confine their consideration to the minority of the child, but may take into consideration all of the probable or even possible benefits which might result to the parent from its life, modified as in their estimation it would be by all the chances of failure or misfortune.⁵⁴

46. *Radley v. Leray Paper Co.*, 214 N. Y. 32.

47. *Quin v. Moore*, 15 N. Y. 432.

Setting aside verdict for nominal damages.—There is no presumption of pecuniary loss to the next of kin so as to justify the setting aside of a verdict for nominal damages as inadequate. *Silberstein v. William Wicke*, 29 Abb. N. Cas. 291, 22 N. Y. Supp. 170.

48. *Oldfield v. N. Y. & H. R. R. Co.*, 3 E. D. Smith, 103; *aff'd*, 14 N. Y. 310; *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504; *Gorham v. N. Y. C. R. R. Co.*, 23 Hun, 449; *Pendergrast v. N. Y. C. R. R. Co.*, 58 N. Y. 652. See *Mitchell v. N. Y. C. R. R. Co.*, 2 Hun, 535; *aff'd* on another point, 64 N. Y. 655.

49. *Etherington v. Railroad Company*, 88 N. Y. 641; *Houghkirk v. Railroad Company*, 92 N. Y. 219; *Butler v. Manhattan Ry. Co.*, 143 N. Y. 417; *Kellogg v. Albany, etc., Power Co.*, 72 App. Div. 321, 73 N. Y. Supp. 85.

50. *McGovern v. N. Y. C. R. R. Co.*, 67 N. Y. 417; *Stuebing v. Marshall*, 2 Civ. Proc. 77.

In a common-law action by the father of an infant who has been negligently killed to recover from the person whose negligence caused the infant's death, damages for the loss of the latter's services is limited to the interval between the injury to the infant and his death. Consequently where the death of the infant was instantaneous the father is not entitled to recover damages for loss of services. *Ohnmacht v. Mount Morris El. Light Co.*, 66 App. Div. 482, 73 N. Y. Supp. 296.

51. *Gill v. Rochester R. Co.*, 37 Hun, 107.

52. *Stuebing v. Marshall*, 2 Civ. Proc. 77.

53. *Waldele v. N. Y. C. R. R. Co.*, 29 Hun, 35.

54. *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504.

In an action for the death of a son seventeen years of age, it is error to leave it to the jury to consider the benefit likely to result to the parents from his advice and counsel, in the absence of evidence which might serve the jury on that point, other than that he was living with his father and assisting him.⁵⁵

5. Amount of damages.

The question what damages, if any, aside from actual disbursements, are recoverable in the action, as they are not capable of exact proof, being remote, uncertain and not recognized by the common law, is a question for the jury to determine in the exercise of a reasonable discretion in view of the situation as proved.⁵⁶ The amount of damages upon such proof as can be made is for the determination of the jury, subject to be reviewed and modified, if the discretion is abused, in the court of original jurisdiction, but not in the Court of Appeals.⁵⁷ If any pecuniary loss or injury be shown, the jury are at liberty to give such damages as they shall deem a fair and just compensation therefor within the statutory limitation.⁵⁸ In the absence of all proof of earning capacity or of any probability of the decedent's life being of pecuniary value, the jury is not required, as a matter of law, to award substantial damage.⁵⁹

The judgment of the jury will not ordinarily be disturbed, unless it is shown to have been affected by improper influences.⁶⁰ But, if the verdict is plainly excessive, the courts will not permit it to stand.⁶¹ Verdicts for \$1,300 for the death of a child seven years old,⁶² \$1,800 for the death of a boy three and a half years old,⁶³ \$3,500 for the death of

55. *Gill v. Rochester, etc.*, R. R. Co., 37 Hun, 107.

56. *Countryman v. Fonda, J. & G.* R. R. Co., 166 N. Y. 202; *Fitzgerald v. N. Y. C. & H. R. R. Co.*, 88 Hun, 359, 34 N. Y. Supp. 824; rev'd, 154 N. Y. 263.

57. *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504.

58. *Cornwall v. Mills*, 44 Super. Ct. 45; *Etherington v. Prospect Park, etc.*, R. R. Co., 88 N. Y. 641.

59. *Sciurba v. Metropolitan Street*

R. Co., 73 App. Div. 170, 76 N. Y. Supp. 772.

60. *Kane v. Mitchell Transp. Co.*, 90 Hun, 65, 35 N. Y. Supp. 581, 70 St. Rep. 203; aff'd, 153 N. Y. 680.

61. *Morton v. Smith Hoisting Co.*, 152 App. Div. 738, 137 N. Y. Supp. 829.

62. *Oldfield v. N. Y. & H. R. R. Co.*, 14 N. Y. 310.

63. *Fitzgerald v. National S. S. Co.*, 1 Wkly. Dig. 225.

girl fourteen years of age,⁶⁴ \$5,000 for a son's death, in favor of a helpless mother, who was largely dependent on her son's earnings for her support,⁶⁵ are illustrations of verdicts which the courts have sustained. Where testator was at the time of his death a Supreme Court justice, with six years to serve at an annual salary of \$17,500, and having an expectancy of life of fourteen years, and being survived by a widow and two grandchildren, a verdict of \$70,000 was not excessive.⁶⁶ But a verdict of \$3,000 for the death of a woman of fifty-eight years who, being housekeeper for her family, leaves surviving a husband and three sons from twenty-four to thirty years of age, is excessive.⁶⁷ A verdict of \$49,000 for the death of a laborer and mechanic was excessive, although he was the sole support of a wife and family.⁶⁸

Where it appeared that the deceased was thirty-seven years of age; that he left a wife and four children, all of the children being under five years of age at the time of his death; that one of them had died since the trial, there was no definite evidence as to the amount deceased earned, or whether he had been able to save anything, and his wife testified that she had received from \$20 to \$25 a week from the deceased for support of herself and her children, it was held that a verdict for \$22,000 should be reduced to \$15,000 on the ground that it was excessive.⁶⁹

Where the decedent, a seamstress earning only nine dollars a week and having no estate, left surviving only an elder brother and a married sister to whose support she had never contributed, a verdict for the amount of the funeral expenses, paid by said next of kin, should not be set aside as inadequate.⁷⁰

64. *Pineo v. N. Y. C. R. R. Co.*, 34 Hun, 80; *aff'd*, 99 N. Y. 644.

65. *Erwin v. Neversink, etc., Co.*, 23 Hun, 573; *aff'd*, 88 N. Y. 184.

66. *Meng v. Emigrant Industrial Savings Bank*, 169 App. Div. 27, 154 N. Y. Supp. 509.

67. *Long v. Union Railway Co. of New York City*, 122 App. Div. 564, 107 N. Y. Supp. 401.

68. *Smith v. New York Central R. R. Co.*, 183 App. Div. 478, 171 N. Y. Supp. 64.

69. *Coolidge v. City of New York*, 99 App. Div. 175, 90 N. Y. Supp. 1078; *aff'd*, 185 N. Y. 529.

70. *De Luna v. Union Railway Co. of New York City*, 130 App. Div. 386, 114 N. Y. Supp. 893.

6. Interest on verdict.

Under section 132, when final judgment for the plaintiff is awarded, the clerk must add to the sum so awarded interest thereupon from the decedent's death, and include it in the judgment. A verdict for damages for negligent killing bears interest from the time of the death to the date of the verdict, at the rate provided by the statute when the verdict was rendered.⁷¹ The jury have nothing to do with the question of interest for that is to be added in the entry of judgment.⁷² The plaintiff in an action for death, brought under the Federal Employers' Liability Act, is not entitled to tax interest on a verdict.⁷³ And where an action to recover damages resulting from the death of the plaintiff's husband is brought in the State of New York under a statute of the State of Pennsylvania, and upon the trial of the action it appears that the Pennsylvania statute does not contain any express provision relating to interest upon the verdict, and that in that State it is discretionary with the jury whether or not to include interest in their verdicts, the clerk of the court has no power to add interest to the amount of the verdict and include it in the judgment.⁷⁴

I. Evidence as to damages.

1. Income and business of deceased.

The evidence of the earning capacity of the intestate and the extent to which he contributed to the support of his family is competent upon the extent of the damages, where it is shown that the income is derived by his own labor without the investment of capital in any proper sense, although he had the assistance of a few other men, which fact did not materially increase his earning capacity.⁷⁵

71. *Salter v. Utica, etc., R. R. Co.*, 86 N. Y. 401.

72. *Manning v. Port Henry Iron Ore Co.*, 91 N. Y. 664.

73. *Norton v. Erie Railroad Co.*, 163 App. Div. 468, 148 N. Y. Supp. 771.

74. *Frounfelker v. D., L. & W. R. R. Co.*, 73 App. Div. 350; 76 N. Y. Supp. 745.

75. *Seifter v. Brooklyn Heights R. R. Co.*, 55 App. Div. 10, 66 N. Y.

Supp. 1007; rev'd upon other grounds, 169 N. Y. 254.

Prospective increase in earnings.—

In an action to recover damages for the negligent killing of the plaintiff's intestate, it is error to permit a member of the firm by which the intestate was employed at the time of his death to state that there was a reasonable expectation that the intestate's salary would, if he had lived, have been in-

While, in an action brought to recover damages resulting from the death of the plaintiff's intestate, the amount of the salary or earnings of the intestate and the probable duration of his life are competent evidence to enable the jury to estimate the probable loss resulting to the widow or next of kin of the decedent from his death, evidence of the amount which it will cost to purchase an annuity equal to the amount of the decedent's income, based upon the probable duration of his life had he not been killed, is incompetent, as the jury would not be justified in using such sum as a basis in determining the amount of their verdict.⁷⁶

Proof of uncertain and fluctuating profits are excluded, but where the decedent was engaged in a business where personal earnings predominated, the widow may testify as to how much she customarily received from him weekly.⁷⁷

2. Habits of deceased.

In an action for death by negligence, though the general character of the deceased for kindness and affection toward his relatives may be shown, yet evidence of specific acts is not admissible.⁷⁸ Evidence tending to show the expensiveness of the manner or habit of the testator's family life is proper as bearing upon the question of damages.⁷⁹ And

creased from time to time to a certain figure, where it appears that this expectation was based upon the hypothesis that the business of the firm would continue to be prosperous, and that its prosperity was dependent upon conditions of peace or war prevailing in a South American republic in which the firm did business. Such a witness should only be permitted to state the nature of the business, the character of the services which the intestate rendered, the amount which was paid for such services, the conditions of the business, and the usual rate paid employees, considering the length of their employment, their skill and faithfulness. From these facts it is for the jury to determine what would be, within reasonable prospect, the earn-

ing power of the decedent. In such an action the jury is not permitted to capitalize the earning power of the decedent, and award the plaintiff a sum of money which, at the rate of interest earned by trust funds, would produce the equivalent of such earning power. *Fajardo v. N. Y. Central & H. R. R. Co.*, 84 App. Div. 354, 82 N. Y. Supp. 912.

^{76.} *Hinsdale v. New York, N. H. & H. R. R. Co.*, 81 App. Div. 617, 81 N. Y. Supp. 356.

^{77.} *Spreen v. Erie R. R. Co.*, 219 N. Y. 533.

^{78.} *Quinn v. Power*, 29 Hun, 183.

^{79.} *Meng v. Emigrant Industrial Savings Bank*, 169 App. Div. 27, 154 N. Y. Supp. 509.

the intemperate habits of deceased may be shown in mitigation of damages.⁸⁰

The personal appearance of the plaintiff's intestate is not an element to be considered by the jury to determine the loss resulting from her death. Thus, the reception in evidence of her photograph, the only effect of which could be to awaken the sympathies of the jury and tend to influence their judgment in the direction of a greater award of damages, constitutes reversible error.⁸¹

3. Family relations.

When an injured person survives an accident and brings suit to recover for his personal injuries, evidence that he has a wife and children is inadmissible as a general rule. But when an action is brought by the personal representative of a decedent to recover damages for causing his death by negligence, evidence that he had a wife and children is competent, because the measure of damages is "just compensation for the pecuniary injuries resulting" to the wife and next of kin.⁸² Mere proof of the existence of grandchildren as bearing on the question of damages is not harmful error.⁸³ But evidence of the remarriage of the surviving spouse is not admissible in mitigation of the damages.⁸⁴ And the reception of evidence tending to show the misfortunes or the poverty of the brothers and sisters and nephews and nieces of the deceased, thus calling attention to the great opportunities the plaintiff had for making a charitable use of any surplus moneys he might have after satisfying his own personal necessities, is reversible error, as such improper evidence is calculated to awaken the sympathy of the jury and thus increase the verdict beyond the amount which otherwise would have been rendered.⁸⁵

4. Expectancy of deceased.

Mortality tables are a proper standard by which to compute the expectancy of life of one for whose death recovery is

80. *Devoe v. Van Vranken*, 29 Hun, 201.

81. *Smith v. Lehigh Valley R. R. Co.*, 177 N. Y. 379.

82. *Simpson v. Foundation Co.*, 201 N. Y. 479.

83. *Meng v. Emigrant Industrial*

Savings Bank, 169 App. Div. 27, 154 N. Y. Supp. 509.

84. *Less v. New York City R. Co.*, 109 Misc. 608, 180 N. Y. Supp. 546.

85. *Lipp v. Otis Brothers & Co.*, 161 N. Y. 559.

sought, and the court will take judicial knowledge of such tables without their being offered in evidence, as they form part of the rules of the court.⁸⁶ The plaintiff should not be permitted to prove, upon the question of damages, the cost of procuring an annuity for the amount of the deceased's annual earnings payable for the length of time which, according to the life tables, the deceased would have lived had he not been killed through the defendant's negligence.⁸⁷ Evidence of the age at which the intestate's father died is not admissible upon the subject of the probable duration of the life of the intestate.⁸⁸

5. Insurance.

Evidence that plaintiff was insured and the insurance had been paid is incompetent on the part of defendant.⁸⁹ Evidence that the defendant in an action for negligence was insured in a casualty company, or that the defense was conducted by an insurance company, is incompetent and so dangerous as to require a reversal, even when the court strikes it from the record and directs the jury to disregard it, unless it clearly appears that it could not have influenced the verdict. Where answers were given which it was claimed were unexpected, and which brought out evidence in violation of this rule, it was the duty of the examining counsel to move to strike out the evidence and to ask the court to instruct the jury to disregard it.⁹⁰

J. Distribution of recovery.

1. Decedent Estate Law, § 133. Distribution of damages recovered.

The damages recovered in an action, as prescribed in this article, or obtained through settlement without action, are exclusively for the benefit of the decedent's husband or wife, and next of kin; and, when they are collected, they must be distributed by the plaintiff, or representative, as if they were unbequeathed assets, left in his hands, after payment of all debts, and expenses of administration; subject, however, to the following provisions, to wit:

86. *Davis v. Standish*, 26 Hun, 608.

87. *Mix v. Hamburg-American Steamship Co.*, 85 App. Div. 475, 83 N. Y. Supp. 322.

88. *Hinsdale v. New York Central, etc., R. Co.*, 81 App. Div. 617, 81 N. Y. Supp. 356.

89. *Carpenter v. Eastern, etc., Co.*, 71 N. Y. 574; *Kellogg v. N. Y. C. R. R. Co.*, 79 N. Y. 72; *Althorf v. Wolf*, 22 N. Y. 355.

90. *Simpson v. Foundation Co.*, 201 N. Y. 479.

1. In case the decedent shall have left him surviving a wife or a husband, but no children, the damages recovered shall be for the sole benefit of such wife or husband.

2. In case the decedent leaves neither husband, wife, nor issue, but leaves a mother, and a father who has abandoned him, or who has left the maintenance and support of their child to the mother, the damages or recovery shall be for the sole benefit of such mother.

3. In case the decedent leaves no husband or wife, issue or father, or having left a father entitled to recovery, who dies prior to the recovery or verdict, the damages or recovery shall be for the sole benefit of the mother if then living.

The reasonable expenses of the action, or settlement, the reasonable funeral expenses of the decedent, and the commissions of the plaintiff or representative, upon the residue may be fixed by the surrogate, upon notice, given in such a manner and to such persons, as the surrogate deems proper or upon the judicial settlement of the account of the plaintiff, or representative, and may be deducted from the recovery.

2. Nature of recovery.

The cause of action is no part of the assets of the decedent's estate; it is not subject to the payment of his debts or to the ordinary rules subject to the settlement or administration of the estates of deceased persons.⁹¹ An accounting by an executor of a fund recovered in the action is not an accounting in respect of the estate of plaintiff's testator, but an accounting *sui generis* regulated by particular statutory rules. Upon such an accounting the executor is entitled to deduct from the fund only the reasonable expenses of the action.⁹²

The damages are allowed, not for an injury to the decedent's estate, but for an injury, through the loss of him, to the estate of the beneficiaries. The executor or administrator of the decedent is a mere nominal party, without any interest in the damages, holding them, when recovered, in the capacity of a trustee or agent for the beneficiaries. While the statute declares that the damages recovered are exclusively for the benefit of the decedent's husband or wife, and next of kin, the denomination "next of kin" in connection with the preceding designation is merely a convenient means of designating, comprehensively and definitely, the distributees of the damages recovered.

91. *Stuber v. McEntee*, 142 N. Y. Misc. 318, 101 N. Y. Supp. 275.
200, 58 St. Rep. 455, 31 Abb. N. C. 92. *Matter of Meng*, 96 Misc. 126, 159
246; *Matter of McDonald's Estate*, 51 N. Y. Supp. 535.

The damages are theirs, not through the laws of intestacy or as a part of the estate of the intestate, but through their original right to them created by the statute.⁹³

3. Statutory changes in distribution.

The statute as to the distribution of the recovery has been amended several times. The proceeds are to be distributed according to the statute in force at the time of the death in question, notwithstanding subsequent changes have been made therein.⁹⁴

4. Distribution to surviving husband or wife.

The amendment in 1911 increased the right of a surviving wife or husband in the proceeds of the action. Under the present statute, unless there are children, the recovery is for the sole benefit of such surviving spouse. The fact that there are grandchildren does not change the situation.⁹⁵ Prior to this amendment, if the survivors were a father and widow, the father was entitled to share in the recovery.⁹⁶

5. Recovery under Federal statute.

Recovery for death of servant in action brought under Federal statute regulating liability of common carriers engaged in interstate commerce must be distributed under statute of distribution of this State.⁹⁷

6. Creditors.

The creditors of the deceased are not entitled to share in the recovery, but it is not exempt from the next of kin's creditors.⁹⁸

7. Expenses of action.

The expenses of the action are to be deducted from the recovery before its distribution. These include the attorney's

93. *Hamilton v. Erie R. R. Co.*, 219 N. Y. 343.

94. *Matter of Brennan*, 160 App. Div. 401, 145 N. Y. Supp. 440; *Matter of Marble*, 88 Misc. 339, 151 N. Y. Supp. 953; *Matter of Connor*, 98 Misc. 538, 164 N. Y. Supp. 748; modified, 178 App. Div. 955, 165 N. Y. Supp. 1081; aff'd, 222 N. Y. 653.

95. *Matter of Meng*, 188 App. Div. 69, 176 N. Y. Supp. 290; rev'd on other grounds, 227 N. Y. 264.

96. *Matter of Snedeker v. Snedeker*, 164 N. Y. 58.

97. *Matter of Taylor*, 204 N. Y. 135.

98. *Wynkoop v. Myers*, 17 Civ. Proc. 443.

fees and disbursements and witness fees, together with reasonable compensation for expert witnesses, where they are required, as well as with payment for all other work, labor and services of whatever nature they may be, so long as they are incurred in good faith under a reasonable supposition that the chances of success in the action would be enhanced by their employment.⁹⁹ The executor or administrator of a deceased person is empowered to engage the services of an attorney and, as incidental thereto, to agree upon the compensation to be given therefor, with the qualification that the amount so agreed upon shall be fair and reasonable.¹ When the contract for a contingent fee is made between the executor or administrator and an attorney, the law imposes the additional condition that as to the damages received, or as to the beneficiaries, the contract is subject to the power of the court to determine the reasonable or suitable compensation or expenditure to the attorney which may be deducted from the recovery. The contract, as a matter of law, through implication, includes that rule of law.² The surrogate is not bound by the opinions of experts as to the value of services rendered but he is bound to find what such expenses were. Proof of the rendition of the services and expenses incurred require the surrogate to make a finding as to what is the reasonable amount to be allowed.³

The surrogate who issued the letters has the exclusive power of allowing the expenses of such action, including the amount of compensation of the plaintiff's counsel, and the Special Term has no jurisdiction to determine the amount such attorney shall receive under his contract of retainer,⁴ or to provide for the deposit of part of the moneys recovered to secure such fees.⁵

99. *Matter of Snedeker v. Snedeker*, 95 App. Div. 149, 88 N. Y. Supp. 847.

1. *Lee v. Van Voorhis*, 78 Hun, 575; *aff'd*, 145 N. Y. 603, 29 N. Y. Supp. 571, 61 St. Rep. 220, citing *In re Hynes*, 105 N. Y. 560, 8 St. Rep. 190; *Taylor v. Bemiss*, 110 U. S. 42; *Lee v. Vacuum Oil Co.*, 126 N. Y. 579, 38 St. Rep. 662; *In re Knapp*, 85 N. Y. 284,

78 Hun, 575, 29 N. Y. Supp. 571.

2. *Matter of Meng*, 227 N. Y. 264.

3. *Matter of Cunningham*, 175 App. Div. 791, 162 N. Y. Supp. 764.

4. *Matter of Atterbury*, 179 App. Div. 648, 167 N. Y. Supp. 88; *rev'd*, 222 N. Y. 355.

5. *Cunningham v. City of New York*, 141 N. Y. Supp. 1000.

8. Funeral expenses.

Where the only property coming into the hands of the administratrix is that received in the settlement of an action for negligently causing the death of the decedent, the surrogate has sole authority to determine the amount to be allowed for funeral expenses and to direct their payment.⁶ The statute in this respect is imperative, and one who has recovered a judgment against the administrator for such funeral expenses should have leave to issue execution to the amount of the fund arising from such source in the administrator's hands.⁷ But the statute contemplates a deduction of funeral expenses only when the beneficiaries are under obligation to pay them, and no such obligation exists where the expenses have been paid from a fund charged with its payment.⁸

K. Costs.

The representative is entitled to a full bill of costs if he has a verdict in his favor, although the damages awarded amount to less than \$50.⁹ The plaintiff on recovering nominal damages is entitled to full costs.¹⁰

An extra allowance of costs granted to the plaintiff at the close of the trial should be computed upon the verdict, exclusive of interest thereon, where there is no direction or intimation by the court that it intended to include such interest in the basis thereof.¹¹

6. *Matter of McDonald's Estate*, 51 Misc. 318, 101 N. Y. Supp. 275.

7. *Matter of McDermott's Estate*, 49 Misc. 402, 99 N. Y. Supp. 829.

8. *Matter of Huth*, 88 Misc. 458, 152 N. Y. Supp. 215.

9. *Gorton v. U. S. & Brazil Mail & Steamship Co.*, 20 Civ. Pro. 202, 37 St. Rep. 556, 13 N. Y. Supp. 653.

10. *Silberstein v. William Wicke Co.*, 29 Abb. N. C. 291, 22 N. Y. Supp. 170.

11. *Seifter v. Brooklyn Heights R. R. Co.*, 53 App. Div. 433, 65 N. Y. Supp. 1123. See also, as to including interest on a computation of an extra allowance, *Boyd v. N. Y. C. R. R. Co.*, 6 Civ. Pro. 222; *Sinne v. The Mayor*, 8 Civ. Pro. 252.

ARTICLE IV.**ACTION BY CREDITOR AGAINST NEXT OF KIN, LEGATEE OR DEVISEE****A. Action against next of kin, legatees, etc.****1. Decedent Estate Law, § 103. Action against husband for debts of deceased wife.**

If a surviving husband does not take out letters of administration on the estate of his deceased wife, he is presumed to have assets in his hands sufficient to satisfy her debts, and is liable therefor. A husband is liable as administrator for the debts of his wife only to the extent of the assets received by him. If he dies leaving any assets of his wife unadministered, except as otherwise provided by law, they pass to his executors or administrators as part of his personal property, but are liable for her debts in preference to the creditors of the husband.

2. Decedent Estate Law, § 170. Action against legatees and others to enforce liability for decedent's debt.

An action may be maintained, as prescribed in this article, against the surviving husband or wife of a decedent, and the next of kin of an intestate, or the next of kin or legatees of a testator to recover, to the extent of the assets paid or distributed to them, for a debt of the decedent, upon which the action might have been maintained, against the executor or administrator. The neglect of the creditor to present his claim to the executor or administrator, within the time prescribed by law for that purpose, does not impair his right to maintain such an action.

3. Decedent Estate Law, § 171. Action may be joint or several.

An action, specified in the last section, must be brought, either jointly against the surviving husband or wife, and all the legatees or all the next of kin, as the case may be, or at the plaintiff's election, against one of them only. But where a legacy is received by two or more persons jointly, they are deemed one legatee, within the meaning of each provision of this article, relating to legatees.

4. Decedent Estate Law, § 172. In joint action, recovery to be apportioned.

Where a joint action is brought, as prescribed in the last section, the whole sum, which the plaintiff is entitled to recover, must be apportioned among the defendants, in proportion to the legacy or distributive share, as the case may be, received by each of them; and the final judgment must award, against each defendant separately, the proportionate sum thus ascertained. The costs of the action, if the plaintiff is entitled to costs, must be apportioned in like manner; except that the expenses of serving the summons upon each defendant must be taxed against him only; and one sheriff's fee, for returning an execution, may be taxed against each defendant, against whom any sum is awarded.

5. Decedent Estate Law, § 173. Recovery in a several action.

Where an action is brought against the surviving husband or wife only, or against one only of the next of kin, or legatees, the sum, which the plaintiff is entitled to recover, cannot exceed the sum which he would have been entitled to recover from the same defendant, in an action brought, as prescribed in the last section.

6. Decedent Estate Law, § 174. Requisites to recovery in action against legatee.

If the action is brought against a legatee, or against all the legatees, the plaintiff must show, either

1. That no assets were delivered by the executor or administrator of the decedent, to the surviving husband or wife, or next of kin; or

2. That the value of assets, so delivered, has been recovered by some other creditor; or

3. That those assets, after payment of the expenses of administration and preferred demands, are not sufficient to satisfy the demand of the plaintiff; in which case, he can recover only for the deficiency.

7. Decedent Estate Law, § 175. Recovery; in action against a preferred legatee.

Where some of the legatees are preferred to others, an action may be maintained, as prescribed in the last five sections, against one or all of those who are equally preferred, or equally deferred, as if the legatees of that class were all the legatees. But where it is brought against a preferred legatee, or a class of preferred legatees, the plaintiff must show, in addition to the matters, with respect to the next of kin, required by the provisions of the last section, the same matters, with respect to each legatee, or class of legatees, to whom the defendant or defendants are preferred.

8. Nature of action.

An action under article 7 of the Decedent Estate Law for a judgment to be apportioned among legatees or others pursuant to the provisions of section 172 is an equitable action and is properly placed upon the calendar of the Special Term.¹² The right to follow legatees for the debt of the testator has been said to exist independently of the statute,¹³ but whether or not this is true, the statute ordinarily affords a complete remedy for the determination of the equitable rights of the parties.¹⁴ In an action to foreclose a mortgage, a judgment has been sustained which enforced the personal liabil-

12. *Herzog v. Marx*, 58 Misc. 356, 21 St. Rep. 315, 3 N. Y. Supp. 309.
110 N. Y. Supp. 1039.

14. *Hamlin v. Smith*, 72 App. Div.

13. *Colgan v. Dunne*, 50 Hun, 443, 601, 76 N. Y. Supp. 258.

ity of a legatee under this statute, but the correctness of the decision may be doubted.¹⁵

9. Liability in general.

The liability under the statute depends on the defendant receiving from the estate of the deceased a legacy or distributive share sufficient to pay the claim of the plaintiff.¹⁶ Payment of a judgment cannot be enforced against the next of kin and beneficiaries where no part of the fund "has been paid or distributed to them."¹⁷

The liability of each legatee does not exceed the money received by him from the decedent's estate.¹⁸ It is not sufficient to show that the person against whom such action is brought has in his possession property coming from the estate of the deceased.¹⁹ The action may be brought by an attorney who rendered legal services to the deceased in his lifetime.²⁰

10. Apportionment of recovery.

In a joint action under section 171 the assets of the estate may be marshalled, and the proportionate sum to be paid by each defendant must be ascertained and the amount to be paid by each separately awarded by the judgment.²¹ Where a testator bequeathed part of his estate to a daughter and part in trust for other beneficiaries, it was held that an action could not be maintained against the trustee without making the personal representatives parties.²²

15. *Collier v. Miller*, 16 N. Y. Supp. 633.

16. See *Hector v. Lavery*, 51 App. Div. 74, 64 N. Y. Supp. 518; *Matter of Kingsland v. Murray*, 133 N. Y. 170.

A legatee, whether general, specific or residuary, is entitled to follow the assets, and may maintain an action against the heirs and next of kin of a widow, who was sole executrix of the will and who received sufficient property from the testator's estate to pay the legacy, but who failed to pay it. *Trustees M. E. Church v. Reeve*, 79 App. Div. 65, 79 N. Y. Supp. 1102.

17. *City of New York v. United States Trust Co.*, 78 App. Div. 366, 79 N. Y. Supp. 1010; *aff'd* without opinion, 178 N. Y. 551.

18. *Howell v. Wallace*, 37 App. Div. 323, 56 N. Y. Supp. 280.

19. *Brater v. Hopper*, 77 Hun, 244, 28 N. Y. Supp. 472.

20. *Sheil v. Muir*, 4 N. Y. Supp. 272, 22 St Rep. 829.

21. *Duck v. McGrath*, 160 App. Div. 482, 145 N. Y. Supp. 1033; *aff'd*, 212 N. Y. 600.

22. *Brater v. Hopper*, 28 N. Y. Supp. 472, 77 Hun, 244.

It is said by the codifiers that "it must be borne in mind, in determining what remedy the creditor ought to have, that this action always bears harshly upon the defendants, and it can never be necessary, except as the result of the creditor's own omission to pursue a more appropriate remedy. It is, therefore, more equitable that he should be required to collect from each defendant a proportion, and that if any of the defendants are insolvent the loss should fall upon him, than that he should be permitted to collect his entire demand from one of the next of kin or legatees, or turn the person thus selected to bear alone the common burden over to an action for contribution."

11. Presentation of claim to representative.

If a creditor fails to present his claim in time, an administrator is not chargeable with assets he may have paid in satisfaction of debts or may have distributed.²³ Before the change in the short statute of limitations on rejected claims,²⁴ it was held that no action could be brought against next of kin, save where the creditor had neglected to present his claim to the personal representatives of the deceased. Where the creditor had presented his claim, and the same had been rejected, and six months had elapsed without bringing the action as required by the statute, this was a defence, not only to an action against the personal representatives of the deceased, but, also, to any action brought to enforce the claim against heirs-at-law or next of kin. The fact that the claim was of such a nature that it could not be enforced during the lifetime of deceased did not take it out of the operation of the statute.²⁵

12. Exhaustion of remedy against estate.

The fact that there has been no judicial settlement in the Surrogate's Court of the accounts of an administratrix furnishes no objection to the determination on the merits of an action brought against the next of kin of the decedent under this section.²⁶ A person who intrusts money to another to be invested by him may, after the latter's death,

23. *Rosen v. Ward*, 96 App. Div. 262, 89 N. Y. Supp. 148.

24. See *supra*, Article I—N.

25. *Selover v. Coe*, 63 N. Y. 438.

26. *Miller v. Morton*, 89 Hun, 574, 35 N. Y. Supp. 294.

maintain an action against his widow—who is the sole legatee and devisee of his property and the administratrix of his will—individually and as executrix, to recover such moneys, and in such action is not required to prove that she has exhausted her remedy against the defendant as administratrix in order to charge her as devisee.²⁷

13. Statute of limitations.

Where an action was brought to foreclose a mortgage and a deficiency judgment obtained, an action will lie under the statute and the liability created by these succeeding sections, although the mortgage was executed more than either six or ten years before the time such action was brought, as the action must be regarded as brought upon a sealed instrument and the period of limitation is twenty years.²⁸

B. Action against heirs and devisees.

1. Decedent Estate Law, § 176. Liability of heirs and devisees for debt of decedent.

The heirs of an intestate, and the heirs and devisees of a testator, are respectively liable for the funeral expenses and debts of the decedent, arising by simple contract, or by specialty, to the extent of the estate, interest, and right in the real property, which descended to them from, or was effectually devised to them by, the decedent.

2. Decedent Estate Law, § 177. When action therefor may be brought against heirs and devisees.

An action to enforce the liability declared in the preceding section, cannot be maintained, except in one of the following cases:

1. Where one year has elapsed since the death of the decedent, and no letters testamentary, or letters of administration, upon his estate, have been granted within the state.

2. Where eighteen months have elapsed since letters testamentary, or letters of administration, upon his estate, were granted, within the state.

3. Decedent Estate Law, § 178. Effect of application to sell real property.

Where it appears that, at the time of the commencement of an action to enforce the liability declared in section one hundred and seventy-six of this chapter, a proceeding for the judicial settlement of the accounts of the executor or administrator of decedent in which an order to dispose of real property

27. *De Crano v. Moore*, 50 App. Div. 303, 63 N. Y. Supp. 585.

28. *Colgan v. Dunne*, 50 Hun, 443, 3 N. Y. Supp. 309.

of the decedent for the payment of his debts may be made, is pending in a surrogate's court having jurisdiction, the proceedings in the action, subsequent to the complaint, must be stayed by the court, until the proceeding is disposed of, unless the plaintiff elects to discontinue. If an order to dispose of real property is granted, the action must be dismissed, unless the plaintiff has alleged in his complaint, or alleges in a supplemental complaint, that real property, other than that included in the decree, descended or was devised to the defendants. If the plaintiff elects to proceed under such an allegation, he is entitled to a preference in payment, out of the real property, with respect to which the allegation is made; but he cannot share, as a creditor, in the distribution of the money, arising from the disposal of the real property, described in the order, and the judgment in the action does not charge, or in any way affect, that property.

4. Decedent Estate Law, § 179. Action must be joint.

An action against heirs or devisees, brought as prescribed in the last three sections, must be brought jointly against all the heirs, to whom any real property descended from the decedent, or jointly against all the devisees, as the case may be.

5. Decedent Estate Law, § 180. Recovery to be apportioned.

In such an action, the sum, which the plaintiff is entitled to recover, for damages and costs, must be apportioned among all the defendants, in proportion to the value of the real property descended to each heir, or devised to each devisee, as the case may be, as prescribed in section one hundred and seventy-two of this chapter, for a similar apportionment among legatees or next of kin, in proportion to the assets received by them. The final judgment must, in like manner, award against each defendant the proportionate sum, with which he is chargeable.

6. Decedent Estate Law, § 181. Requisites to recovery against heirs.

Where the action is brought against heirs, the plaintiff must show, either

1. That the decedent's assets, if any, within the State were not sufficient to pay the plaintiff's debt, in addition to the expenses of administration, and debts of a prior class; or

2. That the plaintiff has been unable, or will be unable, with due diligence, to collect his debt, by proceedings in the proper surrogate's court, and by action against the executor or administrator, and against the surviving husband or wife, legatees, and next of kin.

The executor's or administrator's account, as rendered to, and settled by, the surrogate, may be used as presumptive evidence of any of the facts, required to be shown by this section.

7. Decedent Estate Law, § 182. Requisites to recovery against devisees.

Where the action is brought against devisees, the plaintiff must show, in addition to the matters specified in the last section, either that the real property of the decedent, which descended to his heirs, was not sufficient to pay the plaintiff's debt, or that the plaintiff has been unable, or will be unable, with due diligence, to collect his debt by an action against the heirs.

8. Decedent Estate Law, § 185. Judgment; when to be satisfied out of real property.

If it appears that any of the real property, which descended or was devised to a defendant, had not been aliened by him at the time of the commencement of the action, the final judgment must direct that the debt of the plaintiff, or the proportion thereof which he is entitled to recover against that defendant, be collected out of that real property. Such a judgment is preferred, as a lien upon that property, to a judgment obtained against the defendant, for his individual debt or demand.

9. Decedent Estate Law, § 186. When judgment not a lien on real property aliened.

But a judgment, rendered as prescribed in the last section, does not bind, and the execution thereupon cannot in any way affect, the title of a purchaser, in good faith and for value, acquired before a notice of the pendency of the action is filed, or final judgment is entered, and the judgment-roll filed.

10. Decedent Estate Law, § 187. How judgment taken, when real property aliened.

If it appears that, before the commencement of the action, or afterwards and before the filing of a notice of the pendency of the action, the defendant aliened the real property descended or devised to him, or any part thereof, the plaintiff may, at his election, take a final judgment against him for the value of the property so aliened, or so much thereof as may be necessary, as in an action for the defendant's own debt.

11. Decedent Estate Law, § 191. Action not suspended by infancy.

An action against heirs or devisees, brought as prescribed in this article, is not delayed, nor is the remedy of the plaintiff suspended, by reason of the infancy of any of the parties; except that an execution shall not be issued against an infant heir or devisee, until the expiration of one year after final judgment is rendered, and the judgment-roll filed.

12. Decedent Estate Law, § 192. Liability of heir or devisee not affected where will makes specific provision for payment of debt.

This article does not affect the liability of an heir or devisee, for a debt of a testator, where the will expressly charges the debt exclusively upon the real property descended or devised, or makes it payable exclusively by the heir or devisee, or out of the real property descended or devised, before resorting to the personal property, or to any other real property descended or devised.

13. Liability in general.

At common law land which descended or was devised was not chargeable with simple contract debts of the testator, nor was the heir or devisee personally liable therefor.²⁹

²⁹ Deyo v. Morss, 30 App. Div. 56, 51 N. Y. Supp. 785.

Under section 176 of the Decedent Estate Law, an heir or devisee is liable for certain debts of the decedent to the extent of the interest he acquires in the real property of the decedent.³⁰ But ordinarily he will not be liable beyond the value of the property received by him. A devisee of an undivided one-third of the residue of the testator's real property is liable only for one-third of the claims existing against his estate.³¹ It is not necessary that the legal title to the property shall have passed to the defendant; he is liable where there is an effectual devise of the entire beneficial estate in the land and it is accepted.³²

The defendant may dispute the validity of the plaintiff's debt,³³ as he is not bound by the action of an executor or administrator in allowing the claim of the creditor or in permitting him to recover a judgment therefor,³⁴ or even by the accounting before the surrogate.³⁵ Or the creditor may show the existence of other debts which are properly chargeable against the land.³⁶

The action can only be maintained against the direct heirs and devisees, and cannot be maintained against heirs or devisees of such heirs or devisees.³⁷ The liability of the heirs and devisees for the debts of the decedent to the extent of the real estate descending or devised to them only extends to the real estate and does not attach to that which may be made out of it by the skill, management or labor of the heir or devisee.³⁸

The terms "simple contract" and "specialty" used in section 176, defining the liability of an heir or devisee for the debts of his decedent, comprise every kind of a contractual obligation, and the action may be based on a transaction in which there existed a fiduciary relation between the parties.³⁹ The statutory liability of a testator as the

30. *Matter of Kingsland v. Murray*, 133 N. Y. 170. 349.

31. *Fink v. Berg*, 50 Hun, 211, 19 St. Rep. 322, 2 N. Y. Supp. 851.

32. *Armstrong v. McKelvey*, 104 N. Y. 179.

33. *Long v. Long*, 142 N. Y. 545.

34. *Ferguson v. Broome*, 1 Bradf. 10; *Barnes v. Hathaway*, 66 Barb. 452.

35. *Long v. Long*, 142 N. Y. 545.

36. *Hauselt v. Patterson*, 124 N. Y.

37. *Green v. Dunlop*, 136 App. Div. 116, 120 N. Y. Supp. 583; *Rogers v. Patterson*, 79 Hun, 483, 29 N. Y. Supp. 963, 61 St. Rep. 278; *aff'd*, 150 N. Y. 560.

38. *Cleft v. Moses*, 116 N. Y. 144.

39. *DeCrang v. Moore*, 50 App. Div. 361, 64 N. Y. Supp. 3, 63 N. Y. Supp. 585.

stockholder of a bank is one arising by "simple contract".⁴⁰ An action by an attorney for services rendered to a decedent in his lifetime may be brought against his surviving heir-at-law and next of kin.⁴¹

14. Nature of action.

The action against an heir or devisee is generally classed as an action in equity.⁴² When the action is brought against a defendant who has not alienated the lands he acquired from the deceased, the action is not to enforce but to acquire a lien upon the real property which descended to the defendant, and to authorize its sale for the purpose of satisfying the debt. It is an action in equity having the nature of proceeding *in rem* in such sense that when the land has not been aliened by the heir the judgment must direct that the debt of the plaintiff be collected out of the real property.⁴³ The action is against the property, and the devisee cannot be charged personally where the real estate has not been aliened.⁴⁴

The design of the statute is not to create a personal liability of the heir for the amount of a mortgage debt, but to make, so far as practicable, the realty primarily chargeable with the payment of a debt of the decedent secured by a mortgage on his land, and when, with the mortgaged premises, the heir inherits other lands of the same ancestor, he takes with them the burden of the mortgage debt, if there was a personal liability of the decedent to pay at the time of the decease. The liability of the heirs to pay the mortgage out of the property is proportionate with the real estate inherited by them respectively, and the judgment must be entered and execution issued accordingly. It is only when the land has been aliened by the heirs that they are personally liable for an amount exceeding its value. When the land has not been aliened the remedy is by action in equity, in the nature of a proceeding to reach the land.⁴⁵

40. *Richards v. Gill*, 138 App. Div. 75, 122 N. Y. Supp. 620.

41. *Sheil v. Muir*, 4 N. Y. Supp. 272, 22 St. Rep. 829.

42. *Hauselt v. Patterson*, 124 N. Y. 349; *Richard v. Gill*, 138 App. Div. 75, 122 N. Y. Supp. 620; *DeCrano v. Moore*, 30 Misc. 303, 63 N. Y. Supp. 585; modified, 50 App. Div. 361, 64

N. Y. Supp. 3; *Hentz v. Phillips*, 23 Abb. N. C. 15; *Mortimer v. Chambers*, 43 St. Rep. 365.

43. *Avery v. Avery*, 119 App. Div. 698, 104 N. Y. Supp. 290.

44. *Wood v. Wood*, 26 Barb. 356.

45. *Hauselt v. Patterson*, 124 N. Y. 349.

15. Joinder of causes of action.

The plaintiff cannot make other creditors or persons having liens upon the real estate parties; the statute contemplates an action by each creditor for himself.⁴⁶ Where an action was brought to recover a debt during the lifetime of the debtor, and after his death it was revived against his executors, and subsequently the plaintiff applied to have the devisees made parties, it was held that the application was properly denied, for if granted it would, in effect, authorize the joinder of two distinct and divisible causes of action.⁴⁷

The interest of an heir-at-law of a deceased mortgagor in the mortgaged property is subject to be wiped out by a judgment in foreclosure and, in case of a deficiency, judgment may be entered against the administratrix of the deceased mortgagor, she having been made a party to the foreclosure action, and collected out of property coming into her hands in due course of administration. Where the complaint in an action to foreclose the mortgage sought to obtain judgment for deficiency individually against the widow and next of kin of the deceased mortgagor, who was personally liable for the mortgage debt, a demurrer by one of the heirs-at-law of the deceased mortgagor will be sustained.⁴⁸

Creditors of a decedent, whose claims against the proceeds of his real estate in litigation are protected by a deposit of a part thereof in court, under stipulation that the fund is to be held to answer for any deficiency in his assets, to pay the debts for which his real estate may be liable, may maintain an action against the adverse claimants, joining the depository as stakeholder, and joining the heirs of the deceased for the purpose of obtaining judgment for payment out of the fund and of recovering any deficiency from the heirs, to the extent of their liability as such for the decedent's debt.⁴⁹

46. *Parsons v. Brown*, 7 Paige, 354.

47. *Greene v. Marline*, 27 Hun, 246.

But the rule that an action cannot be maintained against the heir and executor does not apply where the creditor has established his demand before the surrogate and the personal estate

of the deceased was concealed or wasted. *Littell v. Sayre*, 7 Hun, 485.

48. *Buckley v. Beaver*, 99 Misc. 643, 166 N. Y. Supp. 131.

49. *U. S. Life Insurance Co. v. Jordan*, 21 Abb. N. C. 330.

16. Joint liability of heirs.

All the heirs or devisees must be made joint defendants in the action,⁵⁰ although the statute does not make them liable as joint debtors.⁵¹ But if one of the heirs or devisees has died without leaving any property, his personal representatives need not be made a party.⁵² Heirs and devisees are properly joined in an action where it is alleged that the real estate which passed to the heirs is insufficient to satisfy the claim, and judgment may be so framed as to direct that the estate which descended to the heirs-at-law be first exhausted.⁵³

17. When action to be brought.

If letters have not been issued upon the estate of decedent, the action cannot be commenced until one year after his death; and, if letters have been issued, it is eighteen months after the granting of the letters before the action can be maintained.⁵⁴ The period within which the action cannot thus be maintained does not constitute part of the limitation of the action.⁵⁵ The view seems to prevail that the limitation of the action is determined by the nature of the original cause of action against the deceased. If that was equitable in its nature, the ten year statute is applied.⁵⁶ If the cause of action is based upon a sealed instrument of the ancestor, the twenty year limitation is applied.⁵⁷ If on a note or simple contract obligation, the period of limitation is six years.⁵⁸ In each case is to be added the periods during

50. *Misereau v. Ryerss*, 3 N. Y. 264; *Butts v. Genung*, 5 Paige, 254; *Schemehorn v. Barhydt*, 9 Paige, 28; *Stuart v. Kissam*, 11 Barb. 271; *Cassidy v. Cassidy*, 1 Barb. Ch. 467.

Costs.—In a proceeding to hold devisee liable for a debt taken against one properly charged with one-third of the debt, such devisee is liable for the full costs and disbursements of the action and no apportionment thereof shall be made. *Fink v. Berg*, 50 Hun, 211, 2 N. Y. Supp. 851, 19 St. Rep. 322.

51. *Kellogg v. Olmstead*, 6 How. Pr. 487.

52. *Wambaugh v. Gates*, 11 Paige,

506.

53. *Rockwell v. Geery*, 4 Hun, 606, 6 T. & C. 687.

54. *Selover v. Coe*, 63 N. Y. 438; *Roe v. Swezey*, 10 Barb. 247; *Butts v. Genung*, 5 Paige, 254.

55. *Hill v. Moore*, 131 App. Div. 365, 115 N. Y. Supp. 289; *aff'd*, 198 N. Y. 633; *Mead v. Jenkins*, 27 Hun, 570.

56. *Richards v. Gill*, 138 App. Div. 75, 122 N. Y. Supp. 620.

57. *City Equity Co. v. Bodine*, 141 App. Div. 907, 126 N. Y. Supp. 439.

58. *Adams v. Fassett*, 149 N. Y. 61; *Hill v. Moore*, 131 App. Div. 365, 115 N. Y. Supp. 289; *aff'd*, 198 N. Y. 633.

which the plaintiff was not permitted to maintain the action.⁵⁹ A right of action against devisees under subdivision 1 of section 177, which has accrued by the lapse of one year after the death of the decedent without the issue of letters testamentary, is not suspended by the subsequent issue of such letters, and in such case the second subdivision of that section respecting actions after a lapse of eighteen months after the grant of letters has no application.⁶⁰

The statute of limitations in an action for the debt of the testator as a stockholder of an insolvent bank does not begin to run, where the testator contested his liability, until that liability is determined by a final judgment against his estate establishing the amount of the deficiency with which he is chargeable.⁶¹

Upon the application of a creditor of a decedent for an order directing land devised to be sold to pay the debts of such decedent, judgment creditors of such decedent may set up the statute of limitations as a defense. The fact that a judgment was recovered against an executor, who was also a devisee, does not avoid the statute.⁶²

18. Exhaustion of other remedies.

Under section 181, in an action against the heirs of the deceased, the plaintiff must show an insufficiency of the decedent's assets or that he has been unable, or will be unable with due diligence, to collect his debt against the personal representative or the surviving husband or wife, legatees, or next of kin.⁶³ And under section 182, in an action against devisees, the plaintiff must also show that the real property of the decedent which descended to the heirs was not sufficient to pay the debt, or that he has been unable, or will be unable with due diligence, to collect his debt by an action against the heirs.⁶⁴

59. *Hill v. Moore*, 131 App. Div. 365, 115 N. Y. Supp. 289; *aff'd*, 198 N. Y. 633.

60. *Adams v. Fassett*, 149 N. Y. 61.

61. *Richards v. Gill*, 138 App. Div. 75, 122 N. Y. Supp. 620.

62. *Raynor v. Gordon*, 23 How. Pr. 264.

63. *Lawrence v. Grout*, 112 App.

Div. 241, 98 N. Y. Supp. 279; *Armstrong v. Wing*, 10 Hun, 520; *Reed v. Lozier*, 48 Hun, 50; *Roe v. Swezey*, 10 Barb. 247; *Stewart v. Kissam*, 11 Barb. 271.

64. *Lawrence v. Grout*, 112 App. Div. 241, 98 N. Y. Supp. 279; *Adams v. Fassett*, 73 Hun, 430, 26 N. Y. Supp. 447; *aff'd*, 149 N. Y. 61.

During eighteen months after the granting of letters testamentary or of administration, creditors have their remedy against the personal property of the decedent and against the executors or administrators for any waste or misappropriation of the same. During that period they may resort to the real estate, and by showing a compliance with the provisions of the law they may compel its sale for the payment of debts, but if they fail to get payment within such period out of the real or personal estate, after that time further remedies are given them by the Decedent Estate Law. They may sue the surviving husband or wife or next of kin of the decedent who have received any of his personal property; failing to recover from them, they may sue any legatee who has received any of the property or assets of the decedent; failing to recover from them, then they may sue and recover from the heirs who have received any of the real estate or its proceeds; failing here, they may resort to the devisees who have received any of the real estate or its proceeds.⁶⁵

The heirs or next of kin of a deceased person can only be made liable for his contracts, or upon his debts, in manner prescribed by statute, and it must appear that the deceased left no personal estate in the State out of which the debt could be collected, or that the personal assets have been applied toward the payment of the obligation.⁶⁶

In an action brought against heirs to collect a debt due from their ancestor, the burden is upon the plaintiff to establish the extent of the value of the personal property at the time when it passed to the executor and the debts then due. Proof of sale of such property made years subsequently, and the amount realized thereon, is not sufficient to overcome the presumption of its value arising from the executor's account.⁶⁷

The last clause of section 181, relative to the account of the representative, must be interpreted as providing either that an executor's account when so settled must be received as presumptive evidence against all defendants or that it is presumptive evidence against such of the defendants as were parties to the decree on the accounting. It does not

65. *Matter of Kingsland v. Murray*,
133 N. Y. 170, 44 St. Rep. 515.

67. *Read v. Patterson*, 29 St. Rep.
102, 8 N. Y. Supp. 826.

66. *Selover v. Coe*, 73 N. Y. 438.

make mere statements annexed to the account, but not before the Surrogate's Court for adjudication, presumptive evidence of facts stated.⁶⁸

A creditor who holds judgment need not prove his inability to collect the debt by proceedings at law, but it is sufficient to show that the personal assets of deceased were not sufficient to discharge the debt.⁶⁹

A creditor or legatee who has consented to the misappropriation of the personal assets by the administrator to his own use is thereby estopped from proceeding against him or his sureties or any of the next of kin. The personal assets are the primary fund to pay the debts, and if they are wasted or misappropriated by the administrator, the land cannot be reached until the personal responsibility of the administrator and his sureties is exhausted.⁷⁰

19. Lands transferred before action.

Lands aliened in good faith, before the commencement of the suit, by an heir or devisee, are not liable in the hands of the purchasers for the payment of such debt.⁷¹ The good faith of which the statute speaks is that of the purchaser, and not of the heir or devisee.⁷² While section 186 protects purchasers in good faith, it is the plaintiff's right to have the purchasers made parties in order to have it determined in the action whether they or any of them were entitled to the protection of the statute.⁷³ But nothing can accomplish the discharge of the lien upon the land of a creditor as against the legatee or heir-at-law, except payment or the Statute of Limitations. He remains liable personally for debts to the extent of the property which he receives. If he sells to a *bona fide* purchaser after three years, the consideration is merely substituted in place of the land, and may be followed and taken to pay the obligation.⁷⁴

68. Reed v. Patterson, 134 N. Y. 128, 45 St. Rep. 793.

69. Blossom v. Hatfield, 24 Hun, 275.

70. Mayer v. Mayer, 17 Misc. 648, 40 N. Y. Supp. 772.

71. Wambaugh v. Bates, 11 Paige, 505. See, also, Wood v. Wood, 26 Barb. 356; Hauselt v. Fine, 3 St. Rep. 191.

72. Rogers v. Patterson, 87 Hun, 219,

33 N. Y. Supp. 1022.

73. Rogers v. Patterson, 87 Hun, 219, 33 N. Y. Supp. 1022.

74. Matter of Callaghan, 69 Hun, 161, 52 St. Rep. 537, 23 N. Y. Supp. 378; Rogers v. Patterson, 79 Hun, 483, 29 N. Y. Supp. 963, 61 St. Rep. 278; aff'd, 150 N. Y. 560.

Condemnation award.—Although after a decision that a judgment creditor of

A devisee, having aliened the land devised to him, is liable to the creditors of her testator to the extent of the value of the land over the lien thereon at the time of the testator's death, and judgments may be taken against him instead of against the land to that amount, each creditor being entitled to a judgment for his proportionate share, such value being less than the aggregate of debts. But in such case, if the defendant has a dower interest therein, it must be ascertained and deducted from the value of the land in ascertaining the value for which he is liable.⁷⁵

20. Specific provision in will for payment of debt.

Payment of debts will not be charged upon a devise of real estate without clear evidence of such an intent in the will; the intention may not be presumed merely from the use of formal words or the presence of commonly employed phrases. Inadequacy of the personalty is not suggestive of an intent to charge the realty with the payment of debts.⁷⁶ Where land is devised charged with the payment of debts generally, an acceptance of the devise does not create a personal liability to pay, but instead thereof a lien is created in favor of creditors who can enforce it as against the land devised.⁷⁷ A devisee is liable for the testator's debts to the extent of the property received by him, but beyond this he does not become personally liable by merely accepting of the devise, or the rents and profits thereof, though the devise is charged with the debts, unless the will charges the devisee with the duty of personally paying the debts, or

a testatrix has no lien upon an award made when lands devised by her were subsequently taken by eminent domain, and that the award has become personal property the same as if the devisees had aliened the land, the judgment creditor, suing under section 176 of the Decedent Estate Law to enforce the statutory liability of the devisees, still demands a decree that the plaintiff has a lien upon the award and does not ask for personal judgment against the devisees, such judgment may, nevertheless, be entered. But in such action the devisees can only be charged with a personal judg-

ment for the amount which they actually received as the net proceeds of the land taken on condemnation, and hence, where it has been previously held that the award is subject to the lien of the defendants' attorneys, the judgment should be limited to the excess of the award over the amount of the lien. *Lawrence v. Grout*, 140 App. Div. 629, 125 N. Y. Supp. 982.

75. *Lauby v. Gill*, 42 Misc. 334, 86 N. Y. Supp. 718.

76. *Matter of City of Rochester*, 110 N. Y. 150.

77. *Clift v. Moses*, 116 N. Y. 144.

unless the devise is upon the condition that the devisee pay the debts.⁷⁸ The failure to pay legacies provided for by the will of decedent does not work a forfeiture of the devise, nor does the direction to the executor to pay the debts operate to charge the debts upon the lands devised to him.⁷⁹

C. Matters relating to both classes of actions.

1. Decedent Estate Law, § 183. Deductions for prior recoveries.

Where the assets, applicable to the plaintiff's debt, were sufficient to pay a part thereof, or a part thereof has been collected from the executor or administrator, or from the surviving husband or wife, next of kin, or legatees, the plaintiff can recover only for the residue, remaining unpaid or uncollected; and if the action is against devisees, he can recover only for the residue, which the real estate descended, or the amount of his recovery against the heirs, is insufficient to discharge.

2. Decedent Estate Law, § 184. Complaint to describe land descended or devised.

The complaint must describe, with common certainty, the real property, descended or devised to the defendant; and must specify its value.

3. Decedent Estate Law, § 188. Classification of debts, to be enforced under this article.

Where the surviving husband or wife, next of kin, legatees, heirs, or devisees, are liable for demands against the decedent, as prescribed in this article, they must give preference in the payment thereof, and they are so liable therefor, in the order prescribed by law, for the payment of debts by an executor or administrator. Preference of payment cannot be given to a demand, over another of the same class, except where a similar preference by an executor or administrator is allowed by law. The commencement of an action, under any provision of this article, does not entitle the plaintiff's demand to preference over another of the same class, except as otherwise specially prescribed by law.

4. Decedent Estate Law, § 189. Defence, by reason of other prior or equal claims.

Where it appears, in an action brought as prescribed in this article, that there are unsatisfied demands against the decedent's estate, of a class prior to that of the plaintiff's demand, the defendant is entitled to judgment, if the value of the property, which was received, devised, or inherited, as the case

⁷⁸ *Clift v. Moses*, 7 St. Rep. 692, Young, 2 Cow. 569; *Schemehorn v. Cronkhite v. Cronkhite*, 1 T. & Barhydt, 9 Paige, 28.
⁷⁹ *Cunningham v. Parker*, 146 C. 266; *Wheeler v. Lester*, 1 Bradf. N. Y. 29.
 213, 293. See, also, *Whitaker v.*

may be, by the class to which he belongs, does not exceed the amount of the valid demands of a prior class. If it exceeds the amount of those demands, the judgment against the defendant cannot exceed such a proportion of the plaintiff's demand, as the total amount of the valid demands of his class bears to the excess.

5. Decedent Estate Law, § 190. When such a claim is paid.

Where a defendant, or a person belonging to his class, has paid a demand against the decedent's estate, of a class prior to that of the plaintiff's demand, or has paid a demand of the same class, the amount of the demand so paid must be estimated, in ascertaining the amount to be recovered, as if it was outstanding and unpaid.

6. Decedent Estate Law, § 193. One action, where same person is liable in different capacities.

Where a person, who takes real property of a decedent by devise, and also by descent; or who takes personal property as next of kin, and also as legatee; or who takes both real and personal property in either capacity; or who is executor or administrator, and also takes in either of the before mentioned capacities; would be liable in one capacity, for a demand against the decedent, after the exhaustion of the remedy against him in another capacity; the plaintiff, in any action to charge him, which can be maintained, without joining with him any other person, except a person whose liability is in all respects the same, may recover any sum, for which he is liable, although the remedy against him in another capacity was not exhausted. But this section does not increase the sum, which the plaintiff is entitled to recover against him, in the capacity in which he is actually liable; nor does it charge a defendant individually, who is liable only in a representative capacity.⁸⁰

7. Complaint.

The complaint must allege the special facts upon which the defendant's liability depends.⁸¹ It need not set out the evidence by which plaintiff expects to prove his inability to collect his debt against the executor.⁸² In an action to which every one who has received any portion of the real or personal estate of the decedent, either "as widow, devisee, legatee, heir-at-law or next of kin," is a party, it is unneces-

80. An action of an equitable nature may be maintained against the sole administratrix and sole devisee of an estate in order to charge the realty of which the intestate died seized with a debt from him to the plaintiff, and under such circumstances it is not a defense that the plaintiff has not first

exhausted her remedy against the personalty. *DeCrano v. Moore*, 30 Misc. 303, 63 N. Y. Supp. 585; modified, 50 App. Div. 361, 64 N. Y. Supp. 3.

81. *Butts v. Genung*, 5 Paige, 254; *Gere v. Clark*, 6 Hill, 350.

82. *Hauselt v. Fine*, 18 Abb. N. C. 142, 3 St. Rep. 191.

sary to state whether there are any persons who have derived property from the decedent under any statute, or by the general rules of law, or by any instrument, who are primarily liable for the debt.⁸³

A suit against a decedent's personal representatives upon a contract made with such representatives cannot be joined with an action under the statute against the heirs to charge his lands. In an action by a creditor of a deceased person to charge his heirs, they must be sued jointly; but under no circumstances are they liable for debts incurred by the executors.⁸⁴

ARTICLE V.

ACTION TO ESTABLISH WILL.

A. When action lies.

1. Decedent Estate Law, § 200. When action to establish a will may be brought.

An action to procure a judgment, establishing a will, may be maintained, by any person interested in the establishment thereof, in either of the following cases:

1. Where a will of real or personal property, or both, has been executed, in such a manner and under such circumstances, that it might under the laws of the state, be admitted to probate in a surrogate's court; but the original will is in another state or country, under such circumstances, that it cannot be obtained for that purpose; or has been lost or destroyed, by accident or design, before it was duly proved and recorded within the state.

2. Where a will of personal property made by a person, who resided without the state, at the time of the execution thereof, or at the time of his death, has been duly executed, according to the laws of the state or country in which it was executed, or in which the testator resided at the time of his death, and the case is not one, where the will can be admitted to probate in a surrogate's court, under the laws of the state.

2. Discussion of section.

This section is in the main a re-enactment of some of the sections of title I, chapter VI, part II, of the Revised Statutes. The fact that the Supreme Court has jurisdiction to render a judgment establishing a will in certain cases does not deprive the Surrogate's Court of its power to admit the will to probate.⁸⁵ But where circumstances exist, by reason

83. *Duck v. McGrath*, 160 App. Div. Pro. 100.
482, 145 N. Y. Supp. 1033; aff'd on 85. *Estate of Delaplaine*, 12 Civ.
opinion below, 212 N. Y. 600. — Pro. 35, following *Russell v. Hartt*, 87
84. *Hayward v. McDonald*, 7 Civ. N. Y. 19.

of which the will could not be admitted in a Surrogate's Court, the statute permits an action to be maintained for the purpose of establishing it.⁸⁶ But section 200 does not apply to wills which have been duly proved. It is an enactment of the Revised Statutes by which it appears that the term "establishing a will" means the same as proving a will, and such is the obvious meaning of the term as used in this section of the Decedent Estate Law.⁸⁷ Nor does the section authorize the court to appoint a guardian *ad litem* for an infant beneficiary, in a will refused probate by a surrogate, to sue to establish the will.⁸⁸

Where a woman marries on the faith of her husband's oral ante-nuptial agreement to make a will in her favor, which promise he subsequently fulfilled, but afterward made other testamentary disposition of his property, the Supreme Court under its inherent equitable powers has jurisdiction to enforce such ante-nuptial agreement by a judgment establishing the will made pursuant to said agreement, the same being inaccessible owing to the fact that it

86. *Russell v. Hartt*, 13 Wkly. Dig. 309, 87 N. Y. 19; *Caulfield v. Sullivan*, 85 N. Y. 153.

The complaint in an action to establish a lost codicil alleged to contain the following provisions, "I give and bequeath to my friend and former servant, Mary C. Donlon (the plaintiff), unless I shall have settled such a sum on her in my lifetime, one hundred thousand dollars," need not show affirmatively that the sum bequeathed was not settled upon the plaintiff during the life of the testator; the fact that upon the face of the codicil the plaintiff has a probable interest in its establishment is sufficient to entitle her to maintain the action. Such a complaint need not negative subdivision 1 of section 200, which provides that the codicil in question must have been lost or destroyed "before it was duly proved and recorded within the State." *Donlon v. Kimball*, 61 App. Div. 31, 70 N. Y. Supp. 252.

Will in Spain.—Where the com-

plaint alleged that the testator signed, published, delivered, and executed his will and codicil in Spain before a notary and three witnesses, and that such will and codicil had been duly recorded by the notary and published in his register, and that they remained on file in the archives of his office, from which they could not be removed for any purpose whatever, and the copies of the will and codicil, annexed to the complaint, showed that each of these instruments was subscribed by the testator, the witnesses and the notary, the complaint was held to state a cause of action. An averment that deceased was an inhabitant of and domiciled in this State, but temporarily residing in Spain, at the time of the execution of the will, is sufficient. *Younger v. Duffie*, 28 Hun, 242; *aff'd*, 94 N. Y. 535.

87. *Clark v. Poor*, 56 St. Rep. 122, 25 N. Y. Supp. 908.

88. *Dixon v. Cozine*, 114 N. Y. Supp. 615.

has been probated in a foreign State, and in such suit the court may enjoin the probate of the subsequent will.⁸⁹

In an action under section 200, the Supreme Court, by virtue of its jurisdiction in equity, can adapt its procedure to meet exigencies.⁹⁰

B. Sufficiency of proof.

1. Decedent Estate Law, § 204. Proof of lost will in certain cases.

But the plaintiff is not entitled to a judgment, establishing a lost or destroyed will, as prescribed in this article, unless the will was in existence at the time of the testator's death, or was fraudulently destroyed in his lifetime; and its provisions are clearly and distinctly proved by at least two credible witnesses, a correct copy or draft being equivalent to one witness.

2. The loss of the will.

In order to establish a lost or destroyed will pursuant to section 200, it is incumbent upon the plaintiff to show that the will was in existence at the time of the death of the alleged testator, or that it was fraudulently destroyed in his lifetime.⁹¹ The loss of the will is a material fact to be proved. An incidental destruction of the will without the knowledge of the testator while he was living and the will was in the care of a custodian, does not justify the action.⁹² But where it has been lost or destroyed without the knowledge or consent of the testator, its legal existence at the time of his death may be shown by circumstances.⁹³

Where the tenor and due execution of a will are properly proved and the executor to whom it was delivered by the

89. *Adams v. Swift*, 169 App. Div. 802, 155 N. Y. Supp. 873.

90. *Matter of Cameron*, 47 App. Div. 120, 62 N. Y. Supp. 187; *aff'd* without opinion, 166 N. Y. 610.

91. *Matter of Barnes*, 70 App. Div. 523, 75 N. Y. Supp. 373; *Perry v. Perry*, 49 St. Rep. 291, 21 N. Y. Supp. 133.

92. *Matter of Reiffeld*, 36 Misc. 472, 73 N. Y. Supp. 808.

93. *Schultz v. Schultz*, 35 N. Y. 653.

Proof of existence.—Where it is proved that the will, at the time of its execution, was placed by the tes-

tator in the hands of a custodian to keep, who testifies that he took charge of the same and locked it up in a trunk, and supposed it was there at the time of the testator's death, but on search it could not be found, the evidence of its legal existence is sufficient. If, under such circumstances, the will was not in existence at the death of the testator, it becomes evident that it was fraudulently destroyed or lost during the lifetime of the testator, in which case it was his last will and testament. *Schultz v. Schultz*, 35 N. Y. 653.

testatrix for safekeeping testifies to continuous custody of it, the subsequent loss of it, his search therefor and his failure to find it, it is to be inferred that the will existed when the testatrix died or was fraudulently destroyed in her lifetime, and it therefore is entitled to probate.⁹⁴

A will, destroyed by a testator under undue influence, and in belief of a fraudulent statement, is fraudulently destroyed, within the statute.⁹⁵ Where a will is destroyed without the testator's consent or knowledge and in his lifetime, it is generally fraudulently destroyed.⁹⁶ But a destruction of a will by a testator's direction and in his presence is not fraudulent.⁹⁷

Where the will of testatrix, which was last in her custody, was not found at her death, the presumption of law is that she destroyed the will, *animo revocandi*. The burden of overcoming such presumption is on those interested therein.⁹⁸ Statements of a testator as to the making of a will and its contents have been admitted;⁹⁹ and declarations of the testatrix made about a week before her death in which she spoke of the will as being in the custody of the executor are competent to rebut any inference of revocation arising from the loss of the will.¹ An allegation that another person destroyed the will in order to benefit by such destruction charges a crime and must be established by the most stringent proof.²

3. Contents of will.

To establish a lost or destroyed will, its execution and validity must be shown, its contents by two witnesses at the time of the death of testator, as well as its subsequent loss.³ The proof must be clear and convincing, not only in respect to its provisions and execution, but also that it was

94. *Matter of Cosgrove*, 31 Misc. 422, 65 N. Y. Supp. 570.

95. *Voorhees v. Voorhees*, 39 N. Y. 463.

96. *Early v. Early*, 5 Redf. 376.

97. *Lemon v. Claffy*, 45 Barb. 438.

98. *Matter of Kennedy*, 30 Misc. 1, 62 N. Y. Supp. 1011; *aff'd*, 53 App. Div. 105, 65 N. Y. Supp. 879; *aff'd*, 167 N. Y. 163; *Matter of Ascheim*, 75 Misc. 434, 135 N. Y. Supp. 515.

99. *Matter of Marsh*, 45 Hun, 107.

1. *Matter of Cosgrove*, 31 Misc. 422, 65 N. Y. Supp. 570. But see *Matter of Kennedy*, 30 Misc. 1, 62 N. Y. Supp. 1011; *aff'd*, 53 App. Div. 105, 65 N. Y. Supp. 879; *aff'd*, 167 N. Y. 163.

2. *Matter of Kennedy*, 30 Misc. 1, 62 N. Y. Supp. 1011; *aff'd*, 53 App. Div. 105, 65 N. Y. Supp. 879; *aff'd*, 167 N. Y. 163.

3. *Grant v. Grant*, 1 Sandf. Ch. 235.

Establishing title to real estate.—This section has not changed the rule

in existence at the time of the alleged testator's death.⁴ The due execution, as well as the contents, of the will must be shown.⁵

The two credible witnesses which the statute requires respecting the contents of a lost will need not necessarily have been witnesses also to the execution of the will, but they cannot be witnesses to the contents of the will if their knowledge of the contents of the instrument was limited to what they supposed it contained, only because somebody had told them that the draft they had seen of the will had been afterward executed and had become a will.⁶ If the two witnesses differ materially as to the beneficiary or amount of bequests, the will cannot be established on their testimony.⁷ The witnesses must be required to testify, at least, to the substance of the will;⁸ but the spirit of the law is complied with when proof is made, as required, of the provisions which affect the disposition of testator's property.⁹ One witness is sufficient where there exists a copy of the will and such witness testifies to the due execution of the original.¹⁰

at common law that in an action where the plaintiff sought to establish his title to realty through a will, it was sufficient to prove its due execution by one of the subscribing witnesses and the rule at common law was followed under the Revised Statutes. *Upton v. Berstein*, 76 Hun, 516, 27 N. Y. Supp. 1078.

Partition.—It is said that the proof required only relates to the action provided for by the statute, and does not apply to an action for partition. *Harris v. Harris*, 26 N. Y. 433.

4. *Kahn v. Hoes*, 14 Misc. 63, 35 N. Y. Supp. 273; *Schultheis v. Schultheis*, 143 N. Y. Supp. 324.

Judgment for defendant on merits.—Although the evidence is insufficient to establish due execution of the alleged will, or its contents, or the fact that it had ever been executed or was in existence at the death of the testatrix, or had been destroyed either before or after her death, and the plaintiff's failure of proof justifies a dismissal of the

complaint, it is error for the court to award judgment to the defendant on the merits where the evidence does not justify an affirmative finding that no will was executed by the testatrix, or that a paper alleged to be her will was not in existence when she died, or that it had not been fraudulently destroyed during her lifetime, or that the will, if executed, was destroyed by the testatrix *animo revocandi*. *Hollender v. Wallace*, 180 App. Div. 393, 167 N. Y. Supp. 824; *aff'd*, 227 N. Y. 614.

5. *Matter of Purdy*, 25 Misc. 458, 55 N. Y. Supp. 644; *aff'd*, 46 App. Div. 33, 61 N. Y. Supp. 430.

6. *Matter of Waldron*, 19 Misc. 333, 44 N. Y. Supp. 353.

7. *Sheridan v. Houghton*, 6 Abb. N. C. 234.

8. *McNally v. Brown*, 5 Redf. 372.

9. *Early v. Early*, 5 Redf. 376.

10. *Matter of Granacher*, 74 App. Div. 567, 77 N. Y. Supp. 748; *aff'd*, 174 N. Y. 504.

4. Proof of revocation of will.

Although section 204 provides that a lost will shall not be probated unless it was in existence at the time of the testator's death, or was fraudulently destroyed in his lifetime, and unless its provisions are clearly proved by at least two credible witnesses, a correct copy being equivalent to one witness, the section need not be complied with in order to establish that a second will containing a revocation clause, but not found after the testator's death, was duly executed so as to defeat the probate of the prior will. It is one thing to probate a lost will and another thing to establish that a second will revoking the former will had been duly executed and left in the possession of the testator. Thus, it has been held that the fact of the execution of the second will may be established by the testimony of a person who drew and witnessed both wills where the other subscribing witness to the second will is dead.¹¹

C. Decedent Estate Law, § 210. Receiver of decedent's estate.

Where the estate of a decedent has been brought under the jurisdiction of the supreme court, by an action for partition or distribution, or for the construction or establishment of a will, the court may upon the death of the sole surviving executor, appoint a receiver of the estate, pending the action, upon such terms and conditions, and upon such notice to the parties interested, as the court directs, and upon such security, if any, as to the court seems proper. For the purpose of carrying into effect the judgment and orders of the court in relation to the estate, a receiver so appointed is the successor in interest of the surviving executor; and has, subject to the direction of the court, the like power, as an administrator with the will annexed.

D. Judgment.

1. Decedent Estate Law, § 201. Judgment that will be established.

If, in such an action, the facts necessary to establish the validity of the will, as prescribed in the last section, are satisfactorily proved, final judgment must be rendered, establishing the will accordingly. But where the will of a person, who was a resident of the state at the time of his death, is established as prescribed in the last section, the judgment establishing it does not affect the construction or validity of any provisions contained therein; and such a question arising with respect to any provision, must be determined in the same action, or in another action or a special proceeding, as the case requires, as if the will was executed within the state.

11. Matter of Wear, 131 App. Div. 875, 116 N. Y. Supp. 304.

2. Decedent Estate Law, § 202. Judgment admitting the will to probate.

Where the parties to the action, who have appeared or have been duly summoned, include all the persons who would be necessary parties to a special proceeding, in a surrogate's court, for the probate of the same will and the grant of letters thereupon, if the circumstances were such that it could have been proved in a surrogate's court; the final judgment, rendered as prescribed in the last section, must direct, that an exemplified copy thereof be transmitted to the surrogate having jurisdiction, and be recorded in his office; and that letters testamentary, or letters of administration with the will annexed, be issued thereupon from his court, in the same manner, and with like effect, as upon a will duly proved in that court.

3. Decedent's Estate Law, § 203. Contents of judgment; surrogate's duty.

A copy of the will so established, or, if it is lost or destroyed, the substance thereof must be incorporated into a final judgment, rendered as prescribed in the last section; and the surrogate must record the same, and issue letters thereupon, as directed in the judgment.

E. Form of complaint for establishment of will.**NEW YORK SUPREME COURT.**

MARIA DE LA SALUD OVIEDO YOUNGER,
PLAINTIFF,

agst.

MARY ANN PELTON DUFFIE AND DANIEL
P. DUFFIE, DEFENDANTS.

94 N. Y. 535.

The plaintiff for a complaint, complaining of the defendants herein, respectfully shows to this court and avers:

1. That General Alfred N. Duffie, late United States consul at Andalusia, in the kingdom of Spain, temporarily residing at Cadiz in said kingdom, but an inhabitant of and domiciled at West Brighton, in the county of Richmond, and State of New York, died on the 8th of November, A. D. 1880, at the said city of Cadiz, and that he was at the time of his death possessed of personal property within the State of New York.

2. That this plaintiff is a legatee under the last will and testament and the codicil thereof of said deceased, and has an interest thereunder to the extent of \$20,000 and upwards.

3. That prior to his death and on or about the 28th day of January, 1880, the said Alfred N. Duffie, at the said city of Cadiz, in the said kingdom of Spain, duly signed, published, declared and executed before Ricardo de pro y Jajardo, a notary of the illustrious college of Seville, and in the presence of and with three witnesses, namely,

Salvador de Asprez Salvador, Ramirez de Arellano and Manuel Cruelles, all residents of Cadiz aforesaid, his last will and testament, and still later, to-wit, on the 1st day of May, 1881, before said notary and the same three witnesses, said deceased also signed, published, declared and executed a codicil thereto, a copy of which last will and testament, together with the codicil thereof, is hereto annexed, and to be taken as part of this complaint, the original will and codicil being in the Spanish language and in the said kingdom of Spain, under such circumstances they cannot be obtained, and the said copy hereto annexed is a true and faithful translation thereof.

4. That the said last will and testament and said codicil were duly executed as aforesaid, as an open will and codicil thereto, in conformity with the laws of Spain, and were duly recorded by said notary in his register or protocol, and remain on file among the archives of his notarial office, at the said city of Cadiz, from which the same cannot, by reason of the laws of Spain, be taken for purpose of being admitted to probate under the laws of the State of New York, or for any other purpose whatsoever. That the laws of Spain regulating the execution of said will and codicil and the recording of the same, are as follows:

Law I, title XVIII, liber X Novissimo Recopilacion: If any one executes his last will and testament before a notary public, it shall be so done in the presence of at least three witnesses of the vicinity or neighborhood where the same shall be executed; and Law II, title XVIII, liber X, id.: And in the codicils the same solemnity required for the execution of an open last will and testament, shall be observed; and Laws I, IV, and VI, title XXIII, liber X, id.: The public instruments are to be written and executed in the notarial register or protocol which the notary is bound to keep and which must always remain under his custody, and he cannot deliver the said public instruments so executed, but will give copies of the same duly compared or authenticated; and Law VII, title XXIII, liber X, id.: Classes an open will executed before a notary and witnesses and filed in the notarial office in his register or protocol, as a public instrument.

5. That the said last will and testament and codicil were never revoked, canceled or annulled, either by the said testator or by any judgment or operation of law.

6. That the said last will and testament and codicil have not been proved or recorded within the State of New York.

7. That the defendant, Mary Ann Pelton Duffie, is the widow of said deceased and is named as executrix in said will, but that she has declined and still continues to decline to proceed with the probate thereof, and that the defendant, Daniel P. Duffie, is the only next of kin of said testator and has some interest under said will; that no letters of administration have been issued or applied for nor has the estate of said testator been administered upon in this State or elsewhere.

Wherefore, the plaintiff demands judgment against the defendants that the said will and codicil be established and proved as the last will and testament and codicil thereto of the said Alfred N. Duffie,

deceased, and be admitted to probate as a will of personal property or estate; that letters testamentary thereon be issued to Mary Ann Pelton Duffie, the executrix named therein, or in the event of her declining to act, that letters of administration with the will annexed be issued therein to this plaintiff or to the person entitled thereto, out of the Surrogate's Court of the county of Richmond; wherein the said Alfred N. Duffie was domiciled at the time of his death and where property belonging to him was then and still is situated, and for such other and further relief as may be just, together with the costs in this action.

OLCOTT & MESTRE,
Plaintiff's Attorneys.

ARTICLE VI.

ACTION TO DETERMINE VALIDITY, CONSTRUCTION OR EFFECT OF DEVISE.

A. Decedent Estate Law, § 205. Action to determine validity, construction or effect of devise.

The validity, construction, or effect, under the laws of the state, of a testamentary disposition of real property situated within the state, or of an interest in such property, which would descend to the heir of an intestate, may be determined, in an action brought for that purpose, in like manner as the validity of a deed, purporting to convey land, may be determined. The judgment in such an action may perpetually enjoin any party from setting up or from impeaching the devise, or otherwise making any claim in contravention to the determination of the court, as justice requires. But this section does not apply to a case where the question in controversy is determined by the decree of a surrogate's court, duly rendered upon allegations for that purpose, as prescribed by law where jurisdiction of the plaintiff was duly acquired in the special proceeding in the surrogate's court, before the commencement of the action.

B. Other proceedings for construction of will.

In 1892 section 2653a was added to the Code of Civil Procedure. This section provided for an action in the Supreme Court to determine the validity of a will after its probate in Surrogate's Court. The special action authorized by this section was repealed upon the revision of the Surrogate Court practice in 1914. In prior editions of this work, a discussion will be found of the section and cases decided thereunder while that section of the Code was in force. It is to be noted, also, that special proceedings for the construction of wills may be maintained in the Surrogate's Court, but that practice is beyond the scope of this work. Section 2653a provided a useful purpose, for under that

section the validity of the will could be determined conclusively although it related to real estate, whereas the surrogate's decree admitting the will to probate did not have that conclusive effect. But, upon the revision of the Surrogate Court practice, a right to jury trial was provided, and hence it was proper to give a conclusive effect to the decree in the Surrogate's Court, even so far as it related to real estate.¹² It may be difficult to sustain the broad equitable powers which the Legislature has assumed to impose upon the Surrogate's Court, and in at least one case the surrogate has declined to exercise them.¹³ The limitations in section 205 of the Decedent Estate Law are applicable generally to the procedure under the new Surrogate's Code.¹⁴

C. When action lies.

There is no inherent power in courts of equity to construe wills as a distinct and independent branch of jurisdiction, but they exercise this jurisdiction only as an incident to their jurisdiction over trusts.¹⁵ If the construction of a trust is involved, the courts have jurisdiction independently of the statute. Equity has jurisdiction of an action to construe a will where it is necessary to pass on the validity and effect of a trust contained therein, whether the plaintiff seeks to maintain such trust or to destroy it.¹⁶ But, when no trust is involved, as a general rule, the only authority in the court is that given by section 205 of the Decedent Estate Law, which was formerly section 1866 of the Code of Civil Procedure. The action cannot generally be sustained on the theory that it invokes the equitable jurisdiction of removing a cloud from title, for unless the cloud is apparently legal and valid, there is no ground for invoking that jurisdiction.¹⁷ When no equitable estates are created

12. Surrogate Court Act, § 80.

13. *Matter of Freudenheim*, 108 Misc. 528, 177 N. Y. Supp. 795.

14. *Matter of Harden*, 88 Misc. 420, 150 N. Y. Supp. 743.

15. *Higgins v. Downs*, 101 App. Div. 119, 91 N. Y. Supp. 937.

Jury trial.—If the action involves the construction of the disposition of real property, it must be tried by a

jury unless a jury trial is waived. If the defendants are infants, they cannot waive their rights to a jury trial. *Weil v. Weil*, 107 Misc. 145, 176 N. Y. Supp. 248.

16. *Simmons v. Burrell*, 8 Misc. 388, 59 St. Rep. 554, 28 N. Y. Supp. 625; appeal dismissed, 83 Hun, 615.

17. *Mellen v. Mellen*, 139 N. Y. 210.

by the will, the authority of the court to construe it in an equitable action is to be found, if at all, in section 205.¹⁸

If this section is inapplicable for any reason, the rights of the parties must be litigated in an action at law, or a proceeding in Surrogate's Court. One who claims merely as a purchaser cannot maintain the action under section 205, and, unless the will creates equitable estates, he cannot generally maintain an action in equity for its construction.¹⁹ Nor can a judgment creditor of a devisee maintain an action for the construction of the will.²⁰ In fact, no one can maintain the action, except the heir-at-law or devisee of the decedent whose will is offered for construction.²¹

But it is clear that the power of a court over actions for the construction of wills has been extended by this statute, and they may be brought in many cases in which, before the statute, the court would have declined jurisdiction.²² But the limits of the extension are not well settled.²³ In terms it provides that the validity, construction and effect of a testamentary disposition of real estate or any interest in such property, which would descend to the heirs of an intestate, may be determined in like manner as the validity of a deed.²⁴ It has been held that it permits a suit for the construction of a devise in behalf of heirs claiming adversely to the will,²⁵ although no trust is involved.²⁶ But in other cases it has been held that the action cannot be maintained, in the absence of equitable grounds, by an heir claiming in hostility to the will.²⁷

A devisee of the legal estate, in possession of the property devised, cannot maintain an action to establish the will as against the heirs-at-law.²⁸ A devisee who claims a mere

18. *Davis v. Tremain*, 205 N. Y. 236. See, also, *Weil v. Weil*, 107 Misc. 145, 176 N. Y. Supp. 248.

19. *Mellen v. Mellen*, 139 N. Y. 210; *Smith v. Allen*, 121 N. Y. Supp. 939.

20. *Higgins v. Downs*, 101 App. Div. 119, 91 N. Y. Supp. 937.

21. *Matter of Bouchoux*, 89 Misc. 47, 152 N. Y. Supp. 548.

22. *Mellen v. Mellen*, 139 N. Y. 210.

23. *Higgins v. Downs*, 101 App. Div. 119, 91 N. Y. Supp. 937.

24. *Adams v. Becker*, 47 Hun, 65;

Smith v. Hilton, 50 Hun, 236, 2 N. Y. Supp. 820.

25. *Read v. Williams*, 125 N. Y. 560.

26. *Adams v. Becker*, 47 Hun, 65, 13 St. Rep. 41, 28 St. Rep. 910; *Hemmje v. Meinen*, 20 N. Y. Supp. 619.

27. *Kalish v. Kalish*, 45 App. Div. 528, 61 N. Y. Supp. 448; *aff'd*, 166 N. Y. 368; *Jones v. Richards*, 24 Misc. 626, 54 N. Y. Supp. 126.

28. *Anderson v. Anderson*, 112 N. Y. 104.

Residuary legatee.—Where the re-

legal title in the property of the testator, where there is no trust, cannot ordinarily maintain an action for the construction of the devise, but must assert his title by ejectment or other legal action, or, if in possession, must await an attack upon it and set up the devise in answer to the hostile claim.²⁹

D. Matters subject to construction.

To justify the action there must be a color of question as to the construction of the will.³⁰ The jurisdiction of the court under section 205 is limited to devises of real property within the State;³¹ although, independently of the statute, the court will have power in some cases to construe bequests of personal property.³² The action cannot be brought to procure a construction relative to a testamentary disposition of real estate situated without the State.³³

The action contemplated by the statute is one directed to a determination of the validity of a devise, not the validity of the will itself.³⁴ An action cannot be maintained to reform a will under this section, where it appeared that the husband and wife intended to make wills, each in favor of the other, and that, by mistake, each signed and executed the will of the other.³⁵ The Supreme Court will not entertain an action to construe a clause in a will directing executors and trustees to employ the plaintiff, their co-executor and trustee, as

siduary estate cannot be augmented by the destruction of a trust created by a will, a residuary legatee has no interest in the validity or invalidity of the trust, and no standing to ask an adjudication thereon. *Lord v. Lord*, 44 Misc. 530, 90 N. Y. Supp. 143.

The devisee of a life estate has a right to bring an action for the construction of a will. *Jones v. Jones*, 1 How. Pr. (N. S.) 510.

29. *Weed v. Weed*, 94 N. Y. 243; *McKinley v. Van Dusen*, 76 App. Div. 200, 78 N. Y. Supp. 277; *Anderson v. Appleton*, 48 Hun, 534, 1 N. Y. Supp. 319; *aff'd*, 112 N. Y. 104, 16 Civ. Pro. 198; *Whitney v. Whitney*, 63 Hun, 59, 18 N. Y. Supp. 3. See, also, *Weil v.*

Weil, 107 Misc. 145, 176 N. Y. Supp. 248.

30. *Horton v. Cantwell*, 108 N. Y. 255. See *Monypeny v. Monypeny*, 202 N. Y. 90, holding that the complaint in that case disclosed questions sufficient to justify the action.

31. *Wallach v. Wallach*, 144 App. Div. 19, 128 N. Y. Supp. 1020.

32. *Wager v. Wager*, 89 N. Y. 161; *Holland v. Alcock*, 108 N. Y. 312.

33. *Davis v. Tremain*, 205 N. Y. 236.

34. *Anderson v. Anderson*, 112 N. Y. 104; *Nelson v. McDonald*, 61 Hun, 406, 16 N. Y. Supp. 273.

35. *Nelson v. McDonald*, 61 Hun, 406, 16 N. Y. Supp. 273.

their sole counsel and attorney in the settlement and management of the estate.³⁶

In an action brought solely for the construction of a will, the court has no power to construe an independent business agreement.³⁷ No authority is given the court to determine the validity of a power of sale given to the executors.³⁸

The decree of a surrogate, admitting a will to probate, cannot be questioned in an action to construe a will, upon the ground that the decedent was not a resident of the county of the surrogate when he died.³⁹

E. Form of complaint for construction of will.

SUPREME COURT.

JOHN F. MONTIGNANI, AS ADMINISTRATOR,
WITH THE WILL OF BERNARDUS S. STAATS,
DECEASED, ANNEXED, PLAINTIFF,

agst.

MARY Y. STAATS BLADE, HARRIET STAATS,
BELLA T. STAATS ET AL., DEFENDANTS.

145 N. Y. 111.

Plaintiff, complaining of defendants, shows to this court:

1st. That on or about June 22nd, 1891, Bernardus E. Staats died at the city of Albany, in the county of Albany, being a resident of said county, leaving a last will and testament, a copy whereof is hereto attached, forming a part hereof, and marked "Exhibit A."

2nd. That said will was proved and admitted to probate by and before the surrogate of said Albany county, on October 30, 1891, and is in his office recorded in Book 39 of Wills, page 466.

3rd. That Isaac D. F. Lansing and Peter Lansing, the persons named and described in said will as executors and trustees, have each, respectively, by instruments in writing, signed by them, and duly acknowledged in like manner as deed to be recorded in Albany county, renounced his appointment as such executor and trustee, which renunciations were, on October 30th, 1898, filed to be recorded in Albany county surrogate's office, and that said executors thereby and thereupon declined and refused to act as such executors and trustees.

36. Wallach v. Wallach, 144 App. Div. 19, 128 N. Y. Supp. 1020.

38. Mellen v. Mellen, 139 N. Y. 210.

37. Montignani v. Blade, 145 N. Y. 111, 64 St. Rep. 558.

39. Woodward v. James, 16 Abb. N. C. 246.

4th. That, upon proper proceedings duly had, this plaintiff, John F. Montignani, was thereafter duly appointed as the administrator, with the said will of said deceased annexed; that he duly qualified, and that letters of administration were duly issued to him on January 20th, 1892, as such administrator, and that he has since acted and is now acting as such administrator.

5th. That said Bernardus E. Staats left both real and personal property and estate, amounting in the aggregate to about \$50,000, which have come into plaintiff's possession, as such administrator.

6th. That said testator also left in the First National Bank of Albany, N. Y., where they still so remain, certain shares of stock of the Central National Bank of New York, of the value of about \$1,300, and that said stock was so there left by said testator as and for collateral security for a loan of \$300 by him had from said Albany bank, and which loan is now due and unpaid; and that said testator also left, of cash funds on deposit in the First National Bank of Albany, the sum of \$130.84.

7th. That said Bernardus E. Staats left by him surviving no widow, and all the persons named as legatees or devisees mentioned in said will, who are the only heirs-at-law and next of kin of said deceased, and whose names and residences are as plaintiff is informed and believes as follows, viz.:

(Here insert names and residences of heirs-at-law and next of kin.)

8th. That various questions have arisen as to the validity and as to the true intent, meaning and construction of the bequests and provisions contained in said will, and as to the legal effect thereof, and as to the disposition and appropriation of the property of the said Bernardus E. Staats, deceased, in pursuance thereof, and as to the nature and extent of the interest and estate of the said defendant, Bernardus E. Staats, and of the defendant William Staats, and of the defendant Mary Y. S. Blade, and of the defendant Harriet Staats, and of the defendant Bella T. Staats, her daughter, and of the said other defendants, the children, heirs-at-law, legatees, and devisees of said Bernardus E. Staats, deceased, in and to the personal property and real estate in and by said will passing and disposed of, and that plaintiff, in his representative capacity as administrator, with said will annexed, is embarrassed in the execution of his duties, and is apprehensive that he may make mistakes and incur hazard and responsibility in the disposition of the property under said will, and that plaintiff believes and charges that it is important and necessary that the questions should be judicially settled and determined, and that without the aid of this court it is impossible to determine the validity and true construction of said will, and that the interests of the parties require that the same should be speedily construed and determined.

9th. That among the questions which the plaintiff wishes to submit to the judgment of this court are:

I. Whether the trust sought to be created in and by the second disposing clause of said will in favor of the defendant, Bernardus E.

Staats, of said certain shares of Wells, Fargo & Co. express stock for the term of ten years, is a valid and subsisting trust.

* * * * *

II. And if the court decides that said provisions last mentioned do not constitute a valid trust, that the said court then decide whether the property therein mentioned as trust property, namely, No. 52 Elm st., and the furniture and housekeeping articles and utensils therein, and the shares of the New York Central & Hudson R. R. Co. stock pass absolutely to the defendant Mary Yates Staats Blade, or whether such personal property becomes part of the residuary fund of said estate, or whether as to it said testator did not die intestate and not disposing thereof, and whether the same is not divisible among his next of kin and heirs-at-law.

* * * * *

III. That this court also determine what money or funds were meant and referred to by testator in using the expression appearing in said will as follows "the cash funds belonging to myself in the First National Bank of Albany," and whether the expenses of probating said testator's will and of the appointment of said administrator herein and the expenses of administration of said estate are properly payable out of said the cash funds belonging to said testator in the First National Bank of Albany, and whether by said term "cash funds" said testator intended to designate and include certain shares of stock of the Central National Bank of New York remaining in said First National Bank as collateral security as aforesaid, and whether the residue or balance, if any, of the said cash funds in said bank are to be paid to said Mary Y. Staats absolutely, and if an absolute bequest thereof to her is intended.

IV. That this court also determine whether the language and intent of said will in giving and bequeathing to the defendant, Willa F. C. Staats, the residue of testator's real and personal estate are sufficient to vest in and pass to her all legacies and devises for any reason lapsing and what real and personal estate passes to her under the provisions of said will and in virtue of the operation of law.

10th. The plaintiff further alleges that it is important to the due and speedy determination of this estate and to the legatees and interested parties herein, and plaintiff hereby prays and demands that the several matters aforesaid in regard to said estate, property and will, as to which doubts exist, or as to which questions have arisen and all other matters in regard thereto as to which questions or doubts have existed or arisen, or may hereafter exist or arise, be judicially determined by this court in this action, and such direction, decree and judgment be thereupon made as may finally settle and determine the rights of all the parties in interest in said property and estate of said deceased and the proceeds and investment thereof in and to each and every part thereof.

11th. The plaintiff further prays and demands that defendants may answer herein, and that this court shall, by its determination,

decree or judgment, give all necessary and proper directions, decrees and judgments for the due administration and disposition of the estate of said deceased testator and of the property aforesaid in regard to the several particulars hereinbefore referred to, and in regard to any question which may be mooted by any of the parties or which may arise in the case, and for said other and further relief as to the court may seem just, and as the case may require, and that the court will decree to plaintiff the costs and expenses of this action.

WILLIAM S. ELMENDORF,
Plaintiff's Attorney.

DETERMINE CLAIM TO REAL PROPERTY.

See CLAIM TO REAL PROPERTY, ACTION TO DETERMINE.

DISCHARGE OF ANCIENT MORTGAGES.

- A. Statute.
- B. Form of petition.
- C. Form of order to show cause.
- D. Form of order discharging mortgage.

A. Statute.

Article X of the Real Property Law contains provisions for the satisfaction of ancient mortgages. The statute was taken from chapter 365 of the Laws of 1862. It provides generally for the presentation of a petition setting forth the facts to the Supreme Court in the county where the mortgaged premises are situated or to the County Court of such county. Thereupon an order is issued to show cause why the mortgage should not be discharged; and an order is subsequently made discharging the mortgage of record. The remedy is one which is given by statute, and all of the requirements imposed by it must receive compliance. It is required that the petition set forth that the mortgage has been paid, and, without such an allegation, the order should not be granted.¹ In New York City, where the production of the original mortgage is generally required before it will be discharged, a proceeding is authorized by section 322 of the Real Property Law when it is impossible to produce the mortgage. The section seems to authorize a proceeding in some cases when the satisfaction is lost or was never given.²

B. Form of petition.

COUNTY COURT — ALBANY COUNTY.

IN THE MATTER OF THE PETITION OF ANNA BELLE LEVIN, FOR THE DIS- CHARGE OF A CERTAIN MORTGAGE.	}
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To the County Court of Albany County:

The petition of Anna Belle Levin respectfully alleges that your petitioner resides in the village of Green Island, Albany county, N. Y., and is the owner in fee simple of certain premises situated in the vil-

1. Matter of Townsend, 4 Hun, 31; 2. Matter of Foster, 113 Misc. 499.
appeal dismissed, 63 N. Y. 631.

lage of Green Island, Albany county, N. Y., and known on a map of the village of Green Island as lot No. 239, situated on the northwest corner of Hudson avenue and Clifton street in said village.

That your petitioner became the owner of said premises by purchase from Alice E. Murray on August 25, 1911.

That the payment and consideration for the purchase of the same has not been made for the reason that a certain mortgage purporting to be made by Stephen Viele and wife, to John S. Fake, which mortgage is dated May 21, 1850, and recorded May 22, 1850, in book of mortgages No. 80, at page 47, in the Albany county clerk's office, to secure the payment of the sum of one thousand three hundred and thirty-one dollars and eighty-two cents (\$1,331.82), appears from the records of said county to be undischarged and a lien upon the premises above described.

That your petitioner has made diligent inquiry of persons living in the vicinity of said property concerning the parties to said mortgage and presents herewith affidavit of continued ownership from 1873 to the date hereof, showing that the owners and parties in possession, during the said period, were never called upon to pay any part of said mortgage nor the interest thereof, and your petitioner believes and therefore alleges that the said mortgage is paid and that the mortgage has been paid for more than ten years.

That your petitioner is informed and believes that John S. Fake died in the city of Troy on January 11, 1876, leaving a last will and testament which was duly probated in the Rensselaer Surrogate's Court on February 8, 1876, and is set forth in book 86 of wills, Rensselaer surrogate's records, at page 137, and that Augusta E. McMurray, his daughter, was the sole devisee and legatee of said will; and that the inventory filed March 29, 1876, does not show said mortgage to be part of the assets of said estate.

Deponent is further informed and believes that Augusta E. McMurray died January 20, 1894, in said city of Troy, N. Y., leaving a last will and testament dated April 28, 1891, which was duly admitted to probate in the Rensselaer Surrogate's Court on March 2, 1894. That said Augusta E. McMurray left her surviving her husband, Alfred W. McMurray, and two sons, Clarence F. McMurray and Charles B. McMurray, and that in the appraisal of said estate said mortgage was not shown to be part of the assets of said estate.

Your petitioner refers to the certified search of the county clerk and the official abstracts of title, which certify that said mortgage has never been assigned or foreclosed; the certificate of the Rensselaer county surrogate, showing that letters testamentary were issued on the estate of John S. Fake and on the estate of Augusta E. McMurray as herein set forth, together with the accompanying affidavits, all of which are hereto annexed as evidence of the fact that said mortgage has been paid.

WHEREFORE, your petitioner prays that this court will make an order requiring the persons interested to show cause why said mortgage should not be discharged and unless cause be shown, to make an order that said mortgage be discharged of record.

ANNA BELLE LEVIN,
Petitioner.

Dated, *September 8, 1911.*

(Verification.)

FRANK H. DEAL,

Attorney for Petitioner, Troy, N. Y.

(Affidavits, certificates, official search and abstract of title, referred to in petition, annexed.)

C. Form of order to show cause.

At a Special Term of the County Court, held at the County Building in the City of Albany, N. Y., on the 12th day of September, 1911.

Present — Hon. GEORGE ADDINGTON, *County Judge.*

COUNTY COURT — ALBANY COUNTY.

IN THE MATTER OF THE PETITION OF ANNA BELLE LEVIN, FOR THE DIS- CHARGE OF A CERTAIN MORTGAGE.	}
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On reading and filing the petition of Anna Belle Levin, duly verified September 8, 1911; the affidavit of John M. Deal, verified March 16, 1883; the affidavit of Elias Gates and Nancy P. Smythe, verified March 4, 1904; the affidavit of Alice E. Murray, verified September 8, 1911; the certificate of the county clerk of Albany county and the certificate of the clerk of the Surrogate's Court of Rensselaer county, from which it appears that a certain mortgage of record in the county clerk's office of Albany county, purporting to be made by Stephen Viele and wife to John S. Fake, dated May 21, 1850, and recorded in the said clerk's office May 22, 1850, in book 80 of mortgages, at page 47, to secure the payment of the sum of one thousand three hundred and thirty-one dollars and eighty-two cents (\$1,331.82), and which said mortgage appears to be undischarged and a lien upon the premises of said petitioner, situated in the village of Green Island, in said county; that said mortgage is paid; that the mortgagee has been dead more than thirty-five years; that letters testamentary have been taken out in the Surrogate's Court of Rensselaer county, and the executor named in said last will and testament is deceased, and that said mortgage has not been assigned or transferred.

Now, on motion of Frank H. Deal, attorney for petitioner, it is

Ordered, that all persons interested in said mortgage be and they hereby are required to show cause at a term of this court appointed to be held on the 16th day of September, 1911, at the County Building in the city of Albany, N. Y., at ten o'clock in the forenoon of that day, why such mortgage should not be discharged of record. And it is further

Ordered, that this order shall be published in the *Albany Evening Journal*, a newspaper published in the city of Albany, N. Y., once a week until said return date. And it is further

Ordered, that notice by mail, addressed to the following persons at the following addresses, on or before the 13th day of September, 1911, shall be good and sufficient service.

Clarence F. McMurray, 73 First street, Troy, N. Y.

Charles B. McMurray, 613 Third avenue, North, Troy, N. Y.

GEORGE ADDINGTON,

Albany County Judge.

(Annexed proof of publication and of service of order by mail as therein directed.)

D. Form of order discharging mortgage.

(Caption and title.)

The above-named petitioner having presented to this court her petition, duly verified, describing a certain mortgage of record in the clerk's office of the county of Albany, purporting to be made by Stephen Viele to John S. Fake, dated May 21, 1850, and recorded in said clerk's office May 22, 1850, in book 80 of mortgages at page 47, to secure the payment of the sum of one thousand three hundred and thirty-one dollars and eighty-two cents (\$1,331.82), which said mortgage appears to be undischarged and a lien upon the premises of petitioner, situated in the village of Green Island in said county, and alleging that said mortgage is paid and that the mortgagee has been dead more than thirty-five years; that letters testamentary on the estate of said mortgagee have been taken out in the county of Rensselaer, N. Y., appointing his daughter, Augusta E. McMurray, and Alfred W. McMurray, the executrix and executor thereof, and making the said Augusta E. McMurray the sole devisee and legatee; and Augusta E. McMurray having died on January 20, 1894, leaving a last will and testament upon which letters testamentary were granted by the Surrogate's Court of Rensselaer county, N. Y., to her husband, Alfred W. McMurray, and her sons, Clarence F. McMurray and Charles B. McMurray, and said Clarence F. McMurray and Charles B. McMurray having qualified as such executors and were the residuary legatees of said will and said persons are now living and are the sole representatives, heirs-at-law and next of kin of said John S. Fake; that said mortgage has not been assigned or transferred; and this court having heretofore and on the 11th day of September, 1911, made an order requiring all persons interested to show cause at a

term of this court appointed to be held on the 16th day of September, 1911, at the County Building in the city of Albany, N. Y., at ten o'clock A. M., why said mortgage should not be discharged of record and directing that the order should be published in the *Albany Evening Journal*, a newspaper published in the city of Albany, in said county, once prior to the return of the said order to show cause, and that notice by mail be given to Clarence F. McMurray and Charles B. McMurray on or before September 13, 1911, and it appearing from the affidavit of Irene E. Gilligan, verified September 14, 1911, that said notices were duly mailed to said persons as required by said order, and it appearing from the affidavit of publication that said order was duly published in the *Albany Evening Journal*; and there having appeared at the time and place specified in said order, Frank H. Deal, attorney for petitioner, and no one having appeared to show cause why said mortgage should not be discharged, and said petitioner having presented to the court the original abstract of title made by the county clerk in said county, and duly certified by him to be a true statement of the record of said clerk's office, and the certificate of the surrogate of Rensselaer county, that letters testamentary were issued on the estates of John S. Fake and Augusta E. McMurray; that the executors of the estate of John S. Fake are dead and that Clarence F. McMurray and Charles B. McMurray are the only persons in interest; and the certificate of the clerk of said county that said mortgage has never been assigned, that no notice of pendency of an action to foreclose the same has been filed in said clerk's office; and the verified petition herein, together with the affidavits of Alice E. Murray, Elias Gates, Nancy P. Smythe and John M. Deal, from which it appears that said mortgage has been paid; that said mortgage has not appeared in the settlement of the estate of John S. Fake or that of Augusta E. McMurray, as part of such estates, or by the inventory and appraisal of said estates duly filed in the Rensselaer Surrogate's Court; that no interest has been paid thereon since 1873, and no demand for the payment of principal or interest has been made upon the owners in possession of said property since 1873, and the allegations of the payment of said mortgage not having been denied and no evidence having been given to rebut the presumption of payment arising from the lapse of time and proof having been made of the publication of the order of this court, granted September 12, 1911, and of the service by mail of said order of this court as directed by said order, and the court being satisfied that the matters alleged in said petition are true, it is thereby

ORDERED, that the mortgage purporting to be made by Stephen Vicle to John S. Fake, dated May 21, 1850, and recorded in the Albany county clerk's office May 22, 1850, in book 80 of mortgages at page 47, to secure the payment of the sum of one thousand three hundred and thirty-one dollars and eighty-two cents (\$1,331.82), be

discharged of record, and the county clerk of Albany county, upon being furnished with a certified copy of this order and being paid the fees allowed by law, shall discharge said mortgage of record.

GEORGE ADDINGTON,

Albany County Judge.

DISCHARGE OF DEBTOR FROM IMPRISONMENT.

See DEBTOR AND CREDITOR LAW.

DISSOLUTION OF CORPORATION (VOLUNTARY).

See CORPORATIONS.

DIVORCE.

See MATRIMONIAL ACTIONS.

DOWER.*

ARTICLE I.

Origin and nature of dower.

- A. In general.
- B. Elements of right.
- C. Nature of consummate dower before admeasurement.
- D. Inchoate dower.
- E. Conflict of laws.

ARTICLE II.

Lands subject to dower.

- A. Real Property Law, § 190. Dower.
- B. Estate of inheritance.
- C. Seizin.
- D. Trust estate.
- E. Indian lands.
- F. Dower on dower.
- G. Improvements.
- H. Mortgaged lands.
 - 1. Real Property Law, § 192. Dower in lands mortgaged before marriage.
 - 2. Real Property Law, § 193. Dower in lands mortgaged for purchase-money.
 - 3. Real Property Law, § 194. Surplus proceeds of sale under purchase-money mortgages.
 - 4. Real Property Law, § 195. Widow of mortgagee not endowed.
 - 5. Dower in equity of redemption.
 - 6. Mortgage executed before marriage.
 - 7. Purchase money mortgage.
 - 8. Inchoate dower on foreclosure.
- I. Real Property Law, § 191. Dower in lands exchanged.

ARTICLE III.

Bar of dower.

- A. Conveyance or acts of husband.
 - 1. Real Property Law, § 203. Effect of acts of husband.
 - 2. Application of statute.
- B. Release by dowress.
 - 1. Real Property Law, § 206. Divorced woman may release dower.
 - 2. Real Property Law, § 207. Married woman may release dower by attorney.
 - 3. Release to husband.

* For a further discussion of the matters referred to in this chapter, see Weed's Practical Real Estate Law; Aron's Gist of Real Property Law; Schouler on Domestic Relations; B., C. & G. Consolidated Laws.

4. Release to stranger.
 5. Disability of wife.
 6. Power of attorney by wife.
 7. Conveyance set aside for fraud.
- C. Defeat of husband's estate.
- D. Assignment of dower.
- E. Judgment in partition.
- F. Estoppel.
- G. Divorce.
1. Real Property Law, § 196. When dower barred by misconduct.
 2. Real Property Law, § 202. When provision in lieu of dower is forfeited.
 3. Annulment of marriage or decree of separation.
 4. Divorce obtained by wife.
 5. Misconduct without divorce.
 6. Foreign divorce.
- H. Jointure or pecuniary provision.
1. Real Property Law, § 197. When dower barred by jointure.
 2. Real Property Law, § 198. When dower barred by pecuniary provisions.
 3. Real Property Law, § 199. When widow to elect between jointure and dower.
 4. Ante-nuptial agreement.
 5. Agreement made during marriage.
 6. Jointure.
 7. Violation of agreement by husband.
- I. Devise in lieu of dower.
1. Real Property Law, § 200. Election between devise and dower.
 2. Real Property Law, § 201. When deemed to have elected.
 3. When election is required.
 4. Time for election.
 5. Death of widow within year.
 6. Effect of election to take under will.

ARTICLE IV.

Right of widow to quarantine or crops.

- A. Real Property Law, § 204. Widow's quarantine.
- B. Real Property Law, § 205. Widow may bequeath crop.
- C. Quarantine.

ARTICLE V.

Action to recover dower.

- A. Limitation of action.
 1. Real Property Law, § 460. Limitation of action for dower.
 2. Effect of section.
- B. Jurisdiction of courts.
- C. Parties.
 1. Real Property Law, § 461. Necessary defendants.
 2. Real Property Law, § 462. Who may be joined as defendants.

3. Real Property Law, § 463. Actions where defendants claim in severalty.
4. Decisions as to parties.
- D. Action by owner to determine widow's dower.
- E. Demand or possession.
- F. Pleadings.
 1. Real Property Law, § 470. Complaint.
 2. General contents of complaint.
 3. Form of complaint.
 4. Form of amended complaint.
- G. Bill of particulars.
- H. Trial of issues.
- I. Recovery of damages.
 1. Real Property Law, § 464. Damages may be recovered; how estimated.
 2. Real Property Law, § 465. Damages in action against alienee of husband.
 3. Real Property Law, § 466. Damages where several parcels are affected.
 4. Real Property Law, § 467. Damages apportioned between heir and alienee.
 5. General right to damages.
 6. Against person other than heir.
 7. Effect of death of dowress.
- J. Interlocutory judgment.
 1. Real Property Law, § 471. Interlocutory judgment for admeasurement.
 2. Stay of judgment.
 3. Default.
 4. Settlement after interlocutory judgment.
 5. Form of interlocutory judgment.
 6. Form of notice of motion for appointment of referee.
 7. Form of order of reference.
- K. Commissioners or referee to admeasure dower.
 1. Real Property Law, § 472. Dower, how admeasured.
 2. Real Property Law, § 473. Report thereupon.
 3. Real Property Law, § 474. Setting aside report.
 4. Real Property Law, § 475. Fees and expenses.
 5. Notice of meeting.
 6. Division of property.
 7. Improvements.
 8. Form of report.
 9. Form of report not laying off parcel.
- L. Final judgment.
 1. Real Property Law, § 476. Final judgment.
 2. Real Property Law, § 477. Plaintiff may recover sum awarded; court may modify judgment.
 3. Real Property Law, § 478. Junior incumbrancers; not affected by admeasurement.

4. Real Property Law, § 469. Collusive recovery not to prejudice infant.
 5. Real Property Law, § 479. Appeal not to stay execution, if undertaking is given.
 6. Modification and enforcement of judgment.
 7. Form of final judgment.
- M. Acceptance of gross sum.
1. Real Property Law, § 480. Plaintiff may consent to receive a gross sum.
 2. Real Property Law, § 481. Defendant may consent to pay it; proceedings thereupon.
 3. Real Property Law, § 482. Interlocutory judgment for sale.
 4. Real Property Law, § 483. Direction that a part to be laid off.
 5. Real Property Law, § 484. Lien to be ascertained.
 6. Real Property Law, § 485. Satisfaction or protection of lien.
 7. Real Property Law, § 486. Payment of taxes, assessments and water rates out of proceeds.
 8. Real Property Law, § 487. Report of sale.
 9. Real Property Law, § 488. Final judgment upon confirming sale.
 10. Real Property Law, § 490. Certain provisions made applicable.
 11. Judgment.
 12. Computation of gross sum.
 13. Effect of death of dowress.
 14. Form of consent to accept gross sum in lieu of dower.
- N. Costs.
- O. Real Property Law, § 489. Damages against grantee of premises subject to dower.
- P. Real Property Law, § 491. Action for ejectment by reversioner or remainderman, after determination of particular estate.

ARTICLE I.

ORIGIN AND NATURE OF DOWER.

A. In general.

The word "dower" means, in its general acceptance, a certain estate of a wife in the real property of her husband. It has been defined as an interest in lands contingent during the life of the husband and which attaches as soon as there is a concurrence of marriage and seizin, and cannot be prejudiced by any subsequent act of the husband.¹ The origin of the estate is obscure, and in different states and countries its history has been varied. It is a right of great antiquity. It was early recognized by the common law, and finds a place in the earliest statutes of this State.

1. *Denton v. Hanry*, 8 Barb. 618.

Dower at common law is the life estate of a wife in one-third of all the legal estates of inheritance of which her husband is seized at any time during coverture of a sole, beneficial, and immediate seizin, and which any issue of theirs might rightfully inherit. It has three stages, namely: (1) Its inchoate stage, extending from the time of the marriage or the acquisition of the property in question to the time of the husband's death; (2) Its consummate stage, extending from the death of the husband; and (3) Its assigned stage, extending from the time it is set off to the widow. Dower is said to be an adjunct of marriage and survivorship.² Both the right of dower and the manner of enforcing a claim therefor are subject to the power of the Legislature, and depend on the statutes in force at time of the husband's death.³

B. Elements of right.

In order that consummate dower may attach to property, three elements must concur: (1) Marriage; (2) Seizin during coverture; (3) Death of husband during the life of the wife.⁴ If the alleged marriage is void, no right of dower will attach.⁵ The inchoate right of dower which existed during coverture becomes perfected upon the death of the husband, and she then has a right to enter upon the enjoyment of that interest.⁶

C. Nature of consummate dower before admeasurement.

Upon the death of the husband, the widow's right becomes a consummate right of dower. Even before its admeasurement, it is an absolute right. It may be assigned,⁷ and it is

2. *Schiffer v. Pruden*, 64 N. Y. 47.

3. *Jourdan v. Haran*, 56 Super. Ct. 185, 18 St. Rep. 858, 3 N. Y. Supp. 541.

4. *Wait v. Wait*, 4 N. Y. 95.

5. *Cropsey v. Ogden*, 11 N. Y. 228.

A woman married abroad, even before the naturalization of her husband, becomes entitled to dower if he subsequently becomes naturalized here, although she did not follow him to this country. *Burton v. Burton*, 1 Keyes, 359.

6. *Smith v. Doe*, 111 N. Y. Supp. 525; *Payne v. Becker*, 13 Wkly. Dig. 441.

7. *Howell v. Newman*, 59 Hun, 538, 37 St. Rep. 296, 13 N. Y. Supp. 648; *Payn v. Becker*, 87 N. Y. 153; *Pope v. Mead*, 98 N. Y. 201.

Purchase-money mortgage.—A widow's dower right, although not admeasured, is an absolute right which is assignable, and where she assigns, taking back a mortgage on the land, her equities are the same as if she

liable to her creditors. The right of dower of a judgment debtor vests in a receiver appointed in supplementary proceedings,⁸ but it is a chose in action which has been held not subject to execution,⁹ but is liable to attachment.¹⁰

A widow is not, by virtue of her dower right, a tenant in common with the other persons having an interest in the property.¹¹

Although the right of a dowress in lands before assignment is not established, it is a charge and incumbrance upon them and is capable of being enforced and of producing a legal estate. It is in that respect similar to the right which a mortgagee has in the lands mortgaged. The interest of neither constitutes an estate in lands, but both are interests which may be transferred or conveyed by any instrument evidencing an intent to so transfer them and in neither case can the lands be transferred by the legal owners, so as to leave them in the hands of any subsequent grantees, free from the respective claims of the dowress or the mortgagee.¹²

When property out of which dower is to be assigned is in itself indivisible, and will not admit of setting apart a portion by metes and bounds, an allotment by agreement may be made to the widow of her proportionate share of rents and profits issuing from the entire property. Agreements between parties constituting assignments or admeasurements of dower are recognized by the courts as effectual for that purpose, where the intention is clearly manifested.¹³

D. Inchoate dower.

Dower is a positive institution of law incident to the marriage relation.¹⁴ An inchoate right of dower is not derived from her husband. It attaches from the moment of the grant to her husband, and she takes constructively as a

had conveyed the land and taken back a mortgage for the purchase price. *Pope v. Mead*, 99 N. Y. 201.

8. *Sayles v. Naylor*, 5 St. Rep. 816.

9. *Lawrence v. Miller*, 2 N. Y. 245; *Moore v. Mayor*, 8 N. Y. 110; *Aikman v. Harsel*, 98 N. Y. 186; *Sayles v. Naylor*, 5 St. Rep. 816.

10. *Latourette v. Latourette*, 52 App. Div. 192, 65 N. Y. Supp. 8.

11. *Wood v. Clute*, 1 Sandf. Ch. 349.

12. *Mutual Life Ins. Co. v. Shipman*, 119 N. Y. 324.

13. *Howells v. McGraw*, 97 App. Div. 460, 90 N. Y. Supp. 1.

14. *Môere v. The Mayor*, 8 N. Y. 110.

Separate estate.—The inchoate right of dower is no part of the married woman's separate estate. *Watson v. Church*, 3 Hun, 80.

purchaser from the grantor.¹⁵ It is not an estate or interest in land but a contingent claim arising not out of contract but as an institution of law, constituting a chose in action, incapable of transfer by grant or conveyance, but susceptible during its inchoate state only of extinguishment.¹⁶ It is a vested right,¹⁷ but is not a chose in action which can be reached by her creditors.¹⁸ But as a vested right, it will be protected by the court.

During the life of her husband she can redeem mortgaged premises from a foreclosure in which she has not been served with process,¹⁹ but the relief granted will be subject to such conditions as are equitable.²⁰

A married woman may, to protect her inchoate right of dower, maintain an action to cancel of record a deed purporting to be executed by herself and her husband, on the ground that it is a forgery so far as it purports to be executed by her, and is not obliged to wait for admeasurement of dower after his death. Such action may be maintained although the name of the wife in the deed is not exactly that of the plaintiff, where the similarity is so great as to deceive persons not intimately acquainted with her.²¹

A widow is under no obligations to pay taxes assessed against her husband's realty during his lifetime and before the assignment of dower.²²

E. Conflict of laws.

A wife's right to dower must be determined by the law of the State where the lands are situated.²³ Without proof of the law of a foreign country where the common law of England has never been adopted, the court will not assume that a wife is entitled to any dower in her husband's lands

15. *Kursheedt v. Union Dime Savings Institution*, 118 N. Y. 358.

16. *Witthaus v. Schack*, 105 N. Y. 332.

17. *Lawrence v. Miller*, 2 N. Y. 250.

18. *Sherman v. Hayward*, 98 App. Div. 254, 90 N. Y. Supp. 481.

19. *Taggart v. Rogers*, 49 Hun, 265, 1 N. Y. Supp. 900.

20. *MacKenna v. Fidelity Trust Co.*,

184 N. Y. 411.

21. *Clifford v. Kempfe*, 147 N. Y. 383.

22. *Underground Electric Rys. of London v. Owsley*, 196 Fed. 278.

23. *Van Blaricum v. Larson*, 146 App. Div. 278, 130 N. Y. Supp. 925; *aff'd*, 205 N. Y. 355; *Roessle v. Roessle*, 163 App. Div. 344, 148 N. Y. Supp. 659.

in such country, and will not determine the extent or nature of such estate, if any.²⁴

ARTICLE II.

LANDS SUBJECT TO DOWER.

A. Real Property Law, § 190. Dower.

A widow shall be endowed of the third part of all the lands whereof her husband was seized of an estate of inheritance, at any time during the marriage. (See B., C. & G. Consol. L., 2nd Ed., p. 7407.)

B. Estate of inheritance.

In order to entitle the widow to dower, the husband must have been seized of an "estate of inheritance." As a general rule, this includes any interest which is not extinguished by his death.²⁵ It may include an equitable,²⁶ as well as legal estate. She has dower in the interest of her husband as cotenant with other owners.²⁷ The widow of

24. *Farrell v. Farrell*, 142 App. Div. 605, 127 N. Y. Supp. 764; rev'd on other grounds, 205 N. Y. 450.

25. A pier erected under and in pursuance of a statute and by the permission of the city, constituting a right to use and maintain the pier in perpetuity, upon land under water belonging to the State, for the use of and attached to a wharf on the upland appurtenant to the fee of the adjacent street, in the original city of New York, is real property, and therefore subject to the dower right of the widow of the owner of the fee of the street and wharf to which the pier is attached. *Bedlow v. Stillwell*, 158 N. Y. 292.

26. *Lugar v. Lugar*, 160 App. Div. 807, 146 N. Y. Supp. 37. But see *Nichols v. Parke*, 78 App. Div. 95, 79 N. Y. Supp. 547.

Under the Revised Statutes, the widow is held to be entitled to equitable dower in the descendible equitable interests of the husband, which belonged to him at the time of his death, as land which he had paid for but of which he had received no con-

veyance or of land which he had paid for and the deed had been taken by another. *Hawley v. James*, 5 Paige, 318, 453.

The widow of a vendee, who has paid part of the purchase money for lands, is entitled to dower subject to the lien of the vendor for the purchase money, and with the equitable right to have her husband's personal estate applied on the purchase money. *Williams v. Kinney*, 43 Hun, 1; aff'd, 118 N. Y. 679. A right to dower cannot be asserted with respect to lands purchased with the husband's money, but not conveyed or agreed to be conveyed to him. *Phelps v. Phelps*, 143 N. Y. 197.

27. *Smith v. Smith*, 6 Lans. 313; *Church v. Church*, 3 Sandf. Ch. 434.

Parol partition by tenants.—Where two tenants in common having made a parol partition, one of them having sold his portion, the other joined in the conveyance to the purchaser, this is not sufficient to oust the widow of the former of her dower in the whole of the land so conveyed. *Dolf v. Bassett*, 15 Johns. 21. See, however, where

a deceased partner is entitled to dower in a moiety of lands held by two in common,²⁸ but only after the settlement of the partnership accounts.²⁹

Where a reservation of perpetual rent is made, the widow has dower in it as an incorporeal hereditament; but, where the rent may be discharged by the payment of a gross sum, the right of dower is defeated.³⁰ A widow is not endowed where the interest of her husband was a life estate,³¹ or in property devised to another during her widowhood.³²

If deeds are delivered in escrow before the grantor's second marriage, to be recorded, and delivered to the grantor's sons by the first marriage at his death, there is no estate for dower to attach to, although the grantor received the income of and made repairs and paid the taxes on the property during his life.³³

Where the husband has not an estate in possession, to which the right of dower of his wife will attach and no immediate interest in a decedent's estate, if he agrees not to contest the will of the decedent, his wife will not acquire dower interest in the premises of the deceased.³⁴

Where an annuity does not become a charge on the land by force of the original devise, there having been sufficient

conveyance was followed by possession, to the contrary: *Totten v. Stuyvesant*, 3 Edw. 500; *Jackson v. Edwards*, 7 Paige, 386.

28. *Hawley v. James*, 5 Paige, 451.

29. *Greenwood v. Marvin*, 11 St. Rep. 235, 111 N. Y. 423; *Hauptmann v. Hauptmann*, 91 App. Div. 197, 86 N. Y. Supp. 427. See also, *Riddell v. Riddell*, 85 Hun, 482, 33 N. Y. Supp. 99, 66 St. Rep. 702; *Dawson v. Parsons*, 10 Misc. 428, 63 St. Rep. 320, 31 N. Y. Supp. 78.

30. *Moriarta v. McRae*, 10 St. Rep. 631.

31. *Harriot v. Harriot*, 25 App. Div. 245, 49 N. Y. Supp. 447; *Weller v. Weller*, 28 Barb. 588.

Pur autre vie.—The widow is not entitled to dower in her husband's estate for the life of another. *Gillis v. Brown*, 5 Cow. 388.

Life estate with power.—Where by the will of his grandfather decedent was devised certain property "during his natural life with the right and power to dispose of by will," and by a codicil the property was devised to decedent's heirs-at-law in case he did not dispose of it by will, and by a further codicil other property was added subject to the same conditions in every respect mentioned in the will and first codicil, and decedent by will devises the property, his widow is not entitled to dower in the estate so devised to him by his grandfather. *Barr v. Howell*, 85 Misc. 330, 147 N. Y. Supp. 483.

32. *Beckman v. Hudson*, 20 Wend. 53.

33. *Yutte v. Yutte*, 39 Misc. 272, 79 N. Y. Supp. 492.

34. *Jones v. Duff*, 47 Hun, 170.

personalty at testator's death to furnish it, the right of dower of the wife of the devisee is entitled to priority over the right of the annuitant and cannot be affected by subsequent arrangements between such annuitant and the devisee. Where the title comes to the husband subject to a lien, the wife's inchoate right of dower is also subject to such lien. Where a will creates a trust to secure an annuity during the minority of testator's youngest son and no longer, and provides that at his reaching majority a fund be set apart for the annuity and the balance divided among testator's children, the shares of the latter vest when the youngest son attains majority and the right of dower of the wife of one of them becomes consummate upon the subsequent death of her husband during the life of the annuitant.³⁵

C. Seizin.

In order for the widow to acquire a dower right in certain lands, it is necessary that the husband should have been seized of such lands during coverture.³⁶ An instantaneous seizin, of which the husband is immediately divested, is not sufficient.³⁷ Actual possession of the premises is not necessary to constitute seizin;³⁸ but it is *prima facie* evidence of seizin.³⁹ Seizin in fact in the husband is unnecessary; seizin in law, which is the right to immediate possession, is sufficient.⁴⁰ A reversion in fee or a vested remainder, if the husband dies before he becomes entitled to enjoy the property, does not entitle his widow to dower.⁴¹ No dower can attach to the interest of the remainderman which is subject to a precedent trust vesting a legal title in the trustees.⁴² A widow is not dowerable of land in which her husband has only a vested remainder, expectant upon an estate for life,

35. *Clark v. Clark*, 147 N. Y. 639.

36. *Phelps v. Phelps*, 143 N. Y. 197; *Nichols v. Parke*, 78 App. Div. 95, 79 N. Y. Supp. 547; *Poillon v. Poillon*, 90 App. Div. 71, 85 N. Y. Supp. 689; *Purdy v. Purdy*, 95 Misc. 369, 158 N. Y. Supp. 683; *Poor v. Horton*, 15 Barb. 485.

37. *Storto v. Tefft*, 15 Johns. 438; *Cunningham v. Knight*, 1 Barb. 399.

38. *McIntyre v. Costello*, 47 Hun, 289, 14 St. Rep. 369.

39. *Sitzer v. Waltermire*, 5 Cow. 299, 7 Cow. 353.

40. *Lugar v. Lugar*, 160 App. Div. 807, 146 N. Y. Supp. 37.

41. *Durando v. Durando*, 23 N. Y. 331; *Stewart v. Crysler*, 52 App. Div. 597, 65 N. Y. Supp. 483; *Russell v. Wales*, 119 App. Div. 536, 104 N. Y. Supp. 143; *Green v. Putnam*, 1 Barb. 500.

42. *Matter of Faile*, 51 Misc. 166, 100 N. Y. Supp. 856.

which he conveyed to the life tenants during his term, by a deed in which she did not join.⁴³ But, where a husband is seized of a vested remainder, expectant upon an estate for life, subject to be defeated by his own death prior to that of the tenant for life, and he purchases the life estate, this is such a seizin as entitles his wife to dower, subject to be defeated by his death before that of the life tenant.⁴⁴

Where a father died intestate and seized of certain real estate nearly three years after his son, one of his heirs-at-law, had for a valuable consideration by an instrument in writing assigned, transferred and conveyed all his interest in and to the real and personal estate of his father which he had or might have after the death of his father, and authorized and empowered the assignee to take possession of the assigned property, the wife of the son is not entitled to dower in any part of the real estate of which his father died seized, and which descended to the son subject to the right of his assignee to enforce in equity the rights acquired under the assignment.⁴⁵

D. Trust estate.

A widow is not entitled to dower in real property which has been conveyed to her husband in trust for particular purposes.⁴⁶ Where the wife joins with the husband in conveying land to trustees to sell, she is not entitled to dower in parcels sold or contracted to be sold at the time of his death.⁴⁷

Where it does not appear from the pleadings in an action for dower that there was any trust in the lands in favor of plaintiff's deceased husband, and it is clear that he had neither the actual seizin of the property nor a legal right to actual seizin during coverture, a motion for judgment on the pleadings made by defendant must be granted.⁴⁸

43. *Jackson v. Walters*, 86 App. Div. 470, 83 N. Y. Supp. 696.

44. *House v. Jackson*, 50 N. Y. 161; *Powers v. Jackson*, 57 N. Y. 654.

45. *Baker v. Bagg*, 61 Misc. 186, 114 N. Y. Supp. 660.

46. *Cooper v. Whiting*, 3 Hill, 95;

Germond v. Jones, 2 Hill, 569. See also, *Terrett v. Crombie*, 6 Lans. 82.

47. *Hawley v. James*, 5 Paige, 318, 453; *Hicks v. Stebbins*, 3 Lans. 39.

48. *Purdy v. Purdy*, 95 Misc. 369, 158 N. Y. Supp. 683.

E. Indian lands.

The Indian lands in the St. Regis reservation are tribal lands; and, although an allotment thereof may be made, pursuant to section 102 of the Indian Law, an individual member of the tribe does not hold lands so allotted in fee simple, but his only interest is the right of occupancy and the use of the land and probably the ownership of improvements. Such lands may not be conveyed by an individual Indian and the wife of an occupant has no right of dower therein.⁴⁹ But dower has been held to attach to a testator's interest in a lease made by Seneca Indians, authorized by act of Congress, and to his interest in lands owned by him with others in the name of one of whom title was taken.⁵⁰

F. Dower on dower.

Where an intestate leaves him surviving a widow, two sons, and a daughter, and one of the sons dies before his mother, leaving a widow, the son's widow is entitled to dower only in her husband's share of two-thirds of the estate.⁵¹ But the rule that dower upon dower cannot be allowed does not apply where dower has not been actually assigned to the prior dowress. In such a case, the widow of the subsequent owner is entitled to the dower in the whole premises.⁵²

G. Improvements.

Where the husband aliens in his lifetime, the wife is entitled only to dower according to the value of the property at the time of the alienation.⁵³ Dower must be computed upon the value of lands at the date of the husband's death or his alienation of the property. The widow does not share in the value of improvements thereafter made.⁵⁴

49. *Terrance v. Crowley*, 62 Misc. 138, 116 N. Y. Supp. 417.

50. *Matter of McKay*, 5 Misc. 123, 25 N. Y. Supp. 725.

51. *Johnson v. Johnson*, 46 Misc. 314, 93 N. Y. Supp. 197.

52. *Elwood v. Klock*, 13 Barb. 50. Contra *Matter of Cregier*, 1 Barb. Ch. 598. For decisions relating to dower upon dower, see *Reynolds v. Reynolds*, 5 Paige, 161; *Safford v. Safford*, 7

Paige, 259; *Dunham v. Osborn*, 1 Paige, 634.

53. *Hale v. James*, 6 Johns. Ch. 258; *Walker v. Schuyler*, 10 Wend. 480; *Humphrey v. Phinney*, 2 Johns. 484; *Dorchester v. Coventry*, 11 Johns. 510; *Shaw v. White*, 13 Johns. 179; *Parks v. Hardy*, 4 Bradf. 15; *Marble v. Lewis*, 53 Barb. 432.

54. *Emrich v. Emrich*, 129 App. Div. 557, 113 N. Y. Supp. 1052.

H. Mortgage lands.**1. Real Property Law, § 192. Dower in lands mortgaged before marriage.**

Where a person seized of an estate of inheritance in lands, executes a mortgage thereof, before marriage, his widow is, nevertheless, entitled to dower of the lands mortgaged, as against every person except the mortgagee and those claiming under him.

(See B., C. & G. Consol. L., 2nd Ed., p. 7412.)

2. Real Property Law, § 193. Dower in lands mortgaged for purchase-money.

Where a husband purchases lands during the marriage, and at the same time mortgages his estate in those lands to secure the payment of the purchase-money, his widow is not entitled to dower of those lands, as against the mortgagee or those claiming under him, although she did not unite in the mortgage. She is entitled to her dower as against every other person.

(See B., C. & G. Consol. L., 2nd Ed., p. 7413.)

3. Real Property Law, § 194. Surplus proceeds of sale under purchase-money mortgages.

Where, in a case specified in the last section, the mortgagee, or a person claiming under him, causes the land mortgaged to be sold, after the death of the husband, either under a power of sale contained in the mortgage, or by virtue of a judgment in an action to foreclose the mortgage, and any surplus remains, after payment of the money due on the mortgage and the costs and charges of the sale, the widow is nevertheless entitled to the interest or income of one-third of the surplus for her life, as her dower.

(See B., C. & G. Consol. L., 2nd Ed., p. 7413.)

4. Real Property Law, § 195. Widow of mortgagee not endowed.

A widow shall not be endowed of the lands conveyed to her husband by way of mortgage, unless he acquires an absolute estate therein, during the marriage.

(See B., C. & G. Consol. L., 2nd Ed., p. 7414.)

5. Dower in equity of redemption.

Where property is subject to a mortgage, there exists, as a general rule, a right of dower in the equity of redemption owned by the husband.⁵⁵ A widow is entitled to dower in

55. *Hoogland v. Watt*, 2 Sandf. Ch. 148.

Evidence of personal transactions.—Where a wife's dower interest in certain property in controversy was subordinate to the lien of an alleged mortgage executed by her husband prior to

his death, if it was a valid incumbrance thereon, she was held incompetent to testify to transactions between herself and her husband tending to show that the mortgage was never delivered. *Smith v. Smith*, 100 App. Div. 1, 90 N. Y. Supp. 883.

incumbered property according to its value at the time of her husband's death.⁵⁶ If wife joins with the husband in a mortgage, it operates to extinguish her dower as against the mortgage; but, if she survives her husband, it does not affect her contingent right of dower in the equity of redemption.⁵⁷ Where a husband releases his equity of redemption in mortgaged premises, the wife is entitled to dower in the land, after deducting the mortgage.⁵⁸ If the mortgage is foreclosed, she is entitled to the use of one-third of the surplus.⁵⁹ The widow does not lose her dower in surplus after foreclosure, by failure to assert her claim, where the person to whom such surplus has been paid has not been induced to take any action or part with anything, and has sustained no injury by the widow's neglect.⁶⁰

A wife's inchoate right of dower is superior to the equity of one who has loaned money upon mortgage to the husband, deceased, by a false representation that he was unmarried, and this, although the money was used to pay off a prior mortgage.⁶¹

Where a mortgage in which the wife had not joined had been foreclosed during the lifetime of the husband, the wife not being made a party to the foreclosure suit, it was held that she was not entitled to recover dower in the premises after her husband's death, but her remedy was to bring an action to redeem the property, which right accrued when the foreclosure sale was made, and that her right must be enforced within twenty years thereafter.⁶²

6. Mortgage executed before marriage.

A widow may be endowed out of an equity of redemption, which was vested in her husband at the time of her marriage.⁶³ But such dower is liable to be defeated by enforcement of the mortgage.⁶⁴

56. *Everston v. Toppen*, 5 Johns. Ch. 497.

57. *Hawley v. Bradford*, 9 Paige, 200.

58. *Swaine v. Perraine*, 5 Johns. Ch. 482; *Hale v. James*, 6 Johns. Ch. 258.

59. *Tabele v. Tabele*, 1 Johns. Ch. 45.

60. *Matthews v. Duryea*, 45 Barb. 69; *aff'd*, 4 Keyes, 425.

61. *Westfall v. Winze*, 7 Abb. N. C. 236.

62. *McMichael v. Russell*, 68 App. Div. 104, 74 N. Y. Supp. 212.

63. *Coles v. Coles*, 15 Johns. 319; *Denton v. Nanny*, 8 Barb. 618; *Titus v. Neilson*, 5 Johns. Ch. 452; *Van Duyne v. Thayre*, 14 Wend. 233; s. c., 19 Wend. 162; *Bell v. Mayor*, 10 Paige, 49.

64. *Van Duyne v. Thayre*, 14 Wend. 233, 19 Wend. 162.

7. Purchase-money mortgage.

Where the mortgage is given for purchase money, the widow takes dower only in the equity.⁶⁵

A mortgage executed for the purchase money of lands pursuant to an oral agreement by which it was to have been taken at the time of the conveyance, though in fact executed subsequently, is superior to the dower interest of the wife of the mortgagor, who married him in the intervening period.⁶⁶ But a recital that the mortgage was given for purchase money, if untrue in fact, will not bar the wife's right of dower.⁶⁷

A wife takes dower in the mortgaged premises subordinate to the power of sale in, as well as the lien of, a purchase-money mortgage in which she did not join.⁶⁸ But in order to cut off the dower right of the wife of a mortgagor under a purchase-money mortgage, she must be made a party to the action.⁶⁹ The foreclosure of a purchase-money mortgage does not cut off the inchoate right of dower of the mortgagor's wife, unless she is made a party to the foreclosure suit, and the mortgagor who buys in the property as to her becomes merely a mortgagee in possession.⁷⁰ The widow is entitled to dower in lands of which her husband died seized, though at his decease there was an outstanding mortgage for the whole of the purchase money, which was subsequently paid off by a tenant holding under a release from her husband's heir-at-law.⁷¹

Where an infant unites with her husband in conveying land subject to a purchase-money mortgage, which mortgage the grantee purchases and takes an assignment of, the mort-

65. *Mead v. Mead*, 27 Misc. 459, 59 N. Y. Supp. 444; *Stow v. Tift*, 15 Johns. 458; *Jackson v. Dewitt*, 6 Cow. 316; *Mills v. Van Voorhis*, 20 N. Y. 412; *White v. Button*, 37 Hun, 556; *Blydenburgh v. Northop*, 13 How. Pr. 289; *Kettle v. Van Dyck*, 1 Sandf. Ch. 76.

66. *Ulrich v. Ulrich*, 17 St. Rep. 414, 1 N. Y. Supp. 777.

67. *Taylor v. Post*, 30 Hun, 446.

68. *Brackett v. Baum*, 50 N. Y. 8.

69. *Sheldon v. Hoffnagle*, 51 Hun, 478; s. c., 4 N. Y. Supp. 287, 21 St. Rep. 637; aff'd, 117 N. Y. 556; appeal dismissed, 125 N. Y. 725.

70. *Campbell v. Ellwanger*, 81 Hun, 259, 62 St. Rep. 754, 30 N. Y. Supp. 792.

71. *Hitchcock v. Harrington*, 6 Johns. 290. See *Collins v. Torry*, 7 Johns. 278; *Coales v. Cheever*, 1 Cow. 460; *Bunyan v. Stewart*, 12 Barb. 547; *Wheeler v. Morris*, 2 Bosw. 524.

gage is not merged in the interest of the grantee, and the wife is not entitled to dower to the extent of the mortgage.⁷²

8. Inchoate dower on foreclosure.

The wife of a mortgagor is dowable in the surplus moneys even though she joined in the mortgage.⁷³ The inchoate right of dower of the wife of the owner of the equity of redemption attaches to one-third of the surplus moneys on foreclosure, and the court should not direct the payment of such third to a divorced husband on his giving security to pay her the income thereon in case she survives him.⁷⁴ Where the wife is a party, dower may be set aside in the surplus free from costs.⁷⁵ But the wife must be a party to the foreclosure, in order to bar her dower.⁷⁶

The dower of a wife in mortgaged premises is not barred by a foreclosure in which the only allegation was that she claimed an interest subsequent to the mortgage, when she was the wife of the mortgagor when the mortgage was executed.⁷⁷ The right of dower is highly favored in law, and cut off only by an unequivocal act of the dowress, or by proceedings in which the right of dower is clearly and legally brought in question.⁷⁸

Where the wife of the owner did not join in the first of two mortgages, but joined in the second, which was foreclosed, and thereafter the first mortgage was foreclosed and purchase thereunder made by the mortgagor's predecessor in title, it was held that the dower right was cut off by the first mortgage and was not revived by the second.⁷⁹

I. Real Property Law, § 191. Dower in lands exchanged.

If a husband seized of an estate of inheritance in lands, exchanges them for other lands, his widow shall not have dower of both, but she must make her election, to be endowed of the lands given, or of those taken, in exchange; and

72. *De Lisle v. Herbs*, 25 Hun, 485.

73. *N. Y. Life Ins. Co. v. Mayer*, 12 St. Rep. 119; *aff'd*, 108 N. Y. 655.

74. *Emigrant Industrial Savings Bank v. Regan*, 41 App. Div. 523, 58 N. Y. Supp. 639.

75. *Hanley v. Bradford*, 9 Paige, 200; *Church v. Church*, 3 Sandf. Ch. 434.

76. *Mills v. Van Voorhis*, 20 N. Y. 412.

77. *Ocuppaugh v. Wing*, 12 Wkly. Dig. 566.

78. *Fern v. Osterhout*, 11 App. Div. 319, 42 N. Y. Supp. 450.

79. *Calder v. Jenkins*, 42 St. Rep. 38, 16 N. Y. Supp. 797.

if her election be not evinced by the commencement of an action to recover her dower of the lands given in exchange, within one year after the death of her husband, she is deemed to have elected to take her dower of the lands received in exchange.

(See B., C. & G. Consol. L., 2nd Ed., p. 7412.)⁸⁰

ARTICLE III.

BAR OF DOWER.

A. Conveyance or acts of husband.

1. Real Property Law, § 203. Effect of acts of husband.

An act, deed or conveyance executed or performed by the husband without the assent of his wife, evidenced by her acknowledgment thereof, in the manner required by law to pass the contingent right of dower of a married woman, or a judgment or decree confessed by or recovered against him, or any laches, default, covin, or crime of a husband, does not prejudice the right of his wife to her dower or jointure, or preclude her from the recovery thereof.

(See B., C. & G. Consol. L., 2nd Ed., p. 7421.)

2. Application of statute.

The provisions of the statute that no judgment or decree procured against the husband and no laches or default of his shall prejudice the wife's right to dower do not apply to a judgment recovered against the wife.⁸¹ But an agreement or act by the husband will not affect the dower right of his wife. Thus, an oral agreement by a husband, to which his wife is not a party, to give "a proper and sufficient mortgage" upon property in which he owns a half interest to secure the payment of moneys advanced for the payment of taxes, water charges, insurance, etc., has no effect upon the wife's dower rights.⁸²

Where lands are sold for the payment of his debts, one-third of the gross amount is to be invested for the widow, and she is entitled to one-third of the interest on the purchase money from the day of sale.⁸³ In an action for dower

⁸⁰. In order to put the widow to her election, where the husband has effected an exchange of lands during his lifetime, there must be a mutual grant of equal parcels of land, the one in consideration of the other. *Wilcox v. Randall*, 7 Barb. 633. See *Runyan v.*

Stewart, 12 Barb. 537; *Smith v. Gardner*, 42 Barb. 536.

⁸¹. *Feitner v. Hoeger*, 15 St. Rep. 377.

⁸². *Meixel v. Meixel*, 161 App. Div. 518, 146 N. Y. Supp. 587.

⁸³. *Higbie v. Westlake*, 14 N. Y. 281.

brought by a widow against her husband's grantee, the sufficiency of the land not conveyed by the husband to satisfy all claims of dower is no defense.⁸⁴ But it has been said that a court of law will not set aside a deed executed by the husband before the marriage in fraud of the wife's right of dower.⁸⁵ And the wife may not be allowed dower in lands for which her husband holds a contract of sale, if he alien the property during coverture.⁸⁶

B. Release by dowress.

1. Real Property Law, § 206. Divorced woman may release dower.

A woman who is divorced from her husband, whether such divorce be absolute or limited, or granted in his or her favor, by any court of competent jurisdiction, may release to him, by an instrument in writing, sufficient to pass the title to real estate, her inchoate right of dower in any specific real property theretofore owned by him, or generally in all such property, and such as he shall hereafter acquire.

(See B., C. & G. Consol. L., 2nd Ed., p. 7422.)

2. Real Property Law, § 207. Married woman may release dower by attorney.

A married woman of full age may release her inchoate right of dower in real property by attorney in fact in any case where she can personally release the same.

(See B., C. & G. Consol. L., 2nd Ed., p. 7422.)

3. Release to husband.

After the granting of an absolute or limited divorce, the wife may release her inchoate right of dower to her husband;⁸⁷ but it cannot be released to him when no divorce has been granted.⁸⁸ If released to the husband during coverture, it would immediately attach again.

84. *Richardson v. Harms*, 11 Misc. 254, 32 N. Y. Supp. 808, 64 St. Rep. 575.

85. *Baker v. Chase*, 6 Hill, 482. But the contrary is held. *Youngs v. Carter*, 1 Abb. N. C. 135; *aff'd*, 10 Hun, 194; *Babcock v. Babcock*, 53 How. Pr. 97; *Swain v. Perine*, 5 Johns. Ch. 482; *Pomeroy v. Pomeroy*, 54 How. Pr. 228.

86. *Hicks v. Stebbins*, 3 Lans. 39.

87. *Schlesinger v. Klinger*, 112 App. Div. 853, 98 N. Y. Supp. 545; *Savage v. Crill*, 19 Hun, 4; *aff'd*, 80 N. Y. 630.

88. *Graham v. Van Wyck*, 14 Barb. 531; *White v. Wager*, 25 N. Y. 328; *Winans v. Peebles*, 32 N. Y. 423; *Wightman v. Schliefer*, 45 St. Rep. 698, 18 N. Y. Supp. 551; *Armstrong v. Armstrong*, 1 St. Rep. 529.

4. Release to stranger.

During coverture it is clear that the wife cannot transfer or release her inchoate right of dower to a stranger to the title.⁸⁹ She can join in her husband's deed or mortgage so as to carry her dower right to the grantee therein,⁹⁰ or after a conveyance by her husband she can convey her interest to the grantee; but she cannot make an independent conveyance of her dower right to one having no interest in the premises.⁹¹

A wife has no estate in the lands of her husband during his life which she can convey. Her inchoate right of dower is but a contingent claim, incapable of transfer by grant or conveyance, but susceptible only, during its inchoate state, of extinguishment. Such an extinguishment can only be effected by a conveyance to the grantee of the husband. Where, therefore, the wife joins with the husband in a conveyance of his lands, this does not constitute her a grantor of the premises, or vest in the grantee any other or greater estate than there is derived from the conveyance of the husband.⁹²

A deed by the wife joining with the husband operates as a release or satisfaction and removes an incumbrance instead

89. *Marvin v. Smith*, 46 N. Y. 571; *Merchants' Bank v. Thompson*, 55 N. Y. 7; *Elmendorf v. Lockwood*, 57 N. Y. 322.

90. *Hinchcliffe v. Shea*, 103 N. Y. 153; *Lee v. Timken*, 10 App. Div. 213, 41 N. Y. Supp. 979; *Schanz v. Sotscheck*, 167 App. Div. 202, 152 N. Y. Supp. 851; *Armstrong v. Armstrong*, 1 St. Rep. 529; *Irving v. Campbell*, 18 St. Rep. 966, 4 N. Y. Supp. 103.

Third persons.—But where a married woman of full age unites with her husband in a conveyance of real property in which she is entitled to dower, it operates as an extinguishment of her right not only as to the grantee and his successors in interest, but also as to third persons. *Elmendorf v. Lockwood*, 4 Lans. 393; *aff'd*, 57 N. Y. 322; *Gilliam v. Swift*, 14 Hun, 574.

Delivery.—The right of a widow to dower is not affected by her execution of a deed with her husband during his

lifetime, when such deed was not delivered. *Duncklee v. Butler*, 25 Misc. 680, 56 N. Y. Supp. 329; modified, 38 App. Div. 99, 56 N. Y. Supp. 491. A wife joining with her husband in a deed of property owned by him, which was not to be delivered until his death and constituted part of a scheme, not carried out, by which the husband was to dispose of his property and render the wife some equivalent for her dower interest, who surrenders possession of the deed to the grantee on the faith of false representations made by him, will not be barred of her dower interest in the premises by a subsequent delivery of the deed to the grantee by the husband without her consent. *Newton v. Newton*, 52 App. Div. 96, 64 N. Y. Supp. 981.

91. *Armstrong v. Armstrong*, 1 St. Rep. 529.

92. *Witthaus v. Schack*, 105 N. Y. 332.

of transferring an interest.⁹³ An effectual release of dower may be made to a tenant for life, remainderman or other owner of less than the legal fee.⁹⁴

5. Disability of wife.

A *feme covert* is not barred of her right of dower by joining with her husband in a conveyance if she were a minor at the time of the acknowledgment.⁹⁵ And the act of the committee of a lunatic in joining with her husband in executing a deed does not extinguish her inchoate right of dower.⁹⁶

6. Power of attorney by wife.

Under a power of attorney given by a husband and wife authorizing the attorney "to sell and mortgage any of my property and give in our name good deeds therefor, the attorney's deed or mortgage to be deemed our act and deed," it was held that it was the intention of the wife to authorize the attorney to make a conveyance of lands of the husband which released her right of dower.⁹⁷ A power of attorney from a wife to a husband has been sustained so that he has been permitted to release her right of dower.⁹⁸

7. Conveyance set aside for fraud.

Where the deed of a husband is adjudged to be fraudulent as against the creditors of the husband, the wife is entitled to her dower.⁹⁹ In such a case the release of the dower is deemed to be to a stranger to the title.¹

In an action for admeasurement of dower it appeared that the plaintiff's husband conveyed the premises to his daughter

93. See *Jones v. Fleming*, 104 N. Y. 418; *Hinchcliffe v. Shea*, 103 N. Y. 153.

94. *Elmendorf v. Lockwood*, 57 N. Y. 322.

95. *Priest v. Cummings*, 16 Wend. 617; *Sanford v. McLean*, 3 Paige, 117; *Cunningham v. Knight*, 1 Barb. 399; *Sherman v. Garfield*, 1 Den. 329; *McIntyre v. Costello*, 14 St. Rep. 370, 47 Hun, 289.

96. *Matter of Dunn*, 64 Hun, 18, 45 St. Rep. 830, 22 Civ. Proc. 118, 18 N. Y. Supp. 723.

97. *Platt v. Finck*, 60 App. Div. 312, 70 N. Y. Supp. 74.

98. *Wronkow v. Oakley*, 133 N. Y. 505, 45 St. Rep. 882, 28 Abb. N. C. 409.

99. *Maloney v. Horan*, 49 N. Y. 111; *Hinchcliffe v. Shea*, 103 N. Y. 153; *Lowry v. Smith*, 9 Hun, 514; *Wilkinson v. Paddock*, 57 Hun, 191, 11 N. Y. Supp. 442, 32 St. Rep. 535; *aff'd*, 125 N. Y. 748.

1. *Hammond v. Pennock*, 5 Lans. 358; *aff'd*, 61 N. Y. 145.

by a deed in which the plaintiff joined; that the daughter executed a mortgage thereon to a third person, and that thereafter judgment creditors of the plaintiff's husband brought an action to set aside the conveyances as fraudulent and void, making the mortgagor and mortgagee parties, but not the plaintiff. The judgment entered therein set aside the conveyance but sustained the mortgage, and directed its payment out of the proceeds of the sale of the premises; it was held that the lien of the mortgage was superior to any interest the plaintiff might have in the premises and that if the plaintiff was entitled to dower in the land such right was subject to a ratable contribution toward the payment of the mortgage.²

C. Defeat of husband's estate.

The right of dower is merely an incident to the husband's title, and such right falls with the estate of the husband.³ Dower in a defeasible estate is lost when the estate is defeated.⁴ A sale under a judgment obtained before the marriage will divest the wife's right of dower.⁵ But a judgment against a husband, recovered after the marriage, will be a lien subordinate to the wife's right of dower.⁶ When lands are taken for public use and the value of the entire fee is paid to him, the wife's possibility of dower is defeated.⁷ But, as against her husband, the inchoate right of dower of a wife is to be recognized and protected in the condemnation proceedings.⁸

D. Assignment of dower.

Under section 468 of the Real Property Law the acceptance, by a widow, of an assignment of dower, in satisfaction of her claim upon the property in question, bars an action for dower, and may be pleaded by any defendant.

A parol assignment of dower, followed by immediate occupation, is valid and defeats the seizin of the heirs.⁹ The heir

2. *McMahon v. Specht*, 64 App. Div. 128, 71 N. Y. Supp. 806.

3. *Green v. Reynolds*, 54 St. Rep. 846, 25 N. Y. Supp. 625.

4. *Moriarta v. McRea*, 45 Hun, 564; *aff'd*, 120 N. Y. 659, 10 St. Rep. 631.

5. *Sanford v. McLean*, 3 Paige, 117.

6. *N. Y. Life Ins. Co. v. Mayer*, 12 St.

Rep. 119.

7. *Moore v. The Mayor*, 8 N. Y. 110; *Matter of Central Park*, 16 Abb. 56.

8. *Matter of Trustees of New York and Brooklyn Bridge*, 75 Hun, 558, 59 St. Rep. 613, 27 N. Y. Supp. 597.

9. *Gibbs v. Estey*, 22 Hun, 266.

may voluntarily assign the widow's dower; the admeasurement only fixes the location and extent, it does not confer the right.¹⁰ The receipt by the widow of one-third of the rent of the real estate, in lieu of dower, for several years after the death of her husband, does not constitute an assignment of dower or bar her action.¹¹ To bar the widow's right to dower, where rent has been assigned with her assent and accepted by her, it must appear that the rent will endure for her life.¹²

E. Judgment in partition.

A wife of a part owner, who was a party in partition, is barred by the decree, although the husband died before judgment.¹³ A sale in partition extinguishes the inchoate right of dower of the wife, whether she be an adult or an infant,¹⁴ unless she is not a party to the action.¹⁵ But a partition in which the widow appears and claims dower, but no decree is made granting dower to her, is not a bar.¹⁶

F. Estoppel.

Where, on a sale under a surrogate's order, the executrix and widow, with knowledge of the sale, remains silent, she may be estopped as to dower, the terms of sale having been for a clear title.¹⁷ And where a testator, by will, authorized his executors to sell his real estate and allow the widow the use of one-third of the proceeds of the sale, and on such sale the widow accepted and enjoyed the proceeds of the sale for a number of years, it was held that she was estopped from setting up any claim to dower in the premises in the hands of an innocent grantee who was permitted to receive title in her presence and with the assurance that her dower was extinguished.¹⁸

Where it appeared that in the lifetime of her husband, who was a lunatic, a woman had, for a valuable consideration, executed to his committee a release of her dower right and had retained the consideration for seventeen years after her husband's death, without making any demand for admeasurement of dower, it was held her right to dower was barred.¹⁹

10. *Rutherford v. Graham*, 4 Hun, 796.

11. *Aikman v. Harsell*, 98 N. Y. 186.

12. *Ellicott v. Mosier*, 7 N. Y. 201.

13. *Jordan v. Van Epps*, 85 N. Y. 427.

14. *Jackson v. Edwards*, 7 Paige, 386.

15. *Van Gelder v. Post*, 2 Edw. 577.

16. *Matter of Hughes*, 3 Redf. 18.

17. *Dougherty v. Topping*, 4 Paige, 94.

18. *Wood v. Seely*, 32 N. Y. 105.

19. *Doremus v. Doremus*, 66 Hun, 111, 49 St. Rep. 800, 21 N. Y. Supp.

13.

Where a wife, as complainant, procures a rabbinical divorce, acquiesces in the remarriage of her husband, and is herself subsequently remarried and lives with her second husband for twenty-three years, she is estopped from claiming dower in the lands of her first husband which had been conveyed by him to *bona fide* purchasers by deeds in which his second wife joined, releasing her dower.²⁰ But a widow's receipt for years of one-third of the rents reserved on her husband's demise will not bar her dower.²¹

G. Divorce.²²

1. Real Property Law, § 196. When dower barred by misconduct.

In case of a divorce, dissolving the marriage contract for the misconduct of the wife, she shall not be endowed.

(See B., C. & G. Consol. L., 2nd Ed., p. 7414.)

2. Real Property Law, § 202. When provision in lieu of dower is forfeited.

Every jointure, devise and pecuniary provision in lieu of dower is forfeited by the woman for whose benefit it is made in a case in which she would forfeit her dower; and on such forfeiture, an estate so conveyed for jointure, or devised, or a pecuniary provision so made, immediately vests in the person or legal representatives of the person in whom they would have vested on the determination of her interest therein, by her death.

(See B., C. & G. Consol. L., 2nd Ed., p. 7421.)

3. Annulment of marriage or decree of separation.

A divorce *a mensa et thoro* does not bar the right of dower.²³ Where a marriage has been annulled by a judicial decree upon the ground that when it was contracted the husband had another wife living, who had absented herself for more than five successive years immediately preceding the second marriage, without being known by him to be living, although until it was annulled it was voidable only and not void, the wife is not entitled to dower in the real estate owned by the husband at the date of the decree.²⁴

4. Divorce obtained by wife.

Where the wife procures a divorce against the husband, she is entitled to dower in the real property owned by him at the time of the decree.²⁵ This right is affirmed by section

20. *Kantor v. Cohn*, 181 App. Div. 400, 168 N. Y. Supp. 846, 98 Misc. 355, 164 N. Y. Supp. 383.

21. *Ellicott v. Mosier*, 7 N. Y. 201.

22. Matrimonial actions.—As to the effect of a decree in divorce or separa-

tion, see Matrimonial Actions, Art. XII.

23. *Crain v. Cavana*, 62 Barb. 109; *Day v. West*, 2 Edw. Ch. 292.

24. *Price v. Price*, 124 N. Y. 589.

25. *Wait v. Wait* 4 N. Y. 95.

1156 of the Civil Practice Act. But she is not entitled to dower in lands which he has acquired after the decree.²⁶

The wife is deprived of her right of dower by a decree of divorce obtained by her in another State upon constructive service of process upon her husband, where the property was acquired by the husband after the decree; and she cannot, in an action to recover dower, question the jurisdiction of the court to grant the divorce in her own action.²⁷ Thus, where a wife obtained a judgment of separation in New York, and thereafter procured a divorce in Kansas on the ground of cruelty, without personal service on the husband, or his appearance and afterward married, she cannot recover dower in lands thereafter acquired by the husband, or which he owned at the time of the divorce.²⁸

5. Misconduct without divorce.

The adultery of the wife bars dower only where there is a decree of divorce.²⁹ The forfeiture is not a consequence of the offense but of the judgment founded thereon; and where, in an action of divorce *a vinculo*, brought by a husband against the wife, the referee finds the wife guilty of adultery, but also finds the husband guilty of the same offense, and a judgment is entered dismissing the complaint, the wife has not lost her right of dower.³⁰ And, where a husband has obtained an interlocutory decree against his wife, and he dies before the entry of the final decree, she is entitled to dower.³¹

6. Foreign divorce.

Where a divorce procured by the husband in another State is invalid and not entitled to credit in this State, the wife's right of dower is not barred.³² Even if the divorce is procured under such circumstances that its validity is recognized in this State, if it is based on a ground not recognized as sufficient for the dissolution of the marriage, the wife will

Forrest v. Forrest, 6 Duer, 102; Van Voorhis v. Brintnall, 23 Hun, 260; rev'd on other grounds, 86 N. Y. 18; Kade v. Lauber, 16 Abb. (N. S.) 288.

26. Kade v. Lauber, 48 How. Pr. 382; Kade v. Lauber, 16 Abb. (N. S.) 288; Nichols v. Park, 78 App. Div. 95, 79 N. Y. Supp. 547.

27. Starbuck v. Starbuck, 173 N. Y. 503; Van Blaricum v. Larson, 205 N. Y. 355.

28. Voke v. Platt, 48 Misc. 273, 96 N. Y. Supp. 725.

29. Reynolds v. Reynolds, 24 Wend. 193; Cooper v. Whitney, 3 Hill, 95; Schiffer v. Pruden, 7 J. & S. 167; Pitts v. Pitts, 52 N. Y. 593; Rundle v. Van Inwegan, 9 Civ. Pro. 328.

30. Schiffer v. Pruden, 64 N. Y. 47.

31. Byron v. Byron, 134 App. Div. 320, 119 N. Y. Supp. 41.

32. Halter v. Van Camp, 64 Misc. 366, 118 N. Y. Supp. 545.

not necessarily lose her dower right in this State. The right to dower in lands within this State is determined by the law of this State. Hence the statute of another State declaring the effect of the desertion by a wife from her husband to be to bar her dower can have no force or effect in this State.³³

H. Jointure or pecuniary provision.

1. Real Property Law, § 197. When dower barred by jointure.

Where an estate in real property is conveyed to a person and his intended wife, or to the intended wife alone, or to a person in trust for them or for the intended wife alone, for the purpose of creating a jointure for her, and with her assent, the jointure bars her right or claim of dower in all the lands of the husband. The assent of the wife to such a jointure is evidenced, if she be of full age, by her becoming a party to the conveyance by which it is settled; if she be a minor, by her joining with her father or guardian in that conveyance.

(See B., C. & G. Consol. L., 2nd Ed., p. 7415.)

2. Real Property Law, § 198. When dower barred by pecuniary provisions.

Any pecuniary provision, made for the benefit of an intended wife and in lieu of dower, if assented to by her as prescribed in the last section, bars her right or claim of dower in all the lands of her husband.

(See B., C. & G. Consol. L., 2nd Ed., p. 7416.)

3. Real Property Law, § 199. When widow to elect between jointure and dower.

If, before the marriage, but without her assent, or, if after the marriage, real property is given or assured for the jointure of a wife, or a pecuniary provision is made for her, in lieu of dower, she must make her election whether she will take the jointure or pecuniary provision, or be endowed of the lands of her husband; but she is not entitled to both.

(See B., C. & G. Consol. L., 2nd Ed., p. 7416.)

4. Ante-nuptial agreement.

The only provisions of the statute relating to the relinquishment of dower by a woman before marriage are those which authorize her to relinquish her dower on receiving an equivalent for it by way of jointure.³⁴ An ante-nuptial agreement by a woman that she will not claim her dower in the event of her intended marriage is contrary to public policy, and, unless founded upon the consideration of some provision for her in lieu of dower, will be ineffectual both at law and in equity.³⁵ An ante-nuptial contract may bar dower, but it will be rigidly scrutinized and held void if procured by deception or false pretenses; the burden of showing good faith is clearly on the husband, where the

33. *Van Cleef v. Burns*, 133 N. Y. 540, 44 St. Rep. 98; *Rundle v. Van*

34. *Ennis v. Ennis*, 48 Hun, 11.

35. *Curry v. Curry*, 10 Hun, 366.

provision made is disproportionate and inadequate.³⁶ It must generally be upon a valuable consideration and not be a merely nominal provision.³⁷ And an agreement with her husband that in consideration of her enjoyment of her separate property she should relinquish dower will not necessarily be enforced.³⁸ But if the agreement under such circumstances is one which a reasonably prudent person, similarly situated as the woman, would make, the circumstances may be such that a consideration of \$1.⁰⁰ will support an ante-nuptial agreement to release dower.³⁹

5. Agreement made during marriage.

A release made by a wife in her husband's lifetime is insufficient to bar dower, unless it appears that she received some suitable pecuniary provision in lieu of dower.⁴⁰ In order to bar dower, the agreement must be free from fraud. But, where a married woman has released her inchoate right of dower for a money consideration prior to her husband's death, she cannot after that event maintain an action for dower on the ground of fraud in procuring the release, without paying or tendering the amount received by her.⁴¹

Where the wife of a lunatic, in consideration of about one-third of her husband's property, released her inchoate right of dower in all her husband's property, it was held that, as she received a pecuniary consideration therefor, it was in

36. *Pierce v. Pierce*, 71 N. Y. 154. See also, *Curry v. Curry*, 10 Hun, 366.

37. *Graham v. Graham*, 67 Hun, 329, 51 St. Rep. 789, 22 N. Y. Supp. 299; *aff'd*, 143 N. Y. 573.

38. *Townsend v. Townsend*, 2 Sandf. 711.

39. *Schnibe v. Schnibe*, 109 Misc. 382, 179 N. Y. Supp. 54.

40. *Dworsky v. Arndtstein*, 29 App. Div. 274, 51 N. Y. Supp. 597.

A wife entered into a separation agreement with her husband in and by which he agreed to pay her the sum of \$5,200 per annum during her life or until her remarriage, and that he would provide by his will for the payment of said sum to her yearly after his death if she survived him. The wife covenanted that at the request of her husband she would unite with him

at any time in the execution of deeds of any real property he then owned or might thereafter acquire, "without compensation or payment other than hereinbefore provided," and such covenant, with all other provisions of the agreement, is to apply to and be binding upon the heirs, etc., of the parties. The husband executed his will pursuant to the agreement. It was held, that the agreement extinguished the wife's right of dower; and that the wife, having received and retained the pecuniary provision provided in the agreement for a period of six years, and not having returned or offered to return the same, elected to accept it in lieu of dower. *Hogg v. Lindridge*, 151 App. Div. 513, 135 N. Y. Supp. 928.

41. *Spannachie v. Loew*, 87 Hun, 167, 33 N. Y. Supp. 1050, 67 St. Rep. 736; *aff'd*, 156 N. Y. 660.

lieu of dower, and as she had retained the provision, she must be deemed to have kept it in lieu of dower.⁴²

Where a husband and wife lived apart, and the husband had covenanted to allow an annual sum for the separate maintenance of the wife, and made a provision for her in lieu of dower; it was held that she was entitled to both.⁴³

6. Jointure.

Where the widow received compensation for her dower in other lands, which she accepts as a satisfactory equivalent, she cannot claim dower, especially after lapse of time in which the lands as to which she claims dower have been improved.⁴⁴ A competent certain provision settled upon an infant, in lieu of dower, is an equitable bar to dower, but the provision must be as beneficial to her, and as certain, as that required to make a legal jointure a bar under the statute.⁴⁵

7. Violation of agreement by husband.

Where the wife has agreed to accept an annuity in satisfaction for her maintenance and dower, if the agreement is violated by the husband, dower is not barred.⁴⁶ An antenuptial agreement for a settlement not carried into effect by the husband in his lifetime is not a bar of the wife's dower.⁴⁷

I. Devise in lieu of dower.

1. Real Property Law, § 200. Election between devise and dower.

If real property is devised to a woman, or a pecuniary or other provision is made for her by will in lieu of her dower, she must make her election whether she will take the property so devised, or the provision so made, or be endowed of the lands of her husband; but she is not entitled to both.

(See B., C. & G. Consol. L., 2nd Ed., p. 7417.)

2. Real Property Law, § 201. When deemed to have elected.

Where a woman is entitled to an election, as prescribed in either of the last two sections, she is deemed to have elected to take the jointure, devise or pecuniary provision, unless within one year after the death of her husband she enters upon the lands assigned to her for her dower, or commences an action for her dower. But, during such period of one year after the death of her said husband, her time to make such election may be enlarged by the order of any court competent to pass on the accounts of executors, administrators or testamentary trustees, or to admeasure dower, on an affidavit showing the pendency of a proceeding to contest the probate of the will containing such jointure, devise or pecuniary provision, or of an action to construe or set aside

42. *Jones v. Fleming*, 104 N. Y. 418.

8 Wend. 267. See also, *Hawley v. James*, 5 Paige, 318, 16 Wend. 61.

43. *Carson v. Murray*, 3 Paige, 483.

46. *Day v. West*, 2 Edw. 592.

44. *Jones v. Powell*, 6 Johns. Ch.

47. *Pierce v. Pierce*, 9 Hun, 50; s. c.,

such will, or that the amount of claims against the estate of the testator can not be ascertained within the period so limited, or other reasonable cause, and on notice given to such persons, and in such manner, as such court may direct. Such order shall be indexed and recorded in the same manner as a notice of pendency of action in the office of the clerk of each county wherein the real property or a portion thereof affected thereby is situated.

(See B., C. & G. Consol. L., 2nd Ed., p. 7419.)

3. When election is required.

The claim of dower is to be favored, and the presumption is that a provision in the will not expressed to be in lieu of dower is intended as a bounty.⁴⁸ In order to render a claim for dower barred by acceptance of a provision under a will, it must be the manifest intention of the testator that the provision should be received in lieu.⁴⁹ A legacy to a wife not expressly declared to be in lieu of dower will not be so intended, unless such intent can be deduced by clear and manifest implication from the provisions of the will. The claim of dower must be inconsistent with the will and repugnant to its dispositions, and such, as if admitted, would disturb the will.⁵⁰ But, where the provisions of the will cannot be carried out consistently with the widow's claim of dower, she is put to her election.⁵¹ If the scheme of the will would be defeated by allowing dower to the widow, she is put to

48. *Leonard v. Steele*, 4 Barb. 20.

49. *Jackson v. Churchill*, 7 Cow. 287; *Van Orden v. Van Orden*, 10 Johns. 30; *Kennedy v. Mills*, 13 Wend. 553; *Bull v. Church*, 5 Hill, 206; *Wood v. Wood*, 5 Paige, 601; *Fuller v. Yates*, 8 Paige, 329; *Smith v. Kniskern*, 4 Johns. Ch. 9; *Vernon v. Vernon*, 7 Lans. 492; *Rathbone v. Dyckman*, 3 Paige, 9; *Havens v. Havens*, 1 Sandf. Ch. 324; *Mills v. Mills*, 28 Barb. 454; *Stewart v. McMartin*, 5 Barb. 438; *Irving v. Dekay*, 9 Paige, 521.

50. *Horstman v. Flege*, 172 N. Y. 381; *Gray v. Gray*, 5 App. Div. 132, 39 N. Y. Supp. 57; *Roessle v. Roessle*, 163 App. Div. 344, 148 N. Y. Supp. 659; *Matter of Smith*, 1 Misc. 269, 22 N. Y. Supp. 1067; *Huff v. Wheeler*, 27 Misc. 763, 59 N. Y. Supp. 716; *Matter of Grotrian*, 30 Misc. 23, 62 N. Y. Supp. 996; *Leonard v. Steele*, 4 Barb. 20; *Lasher v. Lasher*, 13 Barb. 106; *Adsit v. Adsit*, 2 Johns. Ch. 448; *Sanford v. Jackson*, 10 Paige, 266.

Dower is never excluded by a pro-

vision for the wife except by express words or necessary implication. Where there are no express words there must be on the face of the will a demonstration of the intent of the testator that the widow shall not take both dower and the provision. Such demonstration is furnished only where there is a clear incompatibility arising on the face of the will between a claim of dower, and a claim to the benefit of the provision. The intention to put the widow to an election may not be inferred from the extent of the provision, or because she is a devisee for life or in fee, or because it might seem to the court unjust, as a family arrangement, to permit her to claim both, or because it might be inferred that, had the attention of the testator been called to it, he would have expressly excluded dower. *Konvalinka v. Schlegel*, 104 N. Y. 126.

51. *Ferris v. Ferris*, 10 Misc. 320, 63 St. Rep. 237, 30 N. Y. Supp. 982; *Koezly v. Koezly*, 31 Misc. 697, 65 N.

her election.⁵² Where there is a manifest incompatibility between the bequest to the widow and dower, even though there is no express provision in lieu of dower, the widow cannot take both and is put to her election.⁵³ Although dower is favored by the courts, it is never at the cost of a disregard of express provisions.⁵⁴

If a trust for the benefit of the widow vests the entire legal estate in the trustees, it is inconsistent with the right of dower, and the widow is put to an election.⁵⁵ If the will authorizes the trustees to sell the real estate not devised to the wife, it is inconsistent with dower.⁵⁶ A devise of the testator's whole estate to the widow for life,⁵⁷ or for a shorter period,⁵⁸ will not necessarily put the widow to her election.

A provision in a will directing the executors to distribute the estate to the widow and children in such manner and at such times as they should judge to be for the best interest of the widow and children does not put the widow to her election; but she is entitled to dower in addition to the provision made for her.⁵⁹

It cannot be assumed from the extent of the pecuniary provision, made by the will of the husband to his wife, that

Y. Supp. 613; *Young v. Boyd*, 64 How. Pr. 213; *Sullivan v. Mara*, 43 Barb. 523; *Wetmore v. Peck*, 66 How. Pr. 54; *Ex parte Frazier*, 92 N. Y. 239.

52. *Orth v. Haggerty*, 126 App. Div. 118, 110 N. Y. Supp. 551; *Dodge v. Dodge*, 10 Abb. 401.

53. *Asche v. Asche*, 113 N. Y. 235; *Matter of Tailer*, 147 App. Div. 741, 133 N. Y. Supp. 122; *aff'd*, 205 N. Y. 599.

54. *Nelson v. Brown*, 144 N. Y. 384.

55. *Savage v. Burnham*, 17 N. Y. 561; *Lobias v. Ketchum*, 32 N. Y. 319.

56. *Vernon v. Vernon*, 53 N. Y. 351.

57. *Lewis v. Smith*, 9 N. Y. 502; *Purdy v. Purdy*, 18 App. Div. 310, 46 N. Y. Supp. 215; *Hopkins v. Cameron*, 34 Misc. 688, 70 N. Y. Supp. 1027.

One-third.—The gift to a widow of the "use and improvement" of one-third of all the testator's real estate, held to be in addition to dower. *Duncklee v. Butler*, 30 Misc. 58, 62 N. Y. Supp. 921. See also, *Glaser v. Glaser*, 67 App. Div. 132, 74 N. Y. Supp. 395.

Where a will, after directing pay-

ment of debts, funeral expenses and so forth, gave to the wife during her life the "rents, income, interest, use and occupancy" of all his estate, real and personal, upon condition that she keep the buildings and personal property insured, pay all taxes and assessments, and keep the estate in good repair, *held*, the provision was inconsistent with a dower right and so must be construed as in lieu of dower, and the widow, having accepted the provisions so made, that she could not thereafter claim dower. *Matter of Zahor*, 94 N. Y. 605.

When not entitled to both.—Where testator gave his wife a life estate in all his real estate after payment of taxes, insurance and repairs and authorized his executors and trustees to mortgage said real estate in certain contingencies, the widow is not also entitled to dower therein. *Matter of Foster*, 93 Misc. 400, 156 N. Y. Supp. 1005; *aff'd*, 174 App. Div. 846, 159 N. Y. Supp. 1113.

58. *Bond v. McNiff*, 9 J. & S. 43.

59. *Conner v. Watson*, 1 App. Div. 54, 37 N. Y. Supp. 71, 72 St. Rep. 224.

he intended it in lieu of dower, and the gift of the residue of the estate to testator's children, or power given to executors to sell and give good and sufficient deeds, is not inconsistent with the wife's dower and does not establish by implication that a bequest to the widow was intended to be in lieu of dower.⁶⁰ A request in connection with a devise of real estate that the wife release her right to dower in the residuary estate does not put her to an election.⁶¹ Where a testator by his will divides his property equally between his two children and his widow, and makes no statement that the devise to widow was in lieu of dower, the widow will take her dower in addition to her share.⁶²

Where testator gives his real and personal property to trustees without power to sell or mortgage the realty, but directs them to pay the net profits of the estate to his widow during her life or until her remarriage and the will expressly provides that in the event of her remarriage her interest in testator's estate shall be limited to dower, she is entitled both to dower and the testamentary provisions for her benefit.⁶³ A devise of specific property, and of all the residue, does not compel the widow to whom a specific devise is made to elect, since the former devises may be taken subject to the dower right, as they might be subject to the right of a mortgagee.⁶⁴ A devise of real estate to children charged with annuities to the widow, not stated to be in lieu of dower, does not put her to her election, as the annuities may be considered as a lien on the property and not inconsistent with dower.⁶⁵

Where a testator gave his residence to his widow and the residue of his estate to his executors in trust to pay his widow a certain sum annually and the balance of the income to his children, and directed that, upon the remarriage of his widow, her annuity should cease and she should receive her dower in his estate, which would exceed her annuity, it was held that the testator did not intend the annuity to be in lieu of dower.⁶⁶

The devise by a testator of his real estate to his executors, in trust to receive and apply the income to the use of persons other than his widow, and a power of sale incidental thereto,

60. *Kimbel v. Kimbel*, 14 App. Div. 570, 43 N. Y. Supp. 900.

61. *Miller v. Miller*, 22 Misc. 582, 49 N. Y. Supp. 407.

62. *Closs v. Eldert*, 30 App. Div. 338, 51 N. Y. Supp. 881.

63. *Matter of Knabe*, 94 Misc. 67,

157 N. Y. Supp. 267.

64. *Fenton v. Fenton*, 35 Misc. 479, 71 N. Y. Supp. 1083.

65. *Horstmann v. Flege*, 32 Misc. 665, 66 N. Y. Supp. 446.

66. *Schreiner v. Schreiner*, 63 Misc. 601, 118 N. Y. Supp. 608.

are not inconsistent with a claim of dower on the part of his widow; and the gift to the widow of all his personal estate is not enough from which to infer an intention that it was to be in lieu of dower.⁶⁷

4. Time for election.

If a widow enters into possession of real estate devised to her in lieu of dower, and institutes no proceeding for dower within a year thereafter, it is deemed an acceptance of the testamentary provision.⁶⁸ Upon the death of her husband, the widow is charged with the duty of informing herself as to the condition of his estate and of making her election.⁶⁹ The period of one year acts as a statute of limitations so as to bar her dower.⁷⁰ In cases where the widow is bound to elect between dower and the benefits given her by the will, she is entitled to have the respective values and amounts of her two interests ascertained before she elects between them.⁷¹ If she enters proceedings for dower, as to one parcel, within the year, it is a sufficient election.⁷² An action by a widow to contest the probate of her husband's will is not an election to take dower, if the will is set aside; or take the devise under the will, if it is sustained.⁷³ An order allowing an extension of time within which a widow shall elect between the provision in the will and dower, should not be granted, unless reasonable cause therefor be shown.⁷⁴

5. Death of widow within year.

Where a widow entitled to a legacy under her husband's will, in lieu of dower, dies within a year, without having exercised her right of election under section 201 of the Real Property Law, the right to collect the legacy is vested in her executor.⁷⁵ The power of election is purely personal

67. *Matter of Shields*, 68 Misc. 264, 124 N. Y. Supp. 1003.

68. *Palmer v. Voorhis*, 35 Barb. 479; *Grout v. Cooper*, 9 Hun, 326; *Matter of Nagel*, 35 St. Rep. 245, 12 N. Y. Supp. 707.

69. *Akin v. Kellogg*, 119 N. Y. 441.

70. *Akin v. Kellogg*, 119 N. Y. 441.

71. *Hindley v. Hindley*, 29 Hun, 318.

72. *Howley v. James*, 5 Paige, 318, 16 Wend. 61.

73. *Flynn v. McDermott*, 183 N. Y. 62.

74. *Bradhurst v. Field*, 32 St. Rep.

75. *Flynn v. McDermott*, 183 N. Y. 62.

An insane widow cannot be deprived of the right given to her to elect whether she will take her dower or a legacy. Her silence or her failure to enter or to commence an action to obtain her dower cannot be construed against her, and is not a waiver of her personal privilege. Although she is confined in a State hospital for the insane, the State Commission in Lunacy may not elect in her behalf. *Camardelle v. Schwartz*, 126 App. Div.

so far as a widow is concerned and does not pass to her legal representatives.⁷⁶

6. Effect of election to take under will.

A provision in lieu of dower, if accepted, bars the wife's dower in lands the testator had conveyed before the date of the will, as well as in those held at the time of his death.⁷⁷ The dower is barred by her acceptance of the testamentary provision, and it is no answer to say that she has not received all that was intended for her.⁷⁸ But the acceptance of the terms of the will does not bar the right of the widow to a distributive share in the personal property.⁷⁹ The election which, under the statutes, the widow is deemed to have made by failing within one year to enter upon lands or commence proceedings, is not absolutely conclusive against her so as to prevent her being relieved therefrom when she has been induced to omit such election by fraudulent representations. The statute deems the election to take place only when provision has been actually made for her by will. If, by reason of the insolvency of the estate, the provision fails, she is not deemed to have made an election.⁸⁰ But if part of the provision made by the testator is declared void, the widow is not bound, by a previous election, to receive such provision except as against *bona fide* purchasers or incumbrancers.⁸¹ But where a widow has accepted the provisions of a will in her favor, expressed to be in satisfaction of her dower, the fact that a portion of the provisions in her favor is ineffectual will not entitle her to dower in the lands embraced in the invalid provision if she retains the other benefits conferred by the will and does not seek to avoid her election.⁸²

Where a husband loans money and takes a note therefor, payable to the order of himself and wife, and thereafter makes a will containing a devise expressly in lieu of dower, and of all claims upon his estate, if the note remains unpaid at the time of his decease, the widow is entitled thereto in addition to the testamentary provision.⁸³ The widow's

76. *Camardella v. Schwartz*, 126 App. Div. 334, 110 N. Y. Supp. 611.

77. *Steele v. Fisher*, 1 Edw. 435; *Palmer v. Voorhis*, 35 Barb. 479.

78. *Kennedy v. Mills*, 13 Wend. 553; *Van Orden v. Van Orden*, 10 Johns. 30.

79. *Edsall v. Waterbury*, 2 Redf. 48; *Hatch v. Bassett*, 52 N. Y. 359; *Sink v. Sink*, 53 How. Pr. 400; *Bullard v.*

Benson, 1 Dem. 486.

80. *Aikin v. Kellogg*, 39 Hun, 252, 119 N. Y. 441.

81. *Hone v. Van Schaick*, 7 Paige, 221; *aff'd*, 20 Wend. 564.

82. *Lee v. Tower*, 124 N. Y. 370, 36 St. Rep. 344.

83. *Sanford v. Sanford*, 58 N. Y. 69.

relinquishment of dower forms a valuable consideration for the testamentary gifts, and they must be paid in preference to other legacies and without abatement.⁸⁴ A gift in lieu of dower and its acceptance is in effect a contract whereby the widow becomes a purchaser of the property left to her by the will in consideration of relinquishing her dower.⁸⁵ The bequest is held by her by right of purchase and is not chargeable with debts of the testator.⁸⁶ Where testator devised an interest in real estate to his widow in lieu of dower, and the provisions were accepted by her, it became a debt of the estate, and where the personalty was insufficient to pay it, provision for it should be made in an action to partition real estate.⁸⁷ Where a legacy is accepted by a widow in lieu of dower it is a taxable transfer, it being an election by the widow to accept the provisions of the will.⁸⁸

ARTICLE IV.

RIGHT OF WIDOW TO QUARANTINE OR CROPS.

A. Real Property Law, § 204. Widow's quarantine.

A widow may remain in the chief house of her husband forty days after his death, whether her dower is sooner assigned to her or not, without being liable to any rent for the same; and in the meantime she may have her reasonable sustenance out of the estate of her husband.

(See B., C. & G. Consol. L., 2nd Ed., p. 7421.)

B. Real Property Law, § 205. Widow may bequeath crop.

A widow may bequeath a crop in the ground of land held by her in dower.

(See B., C. & G. Consol. L., 2nd Ed., p. 7422.)⁸⁹

C. Quarantine.

The widow cannot retain possession after the forty days of quarantine have expired, until dower is assigned; she must proceed for that purpose.⁹⁰ After the expiration of a widow's quarantine she is not a squatter or intruder and

84. *Isenhardt v. Brown*, 1 Edw. 411. 197.

85. *Hathaway v. Hathaway*, 37 Hun, 265.

86. *Dunning v. Dunning*, 82 Hun, 462, 31 N. Y. Supp. 749, 64 St. Rep. 397; *aff'd*, 147 N. Y. 686.

87. *Wilmot v. Robinson*, 42 Misc. 244, 86 N. Y. Supp. 575.

88. *Matter of Rieman*, 42 Misc. 648, 87 N. Y. Supp. 731; *Matter of Stuyvesant*, 72 Misc. 295, 131 N. Y. Supp.

89. A widow is entitled to grains and fruits ungathered at the time of the assignment of dower, but if dower has not been assigned and she takes them, she is liable to the heir and cannot retain a third, either as dowress or distributee. *Kain v. Fisher*, 6 N. Y. 597.

90. *Jackson v. Donaghy*, 7 Johns. 247; *Corey v. People*, 45 Barb. 263.

cannot be removed by summary proceedings.⁹¹ In the absence of other proof as to its value, the forty days' sustenance should be allowed to the widow at the rate paid for her board during the decedent's lifetime.⁹² Reimbursement of a widow may be made for sums expended by her for reasonable support and maintenance during her quarantine.⁹³

In a proceeding to distribute surplus moneys arising upon a mortgage foreclosure, the widow of a mortgagor, who continued in the possession of the mortgaged premises during the period between the expiration of her quarantine and the delivery of the referee's deed, is chargeable with only two-thirds of the value of such use and occupation.⁹⁴

ARTICLE V.

ACTION TO RECOVER DOWER.

A. Limitation of action.

1. Real Property Law, § 460. Limitation of action for dower.

An action for dower must be commenced by a widow, within twenty years after the death of her husband; but if she is, at the time of his death, either:

1. Within the age of twenty-one years; or
2. Insane; or
3. Imprisoned on a criminal charge, or in execution upon conviction of a criminal offence, for a term less than for life;

The time of such a disability is not a part of the time limited by this section. And if at any time, before such claim of dower has become barred by the above lapse of twenty years, the owner or owners of the lands subject to such dower, being in possession, shall have recognized such claim of dower by any statement contained in a writing under seal, subscribed and acknowledged in the manner entitling a deed of real estate to be recorded, or if by any judgment or decree of a court of record within the same time and concerning the land in question, wherein such owner or owners were parties, such right of dower shall have been distinctly recognized as a subsisting claim against said lands, the time after the death of her husband, and previous to such acknowledgment in writing or such recognition by judgment or decree, is not a part of the time limited by this section.

2. Effect of section.

Section 460 stands by itself and contains a different and unusual limitation especially prescribed by law, and it is not affected by provisions of the Civil Practice Act, relating to the limitation of actions and applying generally to civil actions.⁹⁵

91. *Lincoln Trust Co. v. Hutchinson*, 65 Misc. 590, 120 N. Y. Supp. 811.

92. *Matter of Stiles*, 64 Misc. 658, 120 N. Y. Supp. 714.

93. *Matter of Brown*, 77 Misc. 507,

137 N. Y. Supp. 978.

94. *Shueler v. Levy*, 73 Misc. 25, 130 N. Y. Supp. 600.

95. *Wetyen v. Fick*, 178 N. Y. 223.

The statute of limitations cannot be

B. Jurisdiction of courts.

The Supreme Court, by virtue of its general powers, has jurisdiction of an action for dower. Under section 67 of the Civil Practice Act, a county court has jurisdiction of an action for dower when the real property to which the action relates is situated within the county.

C. Parties.

1. Real Property Law, § 461. Necessary defendants.

Where the property, in which dower is claimed, is actually occupied, the occupant thereof must be made defendant in the action. Where it is not so occupied, the action must be brought against some person exercising acts of ownership thereupon, or claiming title thereto, or an interest therein, at the time of the commencement of the action.

2. Real Property Law, § 462. Who may be joined as defendants.

1. In either of the cases specified in the last section, any other person, claiming title to, or the right to the possession of, the real property in which dower is claimed, may be joined as defendant in the action.

2. The people of the state of New York may be made a party defendant in an action for dower where the people of the state of New York have an interest in or a lien upon the lands affected thereby, in the same manner as a private person. In such a case the summons must be served upon the attorney-general, who must appear in behalf of the people. But where the people of the state of New York are made a party defendant, as herein provided, the complaint shall set forth, in addition to the other matters required, detailed facts showing the particular nature of the interest in or the lien on the said real property of the people of the state of New York and the reason for making the people a party defendant. Upon failure to state such facts the complaint shall be dismissed as to the people of the state of New York.

3. Real Property Law, § 463. Actions where defendants claim in severalty.

In an action to recover dower, in a distinct parcel of real property of which the plaintiff's husband died seized, or in all the real property which he aliened by one conveyance, all the persons in possession of, or claiming title to, the property, or any part thereof, may be made defendants, although they possess or claim title to different portions thereof in severalty.

4. Decisions as to parties.

Only such parties as have present interests in the real estate, which is the subject of an action to admeasure dower, are necessary parties thereto.⁹⁶ The effect of section 461 is to prevent an action for dower being brought except

interposed as a bar where the widow has been in possession of her dower either with or without suit, and has been subsequently ousted. *Sayre v. Wisner*, 8 Wend. 661; *Payne v. Becker*,

87 N. Y. 153; *Sayles v. Naylor*, 5 St. Rep. 816.

96. *O'Connor v. Garrigan*, 17 Wkly. Dig. 302.

against a person who comes within one of the categories stated in the section either as occupant, or one exercising acts of ownership or claiming title to the premises.⁹⁷ Previous to 1913, there was no authority for making the State a party defendant.⁹⁸

Where in a judgment creditor's action instituted after the death of the judgment debtor a deed of trust of all his property is declared void as against his creditors, said judgment is not an adjudication upon his wife's right of dower though she joined in the deed. In such case, the wife may maintain an action to admeasure her dower against the receiver appointed in a judgment creditor's action though the judgment therein was not entered until more than a year after the death of her husband.⁹⁹

In an action by a widow for an assignment of dower and for her just proportion of the rents and profits thereof, all the heirs-at-law are proper parties to the action, although it is alleged that part only of the heirs-at-law have been in possession and have received the rents and profits of the whole premises.¹

A widow entitled to dower in a block of city lots has been permitted to maintain the action against the occupant of a single floor of a store erected on one lot, which floor the occupant has hired for one year.²

D. Action by owner to determine widow's dower.

Under sections 509-511 of the Real Property Law, an action may be maintained by a person claiming an estate in real property against a woman claiming a right of dower therein, to compel the determination of her claim. This action is discussed in another chapter of this work.³

E. Demand or possession.

A demand of dower before the suit is brought, is not necessary.⁴ Nor will the widow's omission to demand her dower prejudice her claim to damages.⁵ It is no objection to the action that the party was not in actual possession of the lands out of which dower is claimed.⁶

97. *Connolly v. Newton*, 85 Hun, 552, 33 N. Y. Supp. 102.

98. *Smith v. Doe*, 111 N. Y. Supp. 525.

99. *Jenkins v. Mollenhauer*, 105 Misc. 15, 173 N. Y. Supp. 870.

1. *Van Name v. Van Name*, 23 How. Pr. 247.

2. *Ellicott v. Mosier*, 7 N. Y. 201.

3. See *Claim to Real Property, Action to Determine*, Art. V.

4. *Jackson v. Churchill*, 7 Cow. 287; *Ellicott v. Mosier*, 7 N. Y. 201.

5. *Hitchcock v. Harrington*, 6 Johns. 290.

6. *Townsend v. Townsend*, 2 Sandf. 711.

F. Pleadings.**1. Real Property Law, § 470. Complaint.**

The complaint, in an action for dower, must describe the property claimed with common certainty, by setting forth the name of the township or tract and the number of the lot, if there is any, or in some other appropriate manner, so that from the description, possession of the property claimed may be delivered where the plaintiff is entitled thereto, and must set forth the name of the plaintiff's husband.

2. General contents of complaint.

Where in the complaint the description of the premises does not conform to the requirements of the Real Property Law, it should be amended.⁷ The complaint in an action for dower in which it is alleged that the husband of the dowress had executed a deed of the premises to one of the defendants, and she has not joined in the conveyance, but which fails to allege that the defendant was either an actual occupant or a person exercising acts of ownership, or one claiming a title or interest in the premises at the time of the commencement of the action, is demurrable.⁸ It is not necessary to aver the intestacy, of the plaintiff's husband, the presumption being in favor of it, and any matter that will bar dower is a matter of defense to be interposed by answer.⁹

3. Form of complaint.

NEW YORK SUPREME COURT — ULSTER COUNTY.

HANNA EVERSON, PLAINTIFF,

agst.

ANDREW McMULLEN, DEFENDANT.

113 N. Y. 293.

The plaintiff, appearing in this action by G. D. B. Hasbrouck, her attorney, respectfully shows to the court:

First: That the name of plaintiff's husband was Morgan Everson, late of the town of Esopus, County of Ulster, deceased; that plaintiff is a widow, and that the said Morgan Everson, at the time of his death and during many years previous thereto, was seized in fee simple and possessed of the following described premises:

(Insert description.)

Second: That plaintiff is entitled to one undivided third part thereof for her life as her reasonable dower.

7. Peart v. Peart, 18 St. Rep. 455, 33 N. Y. Supp. 102.

2 N. Y. Supp. 322.

9. Draper v. Draper, 11 Hun, 616.

8. Connelly v. Newton, 85 Hun, 552.

Third: That the plaintiff, on or about the 11th day of June, 1906, demanded her dower of the defendant, in the aforesaid premises, and that he refused and still refuses to assign the same to her.

Fourth: That the defendant, Andrew McMullen, was at the time of the commencement of this action and is now in possession and occupation of said premises and claims some title to or some right in the possession of said premises, or some part thereof, which right, if any, is subject to the plaintiff's right of dower; and the said defendant wrongfully and unjustly withholds from the plaintiff the possession of her said one-third part thereof as her dower.

Wherefore plaintiff demands judgment:

1st. That she recover possession of one undivided third part of said premises for her life against the defendant Andrew McMullen.

2d. That the said dower of the plaintiff in the lands and premises hereinbefore described may be set off and admeasured to the plaintiff by commissioners to be appointed for that purpose, or in such other way as the court may direct.

3d. That said widow further recover damages for the withholding of her dower from the time of the making of said demand to the amount of one-third of the annual value of the mesne profits of said property, with the interest and costs of this action.

G. D. B. HASBROUCK,
Plaintiff's Attorney.

4. Form of amended complaint.

SUPREME COURT — COUNTY OF NEW YORK.

MARY ANN ROBINSON, PLAINTIFF,
agst.

ROBERT GOVERS, INDIVIDUALLY AND AS
SOLE EXECUTOR AND TRUSTEE UNDER
THE LAST WILL AND TESTAMENT OF
ANTHONY ROBINSON, DECEASED, AND
OTHERS, DEFENDANTS.

138 N. Y. 425.

.. The amended complaint of Mary Ann Robinson, the above-named plaintiff, by John B. Pine, her attorney, respectfully shows to this court:

1. That heretofore, to wit: On or about the 19th day of April, 1904, at the city of Brooklyn, county of Kings, and State of New York, the plaintiff intermarried with one Anthony Robinson, the testator above named.

2. That the said Anthony Robinson died at the city of New York on the 30th day of December, 1906, leaving a last will and testament and codicil, copies of which are hereto annexed and made a part of this complaint, which said last will and testament and codicil were admitted to probate by the surrogate of the city and county of New York as a will of real and personal property on or about the 24th day of January, 1907; that letters testamentary upon the estate of said Anthony Robinson were by said surrogate on the 26th day of January, 1907, granted unto Robert Govers, the defendant above named; that said defendant Robert Govers alone qualified as the executor under said will, as the plaintiff is informed and verily believes, and alone accepted the trust created thereby.

3. That at the time of the decease, as aforesaid, the above-named Anthony Robinson was seized and possessed of the following described real estate situate in the city and county of New York and more particularly described as follows:

(Insert description.)

being the same premises conveyed to the said Anthony Robinson by Benjamin T. Sherman, master in chancery, by deed dated the 17th day of August, 1843, and recorded on said day in liber 437 of Cons., page 457, in the office of the register in the city and county of New York.

4. Upon information and belief that upon the decease of said Anthony Robinson, the premises above described and designated as parcel "A," which said premises are known by the street number of 79 Perry street, under the second clause of said last will and testament, to the children of the defendant Robert Govers, to wit: to the defendants William J. Govers, Maria Govers, Jane Govers and Esther Govers, subject to and charged with the dower and right of dower of the plaintiff therein, as the widow of said Anthony Robinson, deceased.

5. Upon information and belief that the said premises described as parcel "A" are rented and that the following named defendants have or claim to have an interest therein as tenants, to wit: the defendants Anna Stockman, John R. Toom, James Gamble, Edward Cissie and John Ray, and that the defendant Robert Govers, individually or as executor and trustee under said last will and testament, has collected and is now collecting the rental of said premises due at the time of the death of said Anthony Robinson and since accruing:

Wherefore the plaintiff demands judgment:

I. That as the widow of said Anthony Robinson, deceased, she is entitled to dower in each and every the real property hereinbefore mentioned and described and that the respective rights and interests of the several parties hereto in said premises may be determined.

II. That the said dower of the plaintiff in the several lots of land and premises above mentioned and described may be set off and admeasured to the plaintiff by the referee to be appointed by the court for that purpose or in such other way as the court may direct.

III. That the said premises or so much thereof as may be necessary may be sold according to law and the proceeds thereof or as much thereof as may be necessary to secure the plaintiff's right of dower, may be invested under the direction of the court and the income arising therefrom paid to the plaintiff during the term of her natural life, or that plaintiff have leave to accept a gross sum in lieu thereof, and that the surplus, if any, be distributed among the several parties entitled thereto in proportion to their respective interests, as the same may be by this court determined.

IV. That the defendant Robert Govers account for the rents of said premises collected by him in his individual capacity and as executor and trustee as aforesaid and pay over to the plaintiff the proportion of said rents to which she is entitled.

V. That the plaintiff have such other and further relief in the premises as may be just and equitable, together with her costs and disbursements herein.

JOHN B. PINE,
Attorney for the Plaintiff.

G. Bill of particulars.

In an action for admeasurement of dower where issue is taken as to the marriage of plaintiff, the defendant is entitled to a bill of particulars showing whether such marriage was ceremonial, and if so, when, where and by whom performed, and if not ceremonial, when and where it was contracted.¹⁰

H. Trial of issues.

An action for dower is triable by jury unless a jury trial is waived.¹¹ A general verdict for or against the plaintiff should be rendered; if not, the verdict should be set aside.¹² Under subdivision 9 of section 138 of the Civil Practice Act a preference is allowed to an action for dower where the plaintiff makes proof by affidavit to the satisfaction of the court or a judge thereof that she has not sufficient means of support aside from the estate in controversy.

I. Recovery of damages.

1. Real Property Law, § 464. Damages may be recovered; how estimated.

Where a widow recovers, in an action therefor, dower in property, of which her husband died seized, she may also recover, in the same action, damages for withholding her dower, to the amount of one-third of the annual value of the mesne profits of the property, with interest; to be computed, where the action is against the heir, from her husband's death, or, where it is against any other person, from the time when she demanded her dower of the defendant; and in each case, to the time of the trial, or application for judgment, as the case may be; but not exceeding six years in the whole. The damages shall not include anything for the use of permanent improvements, made after the death of the husband.

2. Real Property Law, § 465. Damages in action against alienor of husband.

Where a widow recovers dower, in a case not specified in the last section, she may also recover, in the same action, damages for withholding her dower, to be computed from the commencement of the action; but they shall not include anything for the use of permanent improvements, made since the property was aliened by her husband. In all other respects, the same must be computed as prescribed in the last section.

3. Real Property Law, § 466. Damages where several parcels are affected.

The last two sections do not authorize the recovery, against a defendant who is joined with others, of damages for withholding dower, in any portion of the property not occupied or claimed by him.

10. *Govin v. DeMiranda*, 87 Hun, 227, 33 N. Y. Supp. 753, 67 St. Rep. 426.

11. Civil Practice Act, § 425; *Kinne v. Kinne*, 2 T. & C. 393.

12. *Vadney v. Thompson*, 44 Hun, 1.

4. Real Property Law, § 467. Damages apportioned between heir and alienee.

Where a widow recovers dower in real property aliened by the heir of her husband, she may recover, in a separate action against him, her damages for withholding her dower, from the time of the death of her husband to the time of the alienation, not exceeding six years in the whole. The sum recovered from him must be deducted from the sum, which she would otherwise be entitled to recover from the grantee; and any sum recovered as damages from the grantee, must be deducted from the sum, which she would otherwise be entitled to recover from the heir.

5. General right to damages.

Damages for the withholding of dower were not recoverable at common law,¹³ but they have been allowed by statute for many years.¹⁴ It is by statute alone that a widow may recover for arrears of dower, either at law or in equity, and damages for the withholding can only be estimated for six years prior to the judgment.¹⁵ The damages are computed upon the value of the property at the date of the succession by the heir,¹⁶ that is, from the date of the death of the husband.¹⁷

A widow's claim for dower in real estate is not subject to set-off for moneys due, nor for receipt of rents and profits of the whole of the lands in which she claims dower,¹⁸ nor for individual claims of one of the heirs against her.¹⁹

In an action for dower a widow should not be awarded a third of the net rental value as established by expert testimony as damages for withholding dower, where the summons against a nonresident incompetent was issued

13. *Enbree v. Ellis*, 2 Johns. 119.

Revised Statutes.—Mesne profits were not recoverable by the widow under the Revised Statutes until the assignment of dower. *Kyle v. Kyle*, 67 N. Y. 400.

14. *Van Name v. Van Name*, 23 How. Pr. 247; *Brown v. Brown*, 31 How. Pr. 481.

The order of reference to compute damages for withholding dower, which provides that the referee may determine whether such damages were taken into consideration by the commissioners appointed to admeasure dower, authorizes the referee to receive evidence as to the action and finding of the commissioners, although they made no formal report as to such damage. A judgment in favor of plaintiff in such

an action may be determined by setting off against the costs awarded to her the costs of a reference in which her claim for damages was disallowed. *Swift v. Swift*, 88 Hun, 551, 34 N. Y. Supp. 852, 68 St. Rep. 749.

15. *Kyle v. Kyle*, 67 N. Y. 400.

16. *Sidway v. Sidway*, 23 St. Rep. 305, 4 N. Y. Supp. 920, 52 Hun, 222.

17. *Gordon v. Gordon*, 80 App. Div. 258, 80 N. Y. Supp. 241; *aff'd* without opinion, 179 N. Y. 549; *Price v. Price*, 54 Hun, 349, 7 N. Y. Supp. 474; *rev'd* on other grounds, 124 N. Y. 589.

18. *Bogardus v. Parker*, 7 How. Pr. 303. See *Elliott v. Gibbons*, 30 Barb. 498.

19. *Bonert v. Bonert*, 112 Misc. 612, 184 N. Y. Supp. 274.

within two days of the husband's death, and the plaintiff, by refusing to agree to any lease which would interfere with the enforcement of her rights, and by *lis pendens* filed made rental for the full value impossible. Under such circumstances, the damages should be reduced to one-third of the net rentals existing at the time of the husband's death, with interest.²⁰

6. Against person other than heir.

In an action against a person other than an heir, the plaintiff is entitled to damages only from the time she demands her dower of the defendant.²¹ The damages are those only which accrue from the time of the alienation;²² they are computed upon the value of the property at that time, and improvements are not considered.²³ They are limited to a period of six years.²⁴ The meaning of the statute is, that the widow shall not recover for increased value of the land.²⁵ Where there is an outstanding mortgage they are ascertained by computing the amount due on the mortgage at the time of the purchase, and deducting one-third of the interest on that amount from one-third of the rents and profits of the property, over and above the necessary repairs, taxes, etc.²⁶ If the husband mortgages the land, but continues in possession, and afterward releases the equity of

20. *Woodbury v. Woodbury*, 144 App. Div. 680, 129 N. Y. Supp. 686; *aff'd*, 205 N. Y. 551.

21. *Gordon v. Gordon*, 80 App. Div. 258, 80 N. Y. Supp. 241; *aff'd* without opinion, 179 N. Y. 549; *Witthaus v. Schack*, 38 Hun, 590; *rev'd* on another point, 105 N. Y. 332; *Price v. Price*, 54 Hun, 349, 7 N. Y. Supp. 474; *rev'd* on other grounds, 124 N. Y. 589.

Beneficiaries.—Where some of the defendants are heirs but the action is against them as beneficiaries under a trust, the damages are computed from the time of the demand. *Gordon v. Gordon*, 80 App. Div. 258, 80 N. Y. Supp. 241; *aff'd* without opinion, 179 N. Y. 549.

Devises.—In an action to admeasure dower, when the defendants are not sued as heirs but as devisees, they are "other persons" within the meaning of section 464, and the plaintiff may only recover *mesne* damages from the time of her demand of dower. *Roessle v. Roessle*, 163 App. Div. 344,

148 N. Y. Supp. 659.

22. *Marble v. Lewis*, 36 How. Pr. 337.

23. *Humphrey v. Phinaey*, 2 Johns. 483; *Dolf v. Bassett*, 15 Johns. 21.

House built on lands.—Where after the husband's death persons by mistake built a house upon vacant lands formerly owned by him, the widow is not entitled to a temporary injunction restraining the removal of the building pending an action to admeasure her dower, having no interest in the increased value so caused. *Emrich v. Emrich*, 129 App. Div. 557, 113 N. Y. Supp. 1052.

24. *Price v. Price*, 54 Hun, 349, 7 N. Y. Supp. 474; *rev'd* on other grounds, 124 N. Y. 589.

25. *Dorchester v. Coventry*, 11 Johns. 510; *Shaw v. White*, 13 Johns. 179; *Coates v. Cheever*, 1 Cow. 460; *Walker v. Schuyler*, 10 Wend. 481.

26. *Russell v. Austin*, 1 Paige, 192; *Hale v. James*, 6 Johns. Ch. 258.

redemption to the mortgagee, the date of the release is deemed the period of alienation at which the value is to be estimated.²⁷

7. Effect of death of doweress.

Plaintiff in an action for dower having died after decision dismissing her complaint, but prior to the entry of judgment on the decision, it seems that her representative may recover the mesne profits of her interest in lands, of which her husband died seized, although she may have died before such dower was assigned, especially if such suit was brought by her for that purpose in her lifetime.²⁸

J. Interlocutory judgment.

1. Real Property Law, § 471. Interlocutory judgment for admeasurement.

If the defendant makes default in appearing or pleading; or if the right of the plaintiff to dower is not disputed by the answer, or if it appears, by the verdict, report, or decision upon a trial, that the plaintiff is entitled to dower in the real property described in the complaint, an interlocutory judgment must be rendered; which, except as otherwise prescribed in this article, must direct that the plaintiff's dower in the property, particularly describing it, be admeasured by a referee, designated in the judgment, or by three reputable and disinterested freeholders, designated therein, as commissioners for that purpose.

2. Stay of judgment.

An action to admeasure dower will not be stayed, where the right of the plaintiff to dower is not disputed, to enable a person who has come in and bought from one of the heirs to have the dower admeasured in a partition suit subsequently brought.²⁹

3. Default.

There cannot be a judgment by default against infant defendants; the plaintiff must prove her case.³⁰

4. Settlement after interlocutory judgment.

A vendee is not justified in rejecting a title as unmarketable because the wife of a prior owner did not join in his deed and afterward began an action to admeasure dower and prosecuted the same to interlocutory judgment awarding an admeasurement, if more than twenty years have elapsed since the judgment without anything further being done in the action. The lapse of twenty years raises a

27. *Hale v. James*, 6 Johns. Ch. 258.

28. *Armstrong v. Trustees of Union*

29. *Rice v. Thompson*, 42 St. Rep.

424.

30. *Armstrong v. Trustees of Union*

30. *Armstrong v. Trustees of Union*

presumption that a settlement was made with the widow, or that she died, and the burden of rebutting the same is on the vendee.³¹

5. Form of interlocutory judgment.

NEW YORK SUPREME COURT — ULSTER COUNTY.

HANNAH EVERSON, PLAINTIFF, <i>agst.</i> ANDREW McMULLEN, DEFENDANT.	} 113 N. Y. 293.
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The above-entitled action having been duly brought to trial at a Trial Term of the Supreme Court held in and for the county of Ulster at the court house in the city of Kingston, commencing November, 1906, and this action having been reached for the trial on the 10th day of November, 1906, and the action having been by a stipulation duly made in open court waiving a jury trial, tried before the court without a jury, and said court having made and filed its decision.

Now, therefore, in accordance with said decision, it is adjudged:

1. That the plaintiff is entitled to dower in the equity of redemption of the premises described in the complaint herein.

2. That the plaintiff's interest as widow be and the same hereby is charged with its just proportion of the mortgage indebtedness as created by the mortgage from Morgan Everson and wife to the Rondout Savings Bank, the mortgage from Charles M. Preston and wife to the Rondout Savings Bank, and the mortgage from Andrew McMullen to the Rondout Savings Bank be and the same is hereby recognized and allowed in ascertaining the amount.

3. That a referee be appointed by this court to admeasure plaintiff's dower and ascertain with what and how it should be charged and determine its value, etc., in accordance with the statute in such case made and provided, and report to the court with all convenient speed, that the court may take final action therein.

4. And that either party have liberty to apply to this court for the further order or judgment of the court, as they might advise.

JACOB D. WURTS.

Clerk.

6. Form of notice of motion for appointment of referee.

SUPREME COURT — COUNTY OF NEW YORK.

MARY ANN ROBINSON, PLAINTIFF, <i>agst.</i> ROBERT GOVERS, INDIVIDUALLY AND AS EXECUTOR AND TRUSTEE, AND OTHERS, DEFENDANTS.	} 138 N. Y. 425.
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SIR:

Please take notice that upon the verdict rendered upon the trial of the above-entitled action, at a Trial Term of this court, held at

31. Port Jefferson Realty Co. v. Supp. 678.
 Woodhull, 128 App. Div. 188, 112 N. Y.

the county court house in the city of New York on the 22d day of October, 1906, before Hon. Edward Patterson, justice, and a jury, finding the plaintiff entitled to dower in the premises described in the amended complaint herein, and upon all the proceedings had and papers filed herein, and upon the affidavit of regularity of John B. Pine, hereto annexed, dated the 30th day of October, 1906, and upon the abstract of title and official searches to be produced upon the hearing of this motion, a motion will be made at a special term of this court to be held at the chambers thereof at the county court house in the city of New York, on the 9th day of November, 1906, at half-past ten o'clock in the forenoon or as soon thereafter as counsel can be heard, for an order adjudging that the plaintiff is entitled to an interlocutory decree herein awarding her dower in the real property aforesaid, and directing a reference to ascertain whether a distinct parcel of said real property can be admeasured and laid off to the plaintiff as tenant in dower without material injury to the interests of the parties, and further directing that if it shall appear from the report of such referee that a distinct parcel cannot be so admeasured and laid off, an interlocutory decree be entered upon the filing of such report, directing a sale of said premises by a referee named therein, and further directing that a reference as to whether any person not a party has a lien upon the said real property or any part thereof be dispensed with and for such other and further relief as may be just and equitable in the premises.

Dated, New York, 30th day of October, 1906.

JOHN B. PINE,
Plaintiff's Attorney.

7. Form of order of reference.

(Caption.)

MARY ANN ROBINSON, PLAINTIFF,
agst.

ROBERT GOVERS, INDIVIDUALLY AND AS
SOLE EXECUTOR AND TRUSTEE UNDER
THE LAST WILL AND TESTAMENT OF
ANTHONY ROBINSON, DECEASED, AND
OTHERS.

138 N. Y. 425.

This being an action for dower and the same having come on for trial at Trial Term of the Supreme Court on the 22d day of October, 1906, and a verdict having been rendered declaring the plaintiff to be entitled to dower in the real property described in the amended complaint, and the plaintiff having before the commencement of the trial, filed with the clerk consent to accept gross sum in full satisfaction and discharge of her right of dower in the said property, such consent being in writing and acknowledged in like manner as a deed to be recorded, and a copy thereof having been served upon each adverse party, who has appeared in the action, and the defendants William J. Govers, Maria Govers, Jane Govers and Esther Govers having, before the rendering of an interlocutory judgment herein, applied to the court upon notice, for an order granting them leave to pay the gross

charge of her dower in the property described in the complaint and therein designated as parcel "A," known as No. 79 Perry street, and the defendant Robert Govers, as trustee under the last will and testament of Anthony Robinson, deceased, having in like manner applied for an order granting him leave to pay the gross sum to which the plaintiff may be entitled in satisfaction and discharge of her dower in the property described in the said amended complaint as parcel "B," known as 81 Perry street, and the said application having come on to be heard,

Now, on reading and filing notices of the said several applications, and after hearing Mr. Shaw, of counsel for the defendants William J. Govers, Maria Govers, Jane Govers and Esther Govers; Mr. Nathan, of counsel for the said Robert Govers as trustee aforesaid; Mr. Pine, of counsel for the plaintiff, and Mr. Carpenter, guardian *ad litem* for the infant defendant Robert G. Robertson, it is

ORDERED, That it be and that it hereby is referred to Thomas F. Donnelly, Esq., counsellor-at-law, as sole referee to ascertain the value of plaintiff's right of dower in the said several parcels respectively, and to report to this court the respective amounts so ascertained by him with all convenient speed.

All questions in respect to costs and in respect to the relief to which the respective parties may be entitled are reserved until the coming in of the report of the said referee, and at which time any of the parties may make such motion in respect thereto as he or she may be advised.

WM. J. M'KENNA,
Clerk.

K. Commissioners or referee to admeasure dower.³²

1. Real Property Law, § 472. Dower, how admeasured.

The referee or the commissioners must execute their duties in the following manner:

1. They must, if it is practicable, and, in their opinion, for the best interests of all the parties concerned, admeasure and lay off, as speedily as possible, as the dower of the plaintiff, a distinct parcel, constituting the one-third part of the real property of which dower is to be admeasured, designating the part so laid off by posts, stones, or other permanent monuments.

2. In making the admeasurement, they must take into consideration any permanent improvements, made upon the real property, after the death of the plaintiff's husband, or after the alienation thereof by him; and, if practicable, those improvements must be awarded within the part not laid off to the plaintiff; or, if it is not practicable so to award them, a deduction must be made from the part laid off to the plaintiff, proportionate to the benefit which

32. Oath of office.—A referee or commissioner, before entering upon his duties, shall subscribe and take an oath to the effect that he will faithfully, honestly and impartially discharge the trust committed to him. Where all the parties whose interest will be affected by the result are of full age and are present or are represented by attorneys, the oath may be

waived, a record thereof being duly made. Civil Practice Act, § 126.

Removal or substitution.—A referee or commissioner may be removed by the court. In case of the death, resignation, neglect or refusal to serve, or removal, of any such officer, another person may be appointed in his stead. Civil Practice Act, § 81.

she will derive from so much of those improvements, as is included in the part laid off to her.

3. If it is not practicable, or if, in the opinion of the referee or commissioners, it is not for the best interests of all the parties concerned, to admeasure and lay off to the plaintiff a distinct parcel of the property, as prescribed in the foregoing subdivisions of this section, they must report that fact to the court.

4. They may employ a surveyor, with the necessary assistants, to aid in the admeasurement.

2. Real Property Law, § 473. Report thereupon.

All the commissioners must meet together in the performance of any of their duties; but the acts of a majority so met are valid. The referee, or the commissioners, or a majority of them, must make a full report of their proceedings, specifying therein the manner in which they have discharged their trust, with the items of their charges, and a particular description of the portion admeasured and laid off to the plaintiff; or, if they report that it is not practicable, or, in their opinion, it is not for the best interests of all the parties concerned, to admeasure and lay off a distinct parcel of the property of which dower is to be admeasured, they must state the reasons for that opinion and all the facts relating thereto. The report must be acknowledged or proved, and certified, in like manner as a deed to be recorded, and must be filed in the office of the clerk.

3. Real Property Law, § 474. Setting aside report.

Upon the application of any party to the action, and upon good cause shown, the court may set aside the report, and, if necessary, may appoint new commissioners, or a new referee, who must proceed, as prescribed in this article, with respect to those first appointed.

4. Real Property Law, § 475. Fees and expenses.

The fees and expenses of the commissioners, or of the referee, including the expense of a survey, when it is made, must be taxed under the direction of the court; and the amount thereof must be paid by the plaintiff, and allowed to her, upon the taxation of her costs.³³

5. Notice of meeting.

It is customary and usual for commissioners to give notice of their meetings to parties interested, but the want of a formal notice is not ground for refusing to confirm their report, where it appears that the party objecting knew of their meetings, and that no injustice was done him by the decision.³⁴ Where three commissioners were appointed, the tenant not attending before the court at the time noticed,

33. Fees of surveyor or commissioner.—A surveyor, employed as prescribed by law, in an action for partition or dower, or to determine dower, is entitled to five dollars for each day actually and necessarily occupied in surveying, laying out, marking, or mapping land therein. Each assistant so employed is entitled to

two dollars for each day actually and necessarily occupied in serving under the surveyor's direction. Each commissioner appointed as prescribed by law to make partition or admeasure dower is entitled to five dollars for each day's actual and necessary service. Civil Practice Act, § 1512.

34. *Smith v. Smith*, 6 Lans. 313.

but on the same day one of them was changed by reason of his health; it was held, that the proceedings might be regarded as continuous and regular without additional notice.³⁵

6. Division of property.

A widow is entitled to have set off to her, by metes and bounds, the one-third part of lands of which her husband died seized as tenant in common, to be held by her as tenant in common with the other owner.³⁶ Though dower must in general be assigned by metes and bounds, yet where the subject-matter is of such a nature that no decision can be made which will give the parties the enjoyment of their respective shares in severalty, it may be assigned so as to give the widow one-third of the profits or the parties may have an alternate occupation of the whole.³⁷ One of several distinct parcels of land in which a widow is entitled to dower, constituting one-third of the real property of which dower is to be admeasured, may be set off in satisfaction of her entire claim for dower in the several parcels of property.³⁸

A widow is entitled to have her dower assigned her, clear of all arrears of taxes and assessments which should be paid out of her husband's personal estate.³⁹ It is not proper in the admeasurement of dower to impose charges upon lands not set off for the exclusive use and benefit of the dowress, during her life, nor is it proper to set off dower in a burial lot.⁴⁰ If a part of a home be assigned to a widow for dower, the tenant cannot object.⁴¹ Where dower was to be assigned in a building used as a dwelling-house and store, the commissioners set it off by running lines through the premises, regardless of rooms, etc., so as to render a part of the building useless; it was held, that the report could be vacated on motion of the owners.⁴² Dower is due of mines worked during coverture, not of those unopened at the husband's death. If the land assigned for dower contain an open mine, the dowress may work it.⁴³

35. *White v. Story*, 2 Hill, 543.

36. *Smith v. Smith*, 6 Lans. 313.

37. *White v. Story*, 2 Hill, 543; *Coates v. Cheever*, 1 Cow. 460; *Van Gelder v. Post*, 2 Edw. 577.

38. *Price v. Price*, 11 Civ. Pro. 359, 41 Hun, 486.

39. *Van Derbeck v. City of Roches-*

ter, 46 Hun, 87; *aff'd*, 122 N. Y. 285.

40. *Price v. Price*, 54 Hun, 349, 7 N. Y. Supp. 474; s. c., 27 St. Rep. 110; *rev'd*, 124 N. Y. 589.

41. *White v. Story*, 2 Hill, 543.

42. *Stewart v. Smith*, 1 Keyes, 59.

43. *Coates v. Cheever*, 1 Cow. 460.

7. Improvements.

The widow is entitled to one-third of the land, according to its value at the time of alienation, and is not entitled to be allowed for any increase in value or any improvements.⁴⁴ No deduction can be made in consequence of any conveyance made by the husband to the wife during coverture.⁴⁵ The question of improvements, however, is to be determined by the commissioners.⁴⁶ Where the husband's title has been divested by bankruptcy proceedings, the widow's dower is to be computed as of the time of the assignment in bankruptcy.⁴⁷

8. Form of report.

SUPREME COURT — CITY AND COUNTY OF NEW YORK.

MARY ANN ROBINSON, PLAINTIFF, <i>agst.</i> ROBERT GOVERS, INDIVIDUALLY AND AS SOLE EXECUTOR AND TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF ANTHONY ROBINSON, DECEASED, DE- FENDANT.	} 138 N. Y. 425.
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To the Supreme Court of the State of New York:

I, the undersigned, Thomas F. Donnelly, to whom, under an order of this court, bearing date the 27th day of November, 1906, made herein, it was referred as sole referee to ascertain the value of the plaintiff's right of dower in the several parcels of property mentioned in said order, and therein described as Nos. 79 and 81 Perry street, respectively, and to report to this court the respective amounts so ascertained, with all convenient speed, do hereby report:

1. That before proceeding with the hearing of the matter so referred to me, I took oath prescribed by the Code of Civil Procedure.

2. That I was attended on such reference by John B. Pine, Esq., attorney for plaintiff (recite other appearances), and thereupon heard the proofs of the respective parties, and from the evidence adduced on said reference and from the proofs before me, I do find and report as follows:

That the plaintiff is 70 years old; that the value of the fee of No. 79 Perry street, New York city, mentioned in said order of reference, is \$15,000; that the value of the fee of No. 81 Perry street, New York city, mentioned in said order of reference, is \$15,000; that the value of the plaintiff's right of dower in the premises known and mentioned as 79 Perry street in said order of reference, is \$1,505.75; that the value of the plaintiff's right of dower in the premises known and

44. *Brown v. Brown*, 4 Robt. 688;
Bartlett v. Musliner, 28 Hun, 235;
Marble v. Lewis, 36 How. Pr. 337.

45. *Hyde v. Hyde*, 4 Wend. 630.
 46. *Marble v. Lewis*, 53 Barb. 432.
 47. *Raynor v. Raynor*, 21 Hun, 36.

mentioned as No. 81 Perry street in said order of reference, is \$1,505.75.

All of which, together with the testimony and proofs adduced before me, is respectfully submitted.

The opinion of the undersigned is annexed to this report.

Dated, New York, January 21, 1906.

THOMAS F. DONNELLY,
Referee.

9. Form of report not laying off parcel.

SUPREME COURT.

HANNAH EVERSON, PLAINTIFF,
agst.

ANDREW McMULLEN, DEFENDANT.

113 N. Y. 293.

To the Supreme Court of the State of New York:

I, Alvah S. Newcomb, the referee appointed by an order of this court made and entered on the 5th day of February, 1906, to admeasure the dower of Hannah Everson, widow of Morgan Everson, deceased, in the property of which said Morgan Everson died seized, situated in the county of Ulster and described as follows: (Insert description) do respectfully report:

I. Before entering upon my duties as such referee, I took and filed the oath prescribed by statute in such case made and provided to faithfully, honestly and impartially execute the trust reposed in me as such referee as aforesaid.

II. On the 18th day of March, 1906, I attended at the premises hereinbefore described, and Hannah Everson, by her attorney, G. D. B. Hasbrouck, Esq., and Andrew McMullen, by his attorney, Charles M. Preston, Esq., appeared before me at the time and place aforesaid and pointed out to me the boundaries of said property and the permanent improvements made thereupon after the death of said plaintiff's husband, and the sale of said property by the executor of her said husband.

III. And I further report that in my opinion it is not for the best interests of all the parties concerned, to admeasure and lay off to said Hannah Everson a distinct part of said property, and the following are the reasons for such opinion:

1. The property has a water front of 150 feet, now divided into three unequal parts. The westerly part is a slip for the use of vessels, in the rear of which stands a large open shed or shop. The next or middle part is an open pier or dock extending from the channel bank of the Rondout creek to the lane at the rear of this lot, and the easterly part is a ship railway for drawing vessels up and out of the water. All of which parts are used by and are indispensable to the said Andrew McMullen in his business as ship builder. All of which improvements, except such shed or shop, have been made by the said Andrew McMullen.

2. If an admeasurement should be made and one-third part of said property be set apart for said Hannah Everson, it could not be done without making the remaining part practically useless to the said Andrew McMullen for his business as ship builder.

3. If an admeasurement should be made and one-third part of said property be set apart for the said Hannah Everson, the rental value of the proportion set apart for her would not be equal to one-third of the rental value of the whole property; for her said one-third part would be too small for shipbuilding purposes or for any other purpose for which such water fronts can be used.

4. And I further report that under a stipulation of the respective attorneys for the parties herein, I attended at the office of Preston & Chipp, attorneys for defendant herein, on the 23d day of March, 1906, and took testimony of certain witnesses to ascertain the rental value of said property, which said stipulation and testimony signed by the witnesses is hereto annexed.

5. And I further report that after hearing the testimony of the witnesses as aforesaid to ascertain the rental value of said property and after hearing G. D. B. Hasbrouck, Esq., of counsel for said Hannah Everson, and Charles M. Preston, of counsel for said Andrew McMullen, and after due consideration of all the evidence before me in this matter, I find that the rental value of said property (independent of the improvements made thereupon since the sale of said property by the executor of plaintiff's husband) was the sum of \$300 for the year 1904, and that the rental value of said property since 1904 has been and still is the sum of \$300 a year.

6. The items of my charges are:

For attending at said property to see if admeasurement could be made	\$10
For services as referee to ascertain rental value of said property or one day taking testimony.....	10
One day preparing report.....	10
	<hr/>
	\$30
	<hr/>

In witness whereof I have hereunto set my hand this first day of April, A. D. 1906.

ALVAH S. NEWCOMB.

L. Final judgment.

1. Real Property Law, § 476. Final judgment.

Upon the report being confirmed by the court, final judgment must be rendered. If the referee or commissioners have admeasured and laid off to the plaintiff a distinct parcel of the property, the judgment must award to her, during her natural life, the possession of that parcel, describing it, subject to the payment of all taxes, assessments, and other charges, accruing thereupon after she takes possession. If the referee or the commissioners report, that it is not practicable, or that, in his or their opinion, it is not for the best interests of all the parties concerned, so to admeasure and lay off a distinct parcel of the property, the final judgment must direct, that a sum, fixed by the court, and specified therein, equal to one-third of the rental value of the real property, as ascertained by a reference or otherwise, be paid to the plaintiff, annually or oftener, as directed in the judgment, during her natural life, for her dower in the property; and that the sum so to be paid, be and remain a charge upon the property, during her natural life. The final judgment may also award damages for the withholding of dower.

2. Real Property Law, § 477. Plaintiff may recover sum awarded; court may modify judgment.

The plaintiff may, from time to time, maintain an action against the owner, or a person who was the owner of the property, to recover any instalment of the sum, so awarded to her for her dower, which became due during his ownership, and remains unpaid. Or, if an instalment remains due and unpaid, she may maintain an action to procure a sale of the property, and enforce the payment of the instalments, due and to become due, out of the proceeds of the sale. Such an action must be conducted, as if the charge upon the real property was a mortgage to the same effect. If, at any time, it is made to appear to the court, that the rental value of the real property has materially increased or diminished, the court may, by an order, to be made upon notice to all the persons interested, modify the final judgment, by increasing or diminishing the sum to be paid to the plaintiff.

3. Real Property Law, § 478. Junior incumbrancers; not affected by admeasurement.

Where a portion of the property is admeasured and laid off to plaintiff as her dower, a lien, which is inferior to the plaintiff's right of dower, attaches, during the life of the plaintiff, to the residue, or to the portion or share of the residue which was subject to it, as if the portion laid off to the plaintiff had not been a part of the property.

4. Real Property Law, § 469. Collusive recovery not to prejudice infant.

Where a widow, not having a right to dower, recovers dower against an infant, by the default or collusion of his guardian, the infant shall not be prejudiced thereby; but when he comes of full age, he may bring an action of ejectment against the widow, to recover the property so wrongfully awarded for dower, with damages from the time when she entered into possession, although that is more than six years before the commencement of the action.

5. Real Property Law, § 479. Appeal not to stay execution, if undertaking is given.

An appeal from a final judgment, awarding to the plaintiff possession of the part admeasured and laid off to her, does not stay the execution thereof, unless the court, or a judge thereof, grants an order directing such a stay. Such an order shall not be granted, if an undertaking is given on the part of the respondent, with one or more sureties, approved by the court, or a judge thereof, to the effect that, if the judgment appealed from is reversed or modified, and restitution is awarded, she will pay, to the person entitled thereto, the value of the use and occupation of the part so admeasured and laid off to her, or of the portion, restitution of which is awarded, during the time she holds possession thereof, by virtue of the judgment.

6. Modification and enforcement of judgment.

After final judgment in an action for dower where a distinct parcel has been set off to the widow, and she has been awarded possession thereof during her natural life, she has a remedy by writ of assistance, or by action of ejectment

to secure possession, if it is still denied her.⁴⁸ Or the judgment may be enforced by execution.⁴⁹ The judgment is a lien upon real property of decedent thereafter sold under a testamentary power of sale.⁵⁰

A receiver holding lands under a decree in an action for the admeasurement of dower, requiring him to pay the widow a certain sum annually, cannot refuse to pay upon the ground that the widow claims a fee to the entire property under a deed subsequently discovered. In such a case, in any event, the widow is entitled to the amount of dower, and the judgment therefor is binding until set aside.⁵¹ Where the widow does not take any proceedings in her lifetime to assert her claim, the right to have dower admeasured abates with her death and neither her personal representatives nor those of her assignee can thereafter enforce it in any form.⁵²

7. Form of final judgment.

(Caption.)

HANNAH EVERSON, PLAINTIFF, <i>agst.</i> ANDREW McMULLEN, DEFENDANT.	}	113 N. Y. 263.
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The above-entitled action having been heretofore duly brought to trial at a Trial Term Court, held in and for the county of Ulster at the court house in the city of Kingston, commencing November 16, 1904, and trial by jury having been waived in open court and trial having been had and the decision of the court made and filed and an interlocutory judgment having been appealed from and having been modified by order of the General Term of this court entered on the 2d day of February, 1905, in the office of the clerk of the county of Ulster, and the court having made an order pursuant to said interlocutory judgment, so modified as aforesaid, and entered in said clerk's office on the 7th day of February, 1905, appointing a referee to admeasure plaintiff's dower in the premises described in the complaint, and who, pursuant to stipulation, took testimony to ascertain the rental value of said premises, and the report of said

48. *Jimeson v. Pierce*, 78 App. Div. 9, 79 N. Y. Supp. 3.

49. Civil Practice Act, § 504.

50. *Conlon v. Kelly*, 199 N. Y. 43.

51. *Conlon v. Kelly*, 137 App. Div. 277, 121 N. Y. Supp. 1084.

Modification.—Where a decree was entered, adjudging plaintiff to be entitled to dower, and fixing the sum of which she was entitled as one-third of the yearly income of the property and

made for an order that the dowress receive one-third of the net rents, it was held that, as the court had, as required by section 476, fixed a sum equal to one-third of the rental value of the property, and specified the same as the dower, the court had no power to alter such final judgment. *McIntyre v. Clark*, 43 Hun, 352.

52. *Howell v. Newman*, 59 Hun, 538, 13 N. Y. Supp. 648, 37 St. Rep. 296.

referee having been duly filed in the office of the clerk of the county of Ulster on the 5th day of April, 1905, and Messrs. Preston & Chipp, of counsel for defendant, being now here in open court and waiving notice of confirmation of said report and application for this judgment, it is adjudged and decreed that the said report of Alvah S. Newcomb be and the same is hereby in all respects confirmed save section 5 thereof in which the referee finds the rental value of said property;

And now after hearing G. D. B. Hasbrouck, Esq., plaintiff's attorney, in favor of this final judgment, and Mr. Chipp, of counsel for the defendant, opposed, and after reading the papers aforesaid now on file, it is adjudged and decreed that the plaintiff is entitled to dower in the premises described in the complaint as follows:

(Insert description.)

And after reading and filing the evidence taken by said referee and his oath and the stipulation of counsel to said evidence, annexed, in relation to the rental value of said premises described in the complaint, and after hearing G. D. B. Hasbrouck, plaintiff's attorney, and Preston & Chipp, Esqs., of counsel for defendant, concerning the same, I hereby fix and determine the rental value of said premises for the year 1904 and since and now, at and to be the sum of \$225 per year independent of taxes or other charges, they having been taken into consideration in fixing the same;

And it is hereby adjudged and decreed that the defendant pay the plaintiff the sum of \$75 per year on the first day of January of each year during her life, as and for her dower in the premises, or her attorney for her;

And on reading the pleadings herein and the evidence taken by the referee as aforesaid, and proof of the taxes and other charges against the said property being now here adduced before me, and the plaintiff and defendant, by their respective attorneys, being now here in open court, I hereby fix and determine one-third of the annual value of the mesne profits to be \$75 per year;

And it is hereby adjudged and decreed that the plaintiff Hannah Everson do recover of the defendant Andrew McMullen the sum of \$135.75 damages for the withholding plaintiff's dower from the 11th day of June, 1904, to date hereof;

And it is hereby adjudged and decreed that plaintiff recover \$137, her costs awarded her by said General Term order, to be taxed by the clerk, and the disbursements of this action, and the costs as of course and not awarded by the discretion of the court in the sum of \$147.33 to be hereafter taxed by the clerk.

A. B. PARKER,
J. S. C.

M. Acceptance of gross sum.

1. Real Property Law, § 480. Plaintiff may consent to receive a gross sum.

In an action for dower, the plaintiff may, at any time before an interlocutory judgment is rendered, by reason of the defendant's default in appearing or pleading, or, where an issue of fact is joined, at any time before the commencement of the trial, file with the clerk, a consent to accept a gross sum, in full satisfaction and discharge of her right of dower in the real property described

in the complaint. Such a consent must be in writing, and acknowledged or proved, and certified, in like manner as a deed to be recorded. A copy thereof, with notice of the filing, must be served upon each adverse party who has appeared, or who appears after the filing.

2. Real Property Law, § 481. Defendant may consent to pay it; proceedings thereupon.

At any time after a consent is filed, as prescribed in the last section, and before an interlocutory judgment is rendered, any defendant may apply to the court, upon notice, for an order granting him leave to pay such a gross sum. Thereupon the court may, in its discretion, and upon such terms as justice requires, ascertain the value of the plaintiff's right of dower in the property, by a reference or otherwise, and make an order, directing payment, by the applicant, of the sum so ascertained, within a time fixed by the order, not exceeding sixty days after service of a copy thereof; and directing the execution by the plaintiff of a release of her right of dower, upon receipt of the money. Obedience to the order may be enforced, either by punishment for contempt, or by striking out the pleading of the offending party, and rendering judgment against him or her or in both modes.

3. Real Property Law, § 482. Interlocutory judgment for sale.

Where the plaintiff's consent has been filed, as prescribed in the last section but one, and she is entitled to an interlocutory judgment in the action, the court must, upon the application of either party, ascertain, by reference or otherwise, whether a distinct parcel of the property can be admeasured and laid off to the plaintiff, as tenant in dower, without material injury to the interests of the parties. If it appears to the court, that a distinct parcel cannot be so admeasured and laid off, the interlocutory judgment must, except in the case specified in the next section, direct that the property be sold by the sheriff, or by a referee designated therein; and that, upon the confirmation of the sale, each party to the action, and every person deriving title from, through, or under a party, after the filing of the judgment-roll, or of a notice of the pendency of the action, as prescribed by law, be barred of and from any right, title, or interest in or to the property sold.

4. Real Property Law, § 483. Direction that a part be laid off.

In a case specified in section four hundred and eighty of this chapter, where the property, or a part thereof, consists of one or more vacant or unimproved lots, the plaintiff's consent may contain a stipulation to take a distinct parcel, out of those lots, in lieu of a gross sum. In that case, the interlocutory judgment, instead of directing a sale, may direct if it appears to be just so to do, that commissioners be appointed to admeasure and lay off to the plaintiff a distinct parcel, out of the vacant or unimproved lots; and, if there is any other property, that it be sold, and a gross sum be paid to her out of the proceeds thereof, as prescribed in the next four sections. The plaintiff's title to each distinct parcel, admeasured and laid off to her, as prescribed in this section, is that of an estate of inheritance in fee simple. In admeasuring and laying off the same, the commissioners must consider quantity and quality relatively, according to the value of the plaintiff's right of dower in the vacant or unimproved lots, out of which the admeasurement is to be made; which must be ascertained, in proportion to the value of those lots, as prescribed, in the next four sections, for fixing a gross sum to be paid to her out of the proceeds of a sale.

5. Real Property Law, § 484. Lien to be ascertained.

Before an interlocutory judgment is rendered for the sale of the property, the court must direct a reference to ascertain whether any person, not a party, has a lien upon the property, or any part thereof. But the court may direct or dispense with such reference, in its discretion, where a party produces a search, certified by the clerk, or by the clerk and register as the case requires, of the county where the property is situated; and it appears therefrom, and by the affidavits, if any, produced therewith, that there is no such outstanding lien. Except as otherwise expressly prescribed in this article, the proceedings upon and subsequent to the reference must be the same, as prescribed by law, where a reference is made in an action for partition to ascertain whether there is a creditor not a party who has a lien on the share or interest of a party.

6. Real Property Law, § 485. Satisfaction or protection of lien.

Where the interlocutory judgment directs a sale, if the right of dower of the plaintiff is inferior to any other lien upon the property, the judgment may, in the discretion of the court, direct that the property be sold either subject to the lien, or discharged from the lien; and, in the latter case, that the officer making the sale pay the amount of the lien, out of the proceeds of the sale.

7. Real Property Law, § 486. Payment of taxes, assessments and water rates out of proceeds.

Where a judgment, rendered in an action for dower directs a sale of the real property, the officer making the sale must, out of the proceeds, unless the judgment otherwise directs, pay all taxes, assessments, and water rates, which are liens upon the property sold, and redeem the property sold from any sales for unpaid taxes, assessments, or water rates, which have not apparently become absolute. The sums necessary to make those payments and redemptions are deemed expenses of the sale.

8. Real Property Law, § 487. Report of sale.

Immediately after completing the sale, and executing the proper conveyance to the purchaser, the officer making the sale must make and file with the clerk a report thereof, showing the name of the purchaser, and the purchase-price paid by him, or, if the property was sold in parcels, the name of each purchaser, and the price and a description of the parcel sold to him; the sums which the officer has paid out of the proceeds of the sale, pursuant to the interlocutory judgment; the purpose for which each payment was made; the amount and items of his fees and expenses; and the net amount of the proceeds, after deducting the payments.

9. Real Property Law, § 488. Final judgment upon confirming sale.

Upon confirming the sale, the court must ascertain, by a reference or otherwise, the rights and interests of each of the parties in and to the proceeds of the sale, and also what gross sum of money is equal to the value of the plaintiff's dower in the net proceeds of the sale, calculated upon the principles applicable to life annuities. The court must thereupon render final judgment, confirming the sale, and directing that the gross sum so ascertained be paid to the plaintiff, in full satisfaction of her right of dower; and that the remainder of the proceeds of the sale be distributed among the persons entitled thereto.

10. Real Property Law, § 490. Certain provisions made applicable.

The provisions of law, relating to a sale in partition, and to the distribution, investment, and care of the proceeds, apply, as far as they are applicable, to a sale made as prescribed in this article, and to the distribution of the proceeds of a sale, as prescribed in section four hundred and eighty-eight.

11. Judgment.

In case a sale of the property is sought, both an interlocutory and a final judgment must be entered under sections 482 and 488 of the Real Property Law.⁵³ In an action by a widow to recover dower in land of which her husband died seized, as tenant in common with another, the court can only direct a sale of the undivided interest of the husband in which dower is claimed. Where the complaint in such an action does not indicate any intent on the part of the plaintiff to seek a judgment affecting the interest of the husband of the co-tenant, the fact that the latter did not appear or answer in the action affords no ground for denying his motion to modify an interlocutory judgment entered in the action by striking therefrom the part thereof which provides for a sale of the co-tenant's interest and charges the same with one-half of the costs of the action.⁵⁴

The filing on behalf of the widow of the consent to accept gross sum in lieu of dower, before the entry of judgment confirming the sale, cures any irregularity in not filing it before the sale is ordered, where the parties have not been prejudiced by the resale.⁵⁵ The statute authorizing the sale of land in an action to admeasure dower does not affect inchoate right of dower in the wife of the heir, if she is not a party to the action for the admeasurement of the dower of the widow of the ancestor.⁵⁶

A widow may dispose of her dower right before it is admeasured, and where land is subject to a dower right of the widow, the purchaser may elect to take title subject to the dower right, in which case he is entitled to an abatement from the contract price equal to the gross cash value of the

^{53.} *Howkins v. Howkins*, 3 Bradb. 370.

The fact that a wife refused a gross sum in lieu of her inchoate dower right is no reason why her application, after her dower has become consummate, should be denied. *Gucker v. Kopp*, 169 App. Div. 922, 152 N. Y. Supp. 370.

^{54.} *Card v. Pudney*, 42 App. Div. 405,

59 N. Y. Supp. 278.

^{55.} *Freeman v. Ahearn*, 64 App. Div. 509, 72 N. Y. Supp. 326.

^{56.} *Jourdan v. Haran*, 56 Super. Ct. 185, 18 St. Rep. 858, 3 N. Y. Supp. 541.

Inchoate dower.—A gross sum cannot be awarded from surplus moneys for an inchoate right of dower. *Citizens' Savings Bank v. Mooney*, 26 Misc. 67, 56 N. Y. Supp. 548.

dower right, and where the widow was a party to the sale without any reservation of her dower right, she was held to have consented to look to the purchase money as a substitute for the land and her dower right therein.⁵⁷

12. Computation of gross sum.

In an action of partition, a widow may elect to take a gross sum in lieu of dower, which should be computed according to the tables of mortality from the date of her husband's death.⁵⁸ A widow who elects to take a gross sum from the surplus, in lieu of dower, is entitled to the same clear of all costs or commissions.⁵⁹ It should be computed upon the net proceeds of the sale, after deducting the costs allowed in the action, if it appears that the attorneys consented to an allowance of full statutory costs, so that there is no presumption that the court intended to charge the same against any particular interest.⁶⁰

The computation must be made under Rule 243 of the Rules of Civil Practice, according to the American Experience Table of Mortality.

13. Effect of death of dowress.

Until it has been determined whether a parcel shall be set off to a widow or a sale had, her right beyond *mesne* profits remains a mere naked and inchoate life estate and terminates on her death, notwithstanding prior service of notice by her to accept a gross sum in lieu of dower.⁶¹

57. *Bostwick v. Beach*, 103 N. Y. 414.

58. *Ryder v. Kennedy*, 166 App. Div. 146, 151 N. Y. Supp. 1036.

Referee.—When a party elects to accept a gross sum in lieu of dower or an annual income for life, upon a fund in court, it is customary, on petition of the party entitled to the same, to appoint a referee to compute the amount due, but this is for the convenience of and discretionary with the court, and when the court refuses to appoint a referee, it is presumed it deemed it a proper case to take the proofs itself and that the matter is still before the court for that purpose. *Livingston v. Livingston*, 8 Wkly. Dig. 328.

59. *Campbell v. Irving*, 43 How. Pr. 258.

60. *Woodbury v. Woodbury*, 144 App. Div. 680, 129 N. Y. Supp. 686; *aff'd*, 205 N. Y. 551.

61. *McKeen v. Fish*, 33 Hun, 28; *aff'd*, 98 N. Y. 645.

Right not defeated.—In *Robinson v. Govers* (30 Abb. N. C. 241, 138 N. Y. 425) it was held that while the widow's estate of dower in the lands of her husband terminated at her death and that in an incomplete proceeding for admeasurement there will be nothing for the court to act upon after the death of the dowress, that proceedings had reached such a stage before the plaintiff's death as to vest in her a right to the money representing the value of her estate in the land and that this right passed to her executor, and it was further held that the plaintiff's right to demand and receive the sum fixed was established when the court made its decision, and this right was not defeated by the fact that the formal order was not entered until after her death, that in equity this

14. Form of consent to accept gross sum in lieu of dower.

SUPREME COURT — COUNTY OF NEW YORK.

MARY ANN ROBINSON <i>agst.</i> ROBERT GOVERS, INDIVIDUALLY AND AS EXECUTOR OF ANTHONY ROBINSON, DECEASED, AND OTHERS.	} 138 N. Y. 425.
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The undersigned, Mary Ann Robinson, the plaintiff in the above-entitled action, hereby consents to accept a gross sum in full satisfaction of her right of dower in the real property described in the amended complaint herein as parcel "A," the amount to be ascertained pursuant to law.

Dated, New York, 16th day of April, 1906.

MARY ANN ROBINSON.

N. Costs.

The plaintiff, if successful, is entitled to costs of course under subdivision 1 of section 1470 of the Civil Practice Act, as it is an action to recover an interest in real property, and is triable by a jury.⁶² Where the widow accepts a gross sum, and a sale is ordered, costs and allowances may be made to both plaintiff and defendant.⁶³

O. Real Property Law, § 489. Damages against grantee of premises subject to dower.

If the defendant, in an action for dower, alienates the real property in question, after the filing of a notice of pendency of action and an execution against him for the plaintiff's damages is returned wholly or partly unsatisfied, an action may be maintained by the plaintiff against any person, who has been in possession of the property, under the defendant's conveyance, to recover the unsatisfied portion of the damages, for a time not exceeding that, during which he possessed the property.

P. Real Property Law, § 491. Action for ejectment by reversioner or remainderman, after determination of particular estate.

Where a tenant for life, or for a term of years, suffers a judgment to be taken against him, by consent or by default, in an action for dower, the heir or person owning the reversion or remainder, may, after the determination of the particular estate, maintain an action of ejectment to recover the property.

might be regarded as done at the time rev'd, 113 N. Y. 293.

the decision was made.

63. Schierloh v. Schierloh, 14 Hun,

62. Jones v. Emery, 1 Civ. Pro. 338; 572.

Everson v. McMullen, 45 Hun, 578;

DRUNKARD, HABITUAL, APPOINTMENT OF COMMITTEE OF.

EJECTMENT.*

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* For a further discussion of the matters referred to in this chapter, see Weed's Practical Real Estate Law; Aron's Gist of Real Property Law.

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- A. Civil Practice Act, § 990. Damages for withholding real property.
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- C. Form of judgment.
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- A. Civil Practice Act, § 1011-a. Limitation of actions under this article in certain cities.
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ARTICLE I.

INTRODUCTORY.

A. History of action.

The action of ejectment is an ancient form of action for the recovery of possession of real property. Upon the enactment of the Code of Civil Procedure statutory provisions relating to it were placed therein and constituted sections 1496–1531. The action was then styled “an action to recover real property.” The common law name of the action, however, has always remained in general use as being both convenient and distinctive. The Civil Practice Act made few changes in the Code provisions, and retained the same name for the action. The statutory provisions relating to the action are now contained in article 63 of the Civil Practice Act, constituting sections 990–1011a thereof. The statute to some extent regulates the procedure in the action, but it does not create the action, and for the principles which govern it, resort must be had to the common law.¹

B. Nature of action.

The words “action of ejectment” refer to an action to recover the immediate possession of real property.² At first

1. *Butler v. Frontier Telephone Co.*, 186 N. Y. 486. 2. Civil Practice Act, § 7, subd. 8.

the action determined only the right of possession to the property in question, but now it litigates the title on which such right of possession is founded.³ The sections of the Civil Practice Act relating to the recovery of real property and those of the Real Property Law relating to the determination of a claim to real property provide exclusive remedies for any issues coming within the scope of their provisions, and an action in equity will not lie to accomplish the purposes for which those sections were provided unless special facts are alleged showing that the remedy at law is not adequate and bringing the case under equitable cognizance.⁴ An action of ejectment is the appropriate action to determine the validity of a conveyance,⁵ or a will devising real estate,⁶ or to try the title by adverse possession to real estate,⁷ The deed of an incompetent person may be avoided in an action of ejectment; it is not necessary to resort to equity.⁸ A plaintiff is not obliged to appeal to a court of equity for relief against a grant obtained from him by fraud, but when the deed is set up to defeat his claim in ejectment, he may avoid its effect by proof of the fraud by which it was obtained.⁹ But ejectment cannot be used to remove a cloud on title.¹⁰

A devisee who claims a mere legal estate in real property of the testator, where there is no trust, must assert his title by ejectment rather than by an action, to establish the validity of the devise.¹¹ Title to office of trustee of a religious corporation cannot be decided in an action of ejectment.¹²

3. *Cagger v. Lansing*, 64 N. Y. 417.

4. *Pure Strains Farm Co. v. Smith*, 99 Misc. 108, 163 N. Y. Supp. 615.

5. *Bockes v. Lansing*, 13 Hun, 38; *aff'd*, 74 N. Y. 437.

6. *Post v. Hover*, 33 N. Y. 593.

7. *Van Schuyver v. Mulford*, 59 N. Y. 426; *Florence v. Hopkins*, 46 N. Y. 182; *Cagger v. Lansing*, 64 N. Y. 417.

8. *Smith v. Ryan*, 191 N. Y. 452, 459.

9. *Wilcox v. American Telephone & Tel. Co.*, 176 N. Y. 115.

Unprobated will.—A deed regular on its face and properly executed and delivered by a grantor, who had not been adjudged incompetent, will be presumed valid in ejectment until set

aside for the grantor's incompetency by a decree in equity. But where the defendant's pleadings rest upon an unprobated will, plaintiff is entitled to show that at the time of the execution the testator lacked testamentary capacity. An unprobated will is valid to pass real estate when its execution has been proved. Probate is not necessary to pass real estate. *Smith v. Ryan*, 116 App. Div. 397, 101 N. Y. Supp. 1011; *rev'd*, 191 N. Y. 452.

10. *Pixley v. Rockwell*, 1 Sheld. 267.

11. *Anderson v. Appleton*, 48 Hun, 534, 1 N. Y. Supp. 319; *aff'd*, 112 N. Y. 104.

12. *Concord Society v. Stanton*, 38 Hun, 1.

ARTICLE II.

PROPERTY RIGHTS SUBJECT TO ACTION.

A. In general.

The action of ejectment is maintainable only for corporeal hereditaments, something tangible and visible, and upon which an entry can be made and of which the owner can be disseized.^{12a} The true test of the action seems to be that the thing claimed should be a corporeal hereditament; that a right of entry should exist at the time of the commencement of the action, and the interest be visible and tangible, so that the sheriff may deliver the possession to the plaintiff in execution of the judgment of the court.^{12b} Ejectment lies for a house or room,^{12c} or for a church or chapel.^{12d} Though a lease for seven years is a chattel interest, ejectment lies to recover possession of the land demised.^{12e}

Ejectment lies to compel the removal of a telephone wire strung above plaintiff's land without authority, even though the actual soil was not interfered with, and plaintiff is entitled to the peculiar rights given to parties in such action. The owner of real property owns the space above the surface, and has the same right to its free and uninterrupted enjoyment as to the space below.^{12f} But ejectment will not lie for incorporeal hereditaments or a mere easement, as a right to flow land.^{12g} It will not lie for things existing merely in grant, not capable of being delivered in execution.^{12h}

The owner of land upon which a contractor is erecting a building has a right to enter the building for the purpose of inspecting the work as it progresses, and upon his exclusion he is not obliged to have recourse to a rescission of the contract but may maintain ejectment against the contractor.¹²ⁱ

Where the defendants claimed under a deed from the grantee of the sheriff by virtue of a sale under a judgment

12a. *Child v. Chappell*, 9 N. Y. 246; *Jackson v. Loucks*, 9 Johns. 298; *Woodhull v. Rosenthal*, 61 N. Y. 382; *Jackson v. May*, 16 Johns. 184.

12b. *Rowan v. Kelsey*, 18 Barb. 484; *Butler v. Frontier Co.*, 186 N. Y. 486.

12c. *Child v. Chappell*, 9 N. Y. 246.

12d. *Van Deusen v. Presbyterian Congregation of Fort Edward*, 3 Keyes, 550.

12e. *Olendorf v. Cook*, 1 Lans. 37.

12f. *Butler v. Frontier Telephone Co.*, 109 App. Div. 217. 95 N. Y. Supp.

684; *aff'd*, 186 N. Y. 486. See, also, *McPhillips v. New York Telep. Co.*, 195 App. Div. 643, 187 N. Y. Supp. 183.

As to a projecting gutter or cornice, see *Aiken v. Benedict*, 39 Barb. 400; *Vrooman v. Jackson*, 6 Hun, 326; *Brady v. Hennion*, 8 Bosw. 528.

12g. *Wilklow v. Lane*, 37 Barb. 244.

12h. *Northern Turnpike Co. v. Smith*, 15 Barb. 355.

12i. *Smith v. Revels*, 79 Hun, 213, 61 St. Rep. 138, 29 N. Y. Supp. 658.

against the plaintiff's grantor, the judgment having been decided by the Court of Appeals to be void by reason of insufficient service by publication of the summons in the action in which it was granted, it was held that plaintiff could recover in ejectment.^{12j}

B. Lands under or adjoining water.

Lands under water may be recovered by ejectment.¹³ Thus, the remedy is available for lands covered by a mill dam.¹⁴ But ejectment will not lie to determine the right to the use of piers or wharves.¹⁵

Where a defendant, without the consent of the State and against the protest of the owner of lands abutting upon the shore of Lake George, erects a permanent dock in the water fronting such lands, the owner of the lands may maintain ejectment to recover possession of the dock.¹⁶

One who has dedicated to the public a street which leads to public waters owned by the State, or who owns uplands on such waters, cannot maintain ejectment against another who builds a boathouse and dock in the line of the street or in front of such lands but on public lands beyond the low-water mark, because the plaintiff has no title to the soil from which he seeks to eject the defendant, and ejectment does not lie to prevent interference with the plaintiff's incorporeal hereditaments as a riparian owner of uplands abutting upon public waters.¹⁷

C. Lands used for street.

The owner of the fee of a highway over which the public have an easement for travel may recover the land within the limits of the highway, in ejectment against one who has

12j. *McCracken v. Flanagan*, 51 St. Rep. 545, 21 N. Y. Supp. 1108.

13. *Champlain & St. Lawrence R. R. Co. v. Valentine*, 19 Barb. 484; *Blakeslee Co. v. Blakeslee's Sons*, 59 Hun, 209, 13 N. Y. Supp. 493, 37 St. Rep. 707; *aff'd*, 129 N. Y. 155; *People v. Mauran*, 5 Den. 389.

14. *Beals v. Stewart*, 6 Lans. 408.

15. *Child v. Chappell*, 9 N. Y. 246; *Mayor v. Mabie*, 13 N. Y. 151; *Mayor v. N. S. S. Island Ferry Co.*, 55 How. (N. Y.) 154.

Pier erected without authority.—Where individuals without authority erected a pier in New York city, *held*

that they acquired no right by adverse possession, prescription, or estoppel and that an action of ejectment could be maintained by the city. *Mayor, etc. v. Law*, 125 N. Y. 380, 35 St. Rep. 437.

16. *Chism v. Lamb*, 63 Misc. 209, 118 N. Y. Supp. 458.

17. *Chism v. Smith*, 138 App. Div. 715, 123 N. Y. Supp. 691.

Navigable waters.—As to the right of the owner of land, bordering on tide water or navigable water, to maintain ejectment, see *Sisson v. Cummings*, 35 Hun, 22; *rev'd*, 106 N. Y. 56.

illegally appropriated it to a purpose not authorized by the easement.¹⁸ Thus, the action will lie against a railroad company by the owner of the fee where the street has been appropriated without making compensation therefor.¹⁹ And, if telegraph or telephone poles and wires are illegally erected by a defendant, the owner may maintain ejectment to oust the defendant from the use of the highway.²⁰

The owner of a fee may maintain ejectment against a person having a private right of way over it, where such person claims entire possession.²¹ The owner of land subject to a private easement is entitled to maintain ejectment to recover possession of that land subject to the easement as against the person entitled to the easement, and who is in possession of the whole property under claim of title. Such a judgment protects the rights of the parties.²² Where a grantor conveys, excepting a portion included in a highway, he may maintain ejectment against the parties for encroaching upon it or exclusively occupying it.²³

Where tenants in common of two lots interchanged deeds, one conveying to the other the fee of a strip of land, reserving to himself the privilege of erecting a building over but not upon it, the deed declaring that the alley so conveyed should be kept open for the use and benefit of the grantee,

18. *Etz v. Dailey*, 20 Barb. 32; *Carpenter v. Oswego & S. R. R. Co.*, 24 N. Y. 655; *Wager v. Troy Union R. R. Co.*, 25 N. Y. 526; *Reformed Church v. Schoolcraft*, 65 N. Y. 135; *Brown v. Galley, Hill & D.* Supp. 308; *Westlake v. Kock*, 8 N. Y. Supp. 665, 29 St. Rep. 283.

19. *Lozier v. N. Y. C. R. R. Co.*, 42 Barb. 465; *Wager v. Troy Union R. R. Co.*, 25 N. Y. 526; *Carpenter v. Oswego, etc.*, R. R. Co., 24 N. Y. 655; *Stevens v. Skaneateles R. R. Co.*, 42 Misc. 145, 85 N. Y. Supp. 1005.

Where a railroad company has constructed its track across the corner of a lot of land over which it ordinarily runs its trains, its acts amount to such an appropriation of the possession of the lands so taken as to authorize ejectment; in such case no demand of possession or notice to quit is necessary, and plaintiff may recover, subject to the easement of the public, that part of an adjoining street to which

he has title, which is also occupied by such railroad tracks. *Gas-light Co. of Syracuse v. Rome, etc.*, R. R. Co., 11 Civ. Pro. 239; modified, 51 Hun, 119, 5 N. Y. Supp. 459.

20. *Eels v. American Telephone and Telegraph Co.*, 143 N. Y. 133; *Myers v. Bell Telephone Co.*, 83 App. Div. 623, 82 N. Y. Supp. 83; *Little v. American Telephone & Telegraph Co.*, 96 App. Div. 559, 89 N. Y. Supp. 136.

21. *Strong v. City of Brooklyn*, 68 N. Y. 1.

22. *Wilson v. Wightman*, 36 App. Div. 41, 55 N. Y. Supp. 806; followed, *N. Y. C. & H. R. R. Co. v. Needham*, 29 Misc. 435, 61 N. Y. Supp. 992.

Easement.—In *Howe v. Bell* (143 N. Y. 190, 62 St. Rep. 361) plaintiff was held entitled to maintain ejectment upon the question as to whether a certain instrument imposed an easement on his lot.

23. *Etz v. Daily*, 20 Barb. 32.

his heirs, and assigns, it was held that a subsequent grantee could maintain ejectment for possession of the alleyway.²⁴

D. Land covered by party wall.

It is said to be doubtful whether the action will lie to recover land covered by a party wall; in any event the only interest to be recovered would be the fee subject to the easement.²⁵

E. Lands under condemnation.

An action of ejectment does not lie where the realty of the plaintiffs is directly affected by two proceedings in eminent domain under which a municipality has condemned the perpetual underground easement and the fee simple absolute free from all liens and incumbrances, as such an action would constitute a collateral attack upon a judgment.²⁶ Where the defendant has acquired title to the property in question by eminent domain pending the action, ejectment cannot be maintained, and a judgment that the plaintiff recover possession of the land after the defendant's corporate existence terminates is erroneous.²⁷ A recovery in ejectment for land taken by a municipal corporation for a street cannot be had, where the evidence shows the proceedings were regular and the possession an exercise of dominion by the defendant lawfully.²⁸

ARTICLE III.

WHO MAY MAINTAIN ACTION.

A. In general.

As a general rule, any person owning an estate in lands in fee, for life, or for years, having a present right of entry, or any person vested with a right to the immediate possession incident to some corporeal estate or interest in lands, may maintain an action in the nature of ejectment. A tenant by the curtesy may maintain the action.²⁹ Likewise, it has been held that the action may be maintained by the

24. *Remsen v. Hyams*, 35 Misc. 345, 71 N. Y. Supp. 1002; *aff'd* without opinion, 76 App. Div. 611, 78 N. Y. Supp. 1134.

25. *Rogers v. Sinsheimer*, 50 N. Y. 646; *Vrooman v. Jackson*, 6 Hun, 326; *Kurkel v. Haley*, 47 How. Pr. 75; *Brondage v. Warner*, 2 Hill, 145.

26. *Diack v. City of New York*, 187

App. Div. 312, 175 N. Y. Supp. 364.

27. *Judge v. N. Y. C., etc., R. R. Co.*, 56 Hun, 60, 28 St. Rep. 475, 9 N. Y. Supp. 158.

28. *Binghamton Opera House Co. v. City of Binghamton*, 88 Hun, 620, 34 N. Y. Supp. 421, 68 St. Rep. 252; *aff'd*, 156 N. Y. 651.

29. *Jackson v. Leek*, 19 Wend. 339.

owner of a conditional fee,³⁰ loan commissioners,³¹ a purchaser at foreclosure sale,³² or on an execution sale,³³ or by a purchaser of real estate against the vendor.³⁴ The owner of land appropriated to public use may maintain ejectment against a permanent incumbrancer.³⁵

The wife may sue the husband in ejectment to recover the possession of her property wrongfully detained by him.³⁶ In an action to recover property, the alleged separate estate of the wife, she must sue alone without her husband.³⁷

B. Mortgagee or mortgagor.

1. Civil Practice Act, § 991. Mortgagee cannot maintain action.

A mortgagee, or his assignee or other representative, cannot maintain such an action to recover the mortgaged premises.

2. Discussion of section.

Prior to the Revised Statutes the remedy by ejectment was used by a mortgagee to recover possession of the mortgaged premises after a default by the mortgagor.³⁸ The legal title was then deemed to be vested in the mortgagee, the mortgagor having merely an equity of redemption. But under section 991 of the Civil Practice Act and similar sections heretofore contained in the Code of Civil Procedure and the Revised Statutes, a mortgagee must be regarded as a mere lienor, having no legal estate in the land covered by his mortgage.³⁹ He cannot maintain ejectment to recover possession of the mortgaged premises.⁴⁰ Nor can he obtain possession of the mortgaged premises, prior to foreclosure, so as to constitute himself a mortgagee in possession, except by the consent of the mortgagor, and he has no more right to enter and take possession of the premises, without the consent of the latter, than a stranger would have.⁴¹

30. *Olmstead v. Harvey*, 1 Barb. 102.

31. *Candee v. Hayward*, 37 N. Y. 653.

32. *Clute v. Voris*, 31 Barb. 511.

33. *Reynolds v. Darling*, 42 Barb. 418; *Jackson v. Davis*, 18 How. Pr. 7.

34. *Preston v. Hawley*, 101 N. Y. 586.

35. *Lozier v. N. Y. C. R. R. Co.*, 42 Barb. 465.

36. *Wood v. Wood*, 83 N. Y. 575.

37. *Hillman v. Hillman*, 14 How. Pr. 456; *Danby v. Callaghan*, 16 N. Y. 71.

38. *Packer v. R. & S. R. R. Co.*, 17 N. Y. 283; *Trimm v. Marsh*, 54 N. Y. 599; *Madison Avenue Baptist Church*

N. Y. 82; *Denning v. Fisher*, 20 Hun, 178; *aff'd*, 85 N. Y. 30.

39. *Barson v. Mulligan*, 191 N. Y. 306.

40. **Defective foreclosure.**—A mortgagee who has not obtained a complete title in foreclosure by reason of omission to make a necessary party a defendant cannot maintain ejectment. *Titcomb v. Fonda*, *Johnstown & Gloversville R. R. Co.*, 38 Misc. 630, 78 N. Y. Supp. 226.

The devisee of an interest in a mortgage cannot maintain ejectment. *Beal v. Miller*, 1 Hun, 390.

41. *Barson v. Mulligan*, 191 N. Y.

The rule preventing a mortgagee from maintaining ejectment applies to a deed absolute on its face, but held as security.⁴² Where a deed, absolute in form, is in fact a mortgage, the conveyance remains a mortgage until the equity of redemption is foreclosed, and the mortgagee cannot have ejectment against the mortgagor, or those claiming under him, until after foreclosure.⁴³

The provision of the statute embraces every description of mortgage which, prior to the Revised Statutes, could have been made, and it is not confined to instruments accompanied by a bond or other security for the payment of money and which contain a power of sale.⁴⁴ But if the mortgagee lawfully acquires possession of the premises with the consent of the mortgagor, he can maintain ejectment against one ousting him from possession.⁴⁵ The mortgagor cannot maintain ejectment against the mortgagee in possession, but the remedy of the mortgagor is an action in equity to redeem from the mortgage. A mortgagor cannot maintain ejectment against a mortgagee in possession, who has received rents and profits sufficient to satisfy the mortgage, until an accounting has been had and the rents and profits actually applied on the mortgage.⁴⁶ A mortgagee who gets in possession by foreclosure which is void as to the owner does not become a mortgagee in possession, and ejectment will lie against him.⁴⁷

A mortgagee, who is in possession under a lease, has no right to possession as mortgagee, after the expiration of his term as lessee, and it is his duty to surrender possession upon demand, and is subject to removal if he refuses so to do; but he may show what transpired after the expiration of the lease upon the question of his right to retain the occupation of the premises.⁴⁸ On the other hand, a mortgagor in default may have ejectment against an intruder or one claim-

42. *Murray v. Walker*, 31 N. Y. 399; *Shattuck v. Bascom*, 105 N. Y. 39; *Sahler v. Signor*, 37 Barb. 329; *Berdell v. Berdell*, 33 Hun, 535; *Carr v. Carr*, 4 Lans. 314; *aff'd*, 52 N. Y. 251.

43. *Faulkner v. Cody*, 45 Misc. 64, 91 N. Y. Supp. 633.

44. *Stewart v. Hutchins*, 13 Wend. 485; *aff'd*, 6 Hill, 143.

One who purchases under foreclosure sale by advertisement for the benefit of a third person, under an agreement

by which he is to hold the title as security for his advance, takes only the rights of a mortgagee and cannot maintain ejectment. *Van Vleck v. Enos*, 88 Hun, 348, 34 N. Y. Supp. 754, 68 St. Rep. 572.

45. *Haley v. Steves*, 7 St. Rep. 698.

46. *Hubbell v. Moulson*, 53 N. Y. 225.

47. *Howell v. Leavitt*, 95 N. Y. 617.

48. *Barson v. Mulligan*, 198 N. Y. 28.

ing under a void deed, as he has the right of possession against every one except the mortgagee in possession.⁴⁹

C. Dowress or owner of narrow strip.

1. Civil Practice Act, § 992. Action cannot be maintained in certain cases.

Such an action cannot be maintained in either of the following cases:

1. Where an action for dower may be maintained.
2. Where in any city the real property consists of a strip of land not exceeding six inches in width upon which there stands the exterior wall of a building erected partly upon said strip and partly upon the adjoining lot, and a building has been erected upon land of the plaintiff abutting on the said wall, unless said action be commenced within one year after the completion of the erection of such wall or within one year after the first day of September, eighteen hundred and ninety-eight. But an action may be maintained, if commenced within the further period of one year, for the recovery of damages by reason of the erection of such wall, and upon the satisfaction of the judgment for such damages the title of the plaintiff to such strip of land shall thereby be transferred to and vest in the defendant. If neither an action of ejectment nor an action for the recovery of damages be brought within the period hereby limited therefor, the person in possession of such lands shall be deemed to have an easement in said strip of land so long as the said wall partly erected thereon shall stand, and no longer, and in case of the destruction of such wall the owner of such strip shall have the same right to take or recover the possession thereof as if such wall had never existed.

2. Ejectment for dower.

Before the enactment of the Code of Civil Procedure, an action in the form of ejectment could be maintained by a widow to recover dower.⁵⁰ Under the present practice, dower is to be admeasured in a special action provided for that purpose. The present statute is contained in the Real Property Law.⁵¹

3. Strip less than six inches wide.

The second subdivision of section 992 was added to the Civil Practice Act by chapter 199 of the Laws of 1921. From 1898 to 1920 it formed a part of section 1499 of the Code of Civil Procedure, but was omitted from the Civil Practice on the original enactment thereof. Its constitutionality has been sustained.⁵² In a case covered by the section, a court of equity will refuse a mandatory injunction to compel the removal of the encroachment.⁵³ The sub-

49. *Olmsted v. Elder*, 5 N. Y. 144.

50. *Borst v. Griffin*, 9 Wend. 307;
Oothout v. Ledings, 15 Wend. 410;
Ellicott v. Mosier, 7 N. Y. 201.

51. See Real Property Law, §§ 460-491. And see chapter on Dower.

52. *Volz v. Steiner*, 67 App. Div. 504, 73 N. Y. Supp. 1006.

53. *Carroll v. Bullock*, 207 N. Y. 567. See also, *Jacobus v. Willis*, 74 Misc. 591, 134 N. Y. Supp. 455.

division is not applicable where no building has been erected on the land of the plaintiff abutting the wall of the defendant.⁵⁴ It applies only to a case where the owners of both pieces of land have erected buildings whose walls abut one on the other, and who have thereby apparently made a practical location of the boundary.⁵⁵ It does not apply to a case where the wall of a building encroaches three inches on the adjoining lot, upon which latter lot a building has been erected so as to leave a vacant space between the rear end of the building and the encroaching wall.⁵⁶ This section does not constitute a bar to the action, where less than ten months have elapsed between the completion of the wall, the breach of the contract by the defendant, and the commencement of the action.⁵⁷

D. Tenant in common.

1. Civil Practice Act, § 993. Separate action by joint tenant or tenant in common.

Where two or more persons are entitled to the possession of real property as joint tenants or tenants in common, one or more of them may maintain such an action to recover his or their undivided shares in the property in any case where such an action might be maintained by all.

2. Civil Practice Act, § 1004. When ouster to be proved.

Where the action is brought by a tenant in common or a joint tenant against his co-tenant, the plaintiff, besides proving his right, must also prove that the defendant actually ousted him or did some other act amounting to a total denial of his right.

3. Action by one of several tenants.

Tenants in common may bring a joint action in ejectment;⁵⁸ and, under section 993, one of them may in his own name alone maintain an action of ejectment against a person who is not his cotenant.⁵⁹ Before the Code of Civil Procedure, it was not necessary that all the tenants in common should unite in the action;⁶⁰ but, where there were several tenants in common, a joint action of ejectment could not be maintained by two or more less than the whole number; they must all join or bring separate actions. If one or more refused to join they could be made defendants.⁶¹

54. *Goldbacher v. Eggers*, 38 Misc. 36, 76 N. Y. Supp. 881.

55. *Jacobus v. Willis*, 74 Misc. 591, 134 N. Y. Supp. 455.

56. *Bergman v. Klein*, 97 App. Div. 15, 89 N. Y. Supp. 624.

57. *Snow v. Monk*, 81 App. Div. 206, 80 N. Y. Supp. 719.

58. *Vanderburg v. Bradt*, 2 Caines,

169; *Cole v. Irvine*, 6 Hill, 634; *Malcolm v. Rogers*, 5 Cow. 188.

59. *Commonwealth Water Co. v. Brunner*, 175 App. Div. 153, 161 N. Y. Supp. 794.

60. *Creger v. McLaury*, 41 N. Y. 219; *Kellogg v. Kellogg*, 6 Barb. 116.

61. *Hasbrouck v. Bunce*, 62 N. Y. 475.

Section 993 does not apply to property bought with partnership funds where there has been no accounting and where the rights of the parties to the real estate have not been determined.⁶² Ejectment for property belonging to a firm should be brought in the name of all the persons in whom the legal title is vested. In an action of ejectment, there cannot properly be joined several plaintiffs claiming under distinct titles for distinct interests.⁶³

Two persons, each of whom claims the whole of a piece of land by a title hostile, cannot unite as plaintiffs in ejectment, against a third party in possession, and set forth the title of each plaintiff in a separate count.⁶⁴ In ejectment for breach of a condition subsequent, all the original grantors or their heirs should join.⁶⁵ An action by one of several cotenants cannot be supported unless the action might have been maintained by all the tenants. The section does not require the owner of an undivided interest to allege in his complaint that he and all of his cotenants might join in the action, but the purpose of the section is fulfilled when proof is made that the tenant suing has a legal title, entitling him to possession, and that those having title to other undivided interests are upon the face of the record entitled to maintain a similar action.⁶⁶

4. Action against co-tenant.

In an action by a tenant in common against his cotenant, he must prove that the defendant actually ousted him or did some other act amounting to a total denial of his right.⁶⁷ The general rule is that the possession of one tenant in common is the possession of his cotenant;⁶⁸ and is not adverse to the possession of the latter;⁶⁹ and one tenant in common is justified in taking possession of the common property even though by stealth, if accomplished without breach of the peace.⁷⁰ One cotenant acts as agent for all the others.⁷¹ To constitute an ouster, the denial of plaintiff's right must be such as to amount to a disseizin of the coten-

62. *Eisner v. Eisner*, 5 App. Div. 117, 38 N. Y. Supp. 671.

63. *People ex rel. v. Mayor*, 10 Abb. Pr. 111.

64. *Hubbel v. Lerch*, 58 N. Y. 237.

65. *Cook v. St. Paul's Church*, 5 Hun, 293; *aff'd*, 67 N. Y. 594.

66. *Deering v. Riley*, 38 App. Div. 164, 56 N. Y. Supp. 704; *aff'd*, 167 N. Y. 184.

67. *Dixey v. Dixey*, 196 App. Div. 352, 187 N. Y. Supp. 879; *Sharp v. Ingraham*, 4 Hill, 116; *Edwards v. Bishop*, 4 N. Y. 61.

68. *Humbert v. Trinity Church*, 24 Wend. 587.

69. See *infra*, Adverse Possession, Art. VIII-B-5.

70. *Wood v. Phillips*, 43 N. Y. 152.

71. *Ward v. Warren*, 82 N. Y. 265.

ant or as will establish an adverse possession.⁷² It is sufficient if the possession is adverse and exclusive.⁷³ A conveyance of the whole property, made by one of two cotenants, to a grantee who claims to own the whole is an ouster.⁷⁴ An entry on the land claiming the entire property, denial of possession to cotenant, sale of farm to a stranger and appropriation of proceeds, is an ouster.⁷⁵

Actual and exclusive possession of the property claiming the whole, taking title from a hostile source as against a cotenant, exclusive claim of title while in possession, exclusive of cotenants, each constitutes an ouster.⁷⁶

An answer denying knowledge or information sufficient to form a belief as to plaintiff's interest, and an allegation of title and possession in a defendant cotenant, is an ouster.⁷⁷

The defendant must show himself a tenant in common before plaintiff is put to proof of ouster.⁷⁸ It is said that a cotenant or one claiming under him is the only party entitled to insist on such proof.⁷⁹

E. Grantee of lands held adversely.

1. Civil Practice Act, § 994. Action by grantee of lands held adversely.

Such an action may be maintained by a grantee, his heir or devisee, in the name of the grantor or his heir, where the conveyance under which he claims is void because the property conveyed was held adversely to the grantor. The plaintiff must be allowed to prove the facts to bring the case within this section. In such an action, a judgment against the plaintiff shall not award costs to the defendant; but where the defendant is entitled to costs as of course, they may be taxed, and the person who maintained the action in the plaintiff's name may be compelled to pay the same, as prescribed in section fourteen hundred and forty-three of this act.

2. Nature of action.

Section 994 of the Civil Practice Act is to be read in connection with section 260 of the Real Property Law, which

72. Siglar v. Van Riper, 10 Wend. 414; Edmunds v. Bishop, 4 N. Y. 61; Sparks v. Leavy, 19 Abb. 364; Whiteman v. Hyland, 40 St. Rep. 575, 16 N. Y. Supp. 8.

73. Clason v. Rankin, 1 Duer, 337; Church of North Greig v. Johnson, 66 Barb. 119.

74. Henderson v. Scott, 6 Civ. Pro. 39.

75. Clapp v. Bromagham, 9 Cow. 530.

76. Florence v. Hopkins, 46 N. Y. 182; Clark v. Crego, 47 Barb. 617; Phelan v. Kelly, 25 Wend. 395; Grim v. Dyar, 3 Duer, 354; Smith v. Burtis,

9 Johns. 174; Jackson v. Brink, 5 Cow. 483; Trustees of Church v. Johnson, 66 Barb. 119; Valentine v. Northrup, 12 Wend. 494; Henderson v. Scott, 25 Hun, 303; Miller v. Platt, 5 Duer, 272; Jackson v. Tibbitts, 9 Cow. 241; Humbert v. Trinity Church, 24 Wend. 587.

77. Petersen v. DeBaun, 36 App. Div. 259, 55 N. Y. Supp. 249.

78. Gillett v. Stanley, 1 Hill, 121; Sharp v. Ingraham, 4 Hill, 116.

79. Arnot v. Beadle, Hill & Denio's Supp. 181.

renders a grant of real property absolutely void if, at the time of the delivery thereof, such property is in the actual possession of a person claiming under a title adverse to that of the grantor. The form of procedure prescribed by section 994 is inherited from the common law, and is based upon the theory that, under a deed which was void as against a person in adverse possession, the title remained in the grantor, while the grantee took nothing more than a right of entry which was merely a chose in action. As the assignee of a chose in action could not sue upon it at common law, the courts created this method of permitting the assignee to sue in the name of his assignor. It was simply allowing the grantee under a void deed to use his grantor's title for the purpose of getting possession of the land. With the adoption of the Code of Civil Procedure, requiring suits to be brought by the real party in interest, the common-law rule was abolished, except as to actions in ejectment, in which the rule still survives.⁸⁰

This section only provides a remedy; it does not make a deed valid or change the statute in that regard.⁸¹ If his conveyance is void as against those in possession of the property, the action cannot be maintained by the grantee in his own name;⁸² but the statute allows him to prosecute the action in the name of his grantor.⁸³

A deed of lands which at the time are held adversely by another person is inoperative only as to the person holding adversely and those claiming under him; it is good as between the parties to it.⁸⁴

3. When action may be brought.

The action brought is purely statutory, and to entitle the plaintiff to the benefits of its provisions he must establish the existence of the prescribed conditions and a full compliance with its requirements.⁸⁵ In order for a plaintiff to bring the action in the name of his grantor, the conveyance under which he claims must be void because the property was held adversely to the grantor. If the conveyance under which the plaintiff claims is not void under the statute, he

80. *Dever v. Hagerty*, 169 N. Y. 481.

81. *Dawley v. Brown*, 4 St. Rep. 406.

82. *Lowbar v. Kelley*, 9 Bosw. 494;
De Silva v. Flynn, 9 Civ. Pro. 426.

83. *Cornwell v. Clement*, 87 Hun, 50,

67 St. Rep. 482, 33 N. Y. Supp. 866.

84. *Johnson v. Snell*, 34 St. Rep. 177,
11 N. Y. Supp. 868.

85. *Flagler v. Devlin*, 109 App. Div. 904, 95 N. Y. Supp. 801; *aff'd*, 186 N. Y. 589.

cannot maintain ejectment in the name of the grantor.⁸⁶ The grantee need not secure the consent of the grantor for the use of his name in the maintenance of the action.⁸⁷ The right of a grantee to bring the action is absolute and cannot be questioned by the grantors.⁸⁸ The only issue which can properly be litigated is the ownership of the property as between the plaintiff and the defendant.⁸⁹ Where defendants admit that at the time of the conveyance of the land they claimed adverse possession, it is proper the action should be commenced in the name of the grantors for the benefit of their grantee.⁹⁰

Where the defendant alleges that he was in actual possession of the land, claiming under a title adverse to that of plaintiff's grantors when they made the conveyance, and also claims title under a deed received after the action was begun from plaintiff's grantors to himself, he is estopped from asserting that plaintiff cannot maintain an action in the name of her grantors.⁹¹

4. Action by grantor.

The grantor, in a conveyance of premises held adversely, can maintain ejectment, notwithstanding such deed, and a recovery by him inures to the benefit of his grantee, such deed being valid against all the world except the person holding adversely.⁹² It is no defense in an action of ejectment, brought for the benefit of grantees in the name of the grantor, that the deed to the grantees was given in violation of the statute against sale of lands held adversely. If the deed is void, the grantor's title remains valid and effectual, and he may rely upon it against trespassers and occupants without title. If it be only void as to the defendants, and good as to the other parties, an action is allowed in the name of the grantor for the benefit of the grantee, and in either

86. *Sheridan v. Cardwell*, 141 App. Div. 854, 126 N. Y. Supp. 781.

Disputed boundary.—Where a conveyance is made of land which, owing to a disputed boundary line, is not at the time of conveyance in the actual possession of the grantor, an action to recover the disputed portion may be maintained by the grantee in his own name and this section is not applicable. *Danziger v. Boyd*, 120 N. Y. 628.

Judicial sale.—A conveyance made under an order of the court is not within the statute. *Christie v. Gage*, 71 N. Y. 189.

87. *Hasbrouck v. Bunce*, 62 N. Y. 475.

88. *Sheridan v. Cardwell*, 145 App. Div. 609, 130 N. Y. Supp. 638.

89. *Flagler v. Devlin*, 109 App. Div. 904, 95 N. Y. Supp. 801; *aff'd*, 186 N. Y. 589.

90. *Doherty v. Matsell*, 119 N. Y. 646.

91. *Sheridan v. Cardwell*, 145 App. Div. 609, 130 N. Y. Supp. 638.

92. *Jackson v. Vredenburg*, 1 Johns. 159; *Williams v. Jackson*, 5 Johns. 489; *Livingston v. Proseus*, 2 Hill, 526; *Hamilton v. Wright*, 37 N. Y. 502.

event the grantor's title can be asserted and established.⁹³ The section adds nothing to the right of the grantor, and where the grantor did not have such an estate in the lands as to maintain the action, it cannot be maintained for the benefit of his grantee.⁹⁴

5. Action by successors of grantee.

The right to bring the action in the name of the grantor was formerly limited to the first grantee, and did not extend to a remote grantee of the premises, and the action had to be brought in the name of the individual grantor bringing it, and plaintiff had to stand or fall by his title.⁹⁵ But the action does not abate by the death of the grantee. It may be continued by his devisees.⁹⁶

6. Joinder of grantors.

In an action brought under this section all of the grantors in the void deed must be joined as plaintiffs. It seems that the wife of the grantor must be joined in an action by the grantee in such case.⁹⁷

F. Remainderman or reversioner.

1. Civil Practice Act, § 995. Action by reversioner or remainderman after tenant's default.

Where a tenant for life or for a term of years suffers judgment to be taken against him, by consent or by default, in an action of ejectment, the heir or person owning the reversion or remainder, may maintain an action of ejectment to recover the property, after the determination of the particular estate.⁹⁸

2. Expiration of conditional fee.

Where lands are conveyed subject to certain conditions reserving a right of re-entry, the original grantor or his heirs can maintain ejectment on the happening of the condition.⁹⁹ In

93. *Chamberlain v. Taylor*, 92 N. Y. 348.

94. *Chamberlain v. Taylor*, 105 N. Y. 185.

95. *Smith v. Long*, 12 Abb. N. C. 113. But see the language of the section as it now stands.

96. *Ward v. Reynolds*, 25 Hun, 385.

97. *Crowley v. Murphy*, 11 Misc. 579, 32 N. Y. Supp. 806.

98. *Judgment against tenant under life tenant*.—A judgment in ejectment against one who had no interest in the premises, except as a tenant under a life tenant, when the action was

commenced, and who had moved from the premises before judgment was rendered, is without legal force or effect, and he is not dispossessed by the writ of assistance or execution issued upon the judgment, nor is the plaintiff in any legal sense placed in possession by virtue thereof, so as to hold adversely to a remainderman while the life tenancy continues. *Sand v. Church*, 152 N. Y. 174.

99. *Jackson v. Topping*, 1 Wend. 388; *Nicoll v. N. Y. & Erie R. R. Co.*, 12 N. Y. 121.

such a case all the original grantors or their heirs must join as plaintiffs.¹ Thus, the action lies by the grantor, where the condition is that on violation of covenants, as not to erect a certain structure, the land reverts to the grantor.² The grantor in a deed, on condition that no intoxicating liquors shall be manufactured or sold on the premises conveyed, the conveyance to be void in case of a breach, can maintain ejectment without demand of possession.³ But, where a municipal corporation acquires title to land for a public purpose, the former owner cannot maintain ejectment on the ground that it has been diverted.⁴

Where the deed conveying premises to a religious corporation reserved the right to build a basement story to be used solely for the purposes of a school, it was held that ejectment lay in favor of the corporation against persons using the basement for other than school purposes. The judgment should award possession subject to the easement.⁵

3. Remainderman.

An occupant in lawful possession under a lease from a life tenant for a term of years becomes a trespasser under section 530 of the Real Property Law upon refusal to yield possession of said premises after the death of the life tenant, and the remedy of the owners is by action in ejectment and not by summary proceedings, since the conventional relation of landlord and tenant does not exist and the occupant is not such a trespasser as may be removed through such proceedings.⁶

G. Executor.

Where real estate is devised to executors as such, although they are also named in the will as trustees, they may, as executors, maintain ejectment.⁷ An executor may maintain ejectment for lands which were held by his testator for a term of years, as such term is a chattel real and assets to be administered by him;⁸ but as a general rule he cannot maintain an action to recover the fee.⁹ Where the demise to executors does not authorize them to receive the rents and profits, or to convey the legal title, they cannot maintain

1. *Cook v. Wardens, etc., of St. Paul's Church*, 5 Hun, 293; *aff'd*, 67 N. Y. 594.

2. *Gilbert v. Peteler*, 38 N. Y. 165.

3. *Plumb v. Tubbs*, 41 N. Y. 442.

4. *Sweet v. Buffalo, N. Y. & P. R. R. Co.*, 79 N. Y. 293.

5. *Reformed Church v. Schoolcroft*,

65 N. Y. 135.

6. *Williams v. Alt*, 186 App. Div. 235, 174 N. Y. Supp. 460.

7. *Landon v. Townshend*, 14 N. Y. Supp. 522, 38 St. Rep. 714.

8. *Mosher v. Yost*, 33 Barb. 277.

9. *Van Rensselaer v. Hayes*, 5 Den. 477.

ejectment.¹⁰ Where a will confers a power of sale on the executor and gives the proceeds to persons named therein, the executor takes no title to the real estate and cannot maintain ejectment.¹¹

H. Equitable owner.

The general rule is that an action of ejectment is an action at law and depends on a legal title in the plaintiff, and that the holder of an equitable title cannot maintain the action, but must first convert his equitable right into a legal title.¹² The legal title will prevail at law as against one having only an equitable interest.¹³ Hence it held that an action of ejectment cannot be maintained by one who has, at most, an equitable title to land arising out of an executory contract for its purchase.¹⁴ The rule, however, is not without its qualifications. One who has been put in possession of lands and is entitled to possession under a contract of sale may maintain ejectment against a stranger who wrongfully enters upon such lands, and withholds possession thereof.¹⁵ A person who enters into the possession of land under a contract to purchase it cannot, without surrendering such possession, attack or dispute the title of his vendor.¹⁶ A vendor under contract for sale of lands may maintain ejectment against a vendee in possession on the failure to comply with the contract, and no demand or notice to quit need be

10. *Chamberlain v. Taylor*, 7 St. Rep. 517, 105 N. Y. 185.

11. *Smith v. Chase*, 90 Hun, 99, 35 N. Y. Supp. 615, 70 St. Rep. 411.

12. *Kelsey v. McTigue*, 171 App. Div. 877, 157 N. Y. Supp. 730; *Wright v. Douglass*, 3 Barb. 554; *rev'd*, 2 N. Y. 373, 10 Barb. 99, 7 N. Y. 564; *Murray v. Walker*, 31 N. Y. 399; *Peck v. Newton*, 46 Barb. 173; *Potter v. Sisson*, 2 Johns. Cas. 321; *Kemball v. Van Slyke*, 8 Johns. 487; *White v. Carney*, 16 Johns. 302; *Sinclair v. Field*, 8 Cow. 543; *More v. Spellman*, 5 Den. 225.

Ante-nuptial agreement.—Where no objection was made upon the trial it was held that a court of equity would entertain an action of ejectment, brought for the benefit of the sole infant heir of the wife, to enforce an ante-nuptial agreement, and compel the husband to surrender possession of the wife's estate. *White v. White*, 20 App.

Div. 560, 47 N. Y. Supp. 273.

13. *Simons v. Chase*, 2 Johns. 84; *Jackson v. Pierce*, 2 Johns. 221. But see *Boyd v. Boyd*, 12 Misc. 119, 33 N. Y. Supp. 74, 66 St. Rep. 731; *aff'd*, 146 N. Y. 403.

14. *Kellogg v. Kellogg*, 6 Barb. 116; *Bennett v. Gray*, 92 Hun, 86, 36 N. Y. Supp. 372, 71 St. Rep. 142.

An executory contract for the sale of the lands affords no right to the possession to the purchasers holding under it, as against a grantee of the legal title, and the latter may recover possession in ejectment without putting the defendant in default under the contract by tendering a deed, as the action is not founded on such contract but rests on legal right. *Riseley v. Rice*, 40 Hun, 585.

15. *Murphy v. Loomis*, 26 Hun, 659.

16. *Rhoades v. Freeman*, 9 App. Div. 20, 41 N. Y. Supp. 135.

given.¹⁷ But, where the terms of an agreement of sale have been fully complied with, the vendor cannot maintain ejectment against the grantees of the purchaser.¹⁸

One who takes an assignment of the purchaser's interest in an executory contract for lands as security for a debt cannot, on default, recover possession of the lands from his assignor. Such an assignment is in the nature of a mortgage and may be foreclosed in equity; but, to recover possession in ejectment, plaintiff must show a legal title.¹⁹

I. State.

The People of the State may maintain an action of ejectment.²⁰ But the State cannot maintain an action to recover real estate belonging to a municipality, the possession of which has been wrongfully acquired or is wrongfully withheld.²¹

J. Indians.

A tribe of Indians cannot maintain ejectment in its tribal name.²² A member of a tribe cannot maintain ejectment on behalf of himself, and all other persons equally interested with him.²³

K. Landlord.

1. Civil Practice Act, § 997. When action may be brought for non-payment of rent.

When six months' rent or more is in arrear upon a grant reserving rent or upon a lease of real property, and the grantor or lessor, or his heir, devisee or assignee, has a subsisting right by law to re-enter for the failure to pay the rent, he may maintain an action to recover the property granted or demised, without any demand of the rent in arrear or re-entry on the property.

2. Civil Practice Act, § 998. Action for non-payment of rent when right of re-entry is reserved.

Where a right of re-entry is reserved and given to a grantor or lessor of real property, in default of a sufficiency of goods and chattels whereon to distrain for

17. *Pratt v. Peckham*, 44 Hun, 247; *aff'd*, 122 N. Y. 669.

18. *House v. Howell*, 6 N. Y. Supp. 799.

19. *Campbell v. Swan*, 48 Barb. 109. See *Meigs v. Willis*, 66 How. Pr. 466; *Holcombe v. Holcombe*, 2 Barb. 20.

20. *Jackson ex dem. Miller v. Winslow*, 2 Johns. 81; *People v. Mauran*, 5 Den. 389; *People v. Rector, etc., Trinity Church*, 22 N. Y. 44; *People v. Van Rensselaer*, 9 N. Y. 319; *People v. Denison*, 17 Wend. 312; *People v. Conklin*, 2 Hill, 67; *People v. Livingston*, 8 Barb. 253.

21. *People v. N. Y. & Manhattan Branch R. R. Co.*, 84 N. Y. 565.

22. *Montauk Tribe of Indians v. Long Island R. R. Co.*, 28 App. Div. 470, 51 N. Y. Supp. 142.

As to the right of the Seneca Indians to maintain ejectment with reference to their reservation, see *Seneca Nation v. Christy*, 49 Hun, 524, 18 St. Rep. 881, 2 N. Y. Supp. 546; *aff'd*, 126 N. Y. 122; *appeal dismissed*, 162 U. S. 283.

23. *Johnson v. Long Island R. R. Co.*, 102 N. Y. 462.

the satisfaction of rent due, the re-entry may be made, or an action to recover the property demised or granted may be maintained, by the grantor or lessor, or his heir, devisee or assignee, at any time after default in the payment of the rent; provided the plaintiff, at least fifteen days before the action is commenced, serves upon the defendant a written notice of his intention to re-enter, personally, or by leaving it at his dwelling-house on the premises with a person of suitable age and discretion; or, if the defendant cannot be found with due diligence and has no dwelling-house on the premises whereat a person of suitable age and discretion can be found, by posting it in a conspicuous place on the premises.

3. Civil Practice Act, § 999. Payment before judgment of rent in arrear.

At any time before final judgment for the plaintiff is rendered and the judgment-roll is filed in an action brought as prescribed in either of the last two sections, the defendant may pay or tender to the plaintiff or his attorney, or pay into court, all the rent then in arrear, with interest and the costs of the action to be taxed; and thereupon the complaint must be dismissed.

4. Civil Practice Act, § 1000. Amount of rent in arrear to be stated in judgment.

In such an action, a verdict, report or decision in favor of the plaintiff must fix the amount of rent in arrear to the plaintiff, or, if judgment is taken by default, the amount thereof must be ascertained by or under the direction of the court; and in either case it must be stated in the judgment.

5. Civil Practice Act, § 1001. Payment after execution of rent in arrear.

At any time within six months after possession of the property awarded to the plaintiff in such an action has been delivered to him by virtue of an execution issued upon a judgment rendered therein, the defendant, or any person who has succeeded to his interest, or a mortgagee of the lease, or of any part thereof, who was not in possession when final judgment was rendered, may pay or tender to the plaintiff, or his executor, administrator or attorney, or may pay into court, for the use of the person so entitled thereto, the amount of rent in arrear, as stated in the judgment, and the costs of the action, with interest and all other charges incurred by the plaintiff.

6. Civil Practice Act, § 1002. Restoration of property to person paying rent in arrear.

Within three months after making the payment or tender, the person who made it, or his representative, may apply to the court for an order that possession of the property be delivered to him; and thereupon, upon proof of the facts, and payment of the sum due by reason of rent accruing since the judgment was rendered, and upon compliance with all other terms to be complied with by the grantee or lessee to the time of the application, the court must make an order directing that possession of the property be delivered to the applicant, who shall hold and enjoy the same, without any new grant or lease thereof, according to the terms of the original grant or lease. Notice of the application must be served upon the plaintiff's attorney.

7. Civil Practice Act, § 1003. Use of property by plaintiff, when set off against rent.

If possession of the property recovered has been delivered to the plaintiff by virtue of an execution issued upon a judgment in the action, the order must provide for setting off the sum which the plaintiff has made, or which he might without wilful neglect have made, of the property, during the possession thereof, against the rent accruing after the judgment was rendered, and for reimbursement to the applicant of the balance, if any, of the sum paid into court by him, after making the set-off prescribed in this section.

8. Action by successor of landlord.

Either the grantor of a lease in fee reserving rent, or his assignee of the rent, may maintain ejectment upon nonpayment of the stipulated rent.²⁴ Or the action may be maintained by the personal representatives of the assignee of a life lease.²⁵ But it has been held that a devisee of one who has granted land in fee, subject to rent, cannot maintain ejectment for rent accruing prior to the death of the testator, but only for what has accrued since.²⁶

9. Necessity of right of re-entry.

Ejectment for nonpayment of rent is not limited to rent service, but applies to all cases where there was a right to re-enter at common law.²⁷ But it is said that ejectment for the nonpayment of rent is not proper unless the lease gives a right of re-entry.²⁸ Where a clause in a lease provided for its determination at the option of the lessors on the nonpayment of the rent, they may maintain ejectment on breach of condition, though no right of re-entry is reserved.²⁹

10. Notice of intention to re-enter.

The service of a notice of intention to re-enter the premises is required by section 998 of the Civil Practice Act, but not by section 997. These sections are independent and arise from different sources. The owner can proceed under section 997 only when six months' rent is due independent of the service of a notice, but may bring the action under section 998 when the notice is served independent of how much rent is due.³⁰ Section 998 seems to apply only when the right of

24. *Tyler v. Heidorn*, 46 Barb. 439; *Van Rensselaer v. Slingerland*, 26 N. Y. 580; *Main v. Green*, 32 Barb. 448.

25. *Mosher v. Yost*, 33 Barb. 277.

26. *Van Rensselaer v. Hayes*, 5 Den. 477.

27. *Van Rensselaer v. Ball*, 19 N. Y. 100.

28. *Van Rensselaer v. Jewett*, 2 N. Y. 141; *Tyler v. Heidorn*, 46 Barb. 439; *Delancey v. Ganong*, 9 N. Y. 25; *Hosford v. Ballard*, 39 N. Y. 147.

29. *Horton v. N. Y. C. & H. R. R. Co.*, 12 Abb. N. C. 30.

30. *Martin v. Rector*, 118 N. Y. 476.

re-entry is reserved in default of a sufficiency of goods and chattels whereon a distress for rent may be made.³¹ If the lease reserves a right of re-entry for default in the payment of rent, without regard to the sufficiency of goods whereon to distrain, no notice is required.³² Section 998 is a remnant of the old law permitting the landlord to distrain for rent. When the right of distress was abolished in 1846, the action of ejectment was given to the landlord as provided in section 998. In this way the constitutional rights of the landlord were saved.³³

11. Effect of prior termination of lease.

Ejectment for rent cannot be maintained where, by summary proceedings, the lease has been terminated.³⁴

12. Waiver of forfeiture.

After forfeiture has accrued for nonpayment of rent, it may be waived by the lessor, by acts as well as words, and it will be so waived, and the right of action lost, if he then does any act which amounts to an acknowledgment of an existing tenancy, as receiving rent due at a subsequent quarter.³⁵ But, if the landlord is ignorant of the forfeiture, the receipt of rent is no waiver.³⁶ And the receipt of rent is not a waiver, unless such rent accrued after forfeiture, and then it validates the lease only to the time of payment.³⁷

13. Subsequent payment of rent.

Section 999 permits the payment of the rent in arrears at any time before judgment, with costs; and section 1001 allows the redemption on payment of the rent within six months after the delivery of possession under the judgment.³⁸ Thus, a lease is not defeated by rent in arrears, so

31. *Hosford v. Ballard*, 39 N. Y. 147.

Where the tenants of a large tract partitioned among themselves without the privity of the landlord, it must appear that there was not a sufficient distress upon any part, before he can maintain ejectment upon any part. *Jackson v. Wyckoff*, 5 Wend. 53.

32. *Hosford v. Ballard*, 39 N. Y. 147; *Cruger v. McLaury*, 41 N. Y. 219; *Martin v. Rector*, 118 N. Y. 476, 30 St. Rep. 27.

33. *Van Rensselaer v. Snyder*, 13 N. Y. 299.

34. *Stuyvesant v. Grissler*, 12 Abb. Pr. (N. S.) 6.

35. *Prindle v. Anderson*, 19 Wend. 391; *Collins v. Hasbrouck*, 56 N. Y. 157.

36. *Jackson v. Brownson*, 7 Johns. 227.

37. *Jackson v. Allen*, 3 Cow. 220.

38. *The Revised Statutes* — 2 R. S. 506, § 36 — for which this is a substitute, provided for filing a bill within six months after execution, and made no provision as to the conditions on which relief was to be granted. It was held, under the statute, that a lessee or tenant might redeem, by paying or tendering to the landlord, the rent in arrears and costs in an action to re-enter, for nonpayment of rent,

that, on payment of the rent, the rights of the tenant are reinstated.³⁹ The six months in which lessees or persons claiming under them may redeem commence running from the date of the eviction of defendant in possession under the writ of possession.⁴⁰

The requirement of section 1000, that the amount of rent in arrears must be "fixed" in a judgment of ejectment, is only intended to enable the defendant to avail himself of sections 1001 and 1002, authorizing redemption of the land by the payment of the amount of rent due with interest and costs; it confers a privilege upon the defendant and does not create a judgment against him. Where under a judgment in ejectment the plaintiff is entitled to take possession at once of the land, and the defendant has a right on the payment of a certain sum to retain possession or to recover it within six months after it has been lost, and the defendant remains in possession for more than twenty years, the presumption is that the defendant has at some time during this period paid the necessary sum and thus become entitled to keep possession.⁴¹

A remainderman who was not a party to an action of ejectment brought by a landlord against the life tenant to recover the possession of the property for nonpayment of rent is not within the six months' limitation. An action by a remainderman to redeem after a default judgment in ejectment by a landlord against a life tenant for nonpayment of rent does not sound in tort, but is equitable in its nature, and can be sustained without any proof of fraud.⁴²

14. Disputing title of landlord.

It is a fundamental principle that, as between landlord and tenant, the tenant is estopped from disputing the title of the landlord or claiming under a title hostile to that under which he entered, or a title which he acquired during

whether the action be at common-law or under the statute, and might have an action in equity for that purpose. *Corning v. Beach*, 26 How. Pr. 289.

39. *Holden v. Sackett*, 12 Abb. Pr. 473.

40. *Newell v. Wigham*, 16 Wkly. Dig. 295; *Whitbeck v. Van Rensselaer*, 64 N. Y. 27.

41. *Van Rensselaer v. Wright*, 56 Hun, 39, 29 St. Rep. 468, 8 N. Y. Supp. 885; appeal dismissed, 121 N. Y. 626.

Section 1000 contemplates that on default in payment of rent, the court

must ascertain by proof the amount in arrear in some proper manner as in other cases of default, and the entry of judgment by default is therefore unauthorized upon the overruling of the demurrer interposed to the complaint in an action to recover possession of the premises for the nonpayment of rent, where the court makes no ruling or direction as to the amount of rent due. *Bulger v. Coyne*, 20 App. Div. 224, 46 N. Y. Supp. 1007.

42. *Sand v. Church*, 152 N. Y. 174.

his tenancy.⁴³ This doctrine is said to rest upon the principle that the landlord, if compelled to litigate the title, must be put in as good a position by his tenant as when he gave him possession.⁴⁴ But the tenant may show title out of the landlord where the latter's title has expired since the creation of the tenancy.⁴⁵

15. Counterclaim.

In ejectment for rent the tenant may show, by way of counterclaim, a partial eviction from an easement on other premises, and is not put to his cross action.⁴⁶

16. Ejectment on termination of term of tenant.

The foregoing paragraphs apply to an action by the landlord to eject the tenant for failure to pay rent. Ordinarily the landlord brings summary proceedings to recover possession of the property.⁴⁷ But ejectment is a proper remedy, and it may be used in cases where the difficulty does not arise from the nonpayment of rent. If the tenant has forfeited his lease for any reason, ejectment is a proper remedy for the landlord to recover possession.⁴⁸ But the mere breach of a covenant on the part of the lessee does not authorize ejectment, without a reservation to the lessor of a right of re-entry for such a breach.⁴⁹

A landlord may maintain ejectment against any one in possession after the determination of the particular estate by which he gained it, without notice to quit.⁵⁰ And where a tenant holds over after the expiration of his term, the landlord may, at his election, treat him as a tenant from year to year, or as a trespasser, and maintain ejectment.⁵¹ If, however, the tenancy is at will or by sufferance, a thirty-day

43. *Jackson v. McLeod*, 12 Johns. 182; *Jackson v. Harder*, 4 Johns. 202; *Vernam v. Smith*, 15 N. Y. 327; *Territt v. Cowenhoven*, 79 N. Y. 400; *Colton v. Harper*, 5 Wend. 246; *Jackson v. Hinman*, 10 Johns. 292; *Tompkins v. Snow*, 63 Barb. 525.

44. *Glen v. Gibson*, 9 Barb. 638.

45. *Jackson v. Rowland*, 6 Wend. 666; *Hoag v. Hoag*, 35 N. Y. 469; *Armstrong v. Wheeler*, 9 Cow. 88.

46. *Blair v. Claxton*, 18 N. Y. 529.

47. See chapter on Summary Proceedings in volume III.

48. *National Prohibition Act*.—Where upon the conviction of a tenant for a vio-

lation of the National Prohibition Act upon the leased premises, the landlord under the option given by the statute terminates the lease, demands possession and gives the tenant notice to quit, a motion by the landlord for judgment on the complaint and demurrer thereto in an action in ejectment will be granted. *Farrelly v. Wells*, 115 Misc. 632, 189 N. Y. Supp. 34.

49. *Palmieri v. Antinozzi*, 47 Misc. 237, 95 N. Y. Supp. 865.

50. *Livingston v. Tanner*, 14 N. Y. 64; *Smith v. Littlefield*, 51 N. Y. 539.

51. *Schuyler v. Smith*, 51 N. Y. 309.

notice is required before ejectment will lie.⁵² But a tenant for the life of another, who continues in possession after the death of such life tenant, is not entitled to notice to quit.⁵³ To entitle a tenant holding over a term to notice, the holding over must be for such time as to authorize the implication of assent to such continuance by the landlord.⁵⁴

L. Tenant.

A contract dated at a future day, leasing lands for a term commencing at such day, gives the lessee, when the day arrives, right of possession and a right to maintain ejectment against a stranger wrongfully withholding.⁵⁵ The lessee of a married woman may maintain ejectment against her husband.⁵⁶ Where, in ejectment by a lessee, his title expires during the action, he is entitled to recover the value of the lease from the time of unlawful entry, for the balance of his term.⁵⁷

M. Trustee.

Where lands have been devised to trustees with power of conversion and to apply the income, the trustees may maintain ejectment.⁵⁸ But they cannot maintain the action in a case where the deed of trust does not create a valid trust or convey the legal title.⁵⁹ A *cestui que trust*, of a trust not prescribed by statute, may maintain this action.⁶⁰

When testamentary trustees, authorized only to sell lands and pay over the proceeds, purchase lands without authority, they take title as individuals only, and their grantee and his successor obtain good title in the absence of a claim made upon the lands by the beneficiaries under the will. The title of the successor of such grantee holding under deed executed by both of the trustees is superior to the right of a telegraph company to erect poles on the lands under a written permission given by one trustee only, and he may maintain ejectment.⁶¹

52. Real Property Law, § 228; Burns v. Bryant, 31 N. Y. 453; Larned v. Hudson, 60 N. Y. 102; Post v. Post, 14 Barb. 253; Reeder v. Sayre, 70 N. Y. 180; Lounsbery v. Snyder, 31 N. Y. 514.

53. Livingston v. Tanner, 14 N. Y. 64.

54. Schuyler v. Smith, 51 N. Y. 309; Conway v. Starkweather, 1 Den. 113.

55. Trull v. Granger, 8 N. Y. 115.

56. Vandervoort v. Gould, 3 Trans. App. 357.

57. Woodhull v. Rosenthal, 61 N. Y. 382.

58. McLean v. McDonald, 2 Barb. 534.

59. Heermans v. Robertson, 3 Hun, 464; aff'd, 64 N. Y. 332.

60. Van Deusen v. Trustees of Presbyterian Congregation, 3 Keyes, 550. See, however, Clark v. Crego, 47 Barb. 599; aff'd, 51 N. Y. 646.

61. Paolicchi v. American Telephone and Telegraph Co., 119 App. Div. 609, 104 N. Y. Supp. 162.

ARTICLE IV.

WHAT PLAINTIFF MUST SHOW TO RECOVER.

A. Title of plaintiff.

It is the general rule in an action of ejectment that the plaintiff must recover, if at all, on the strength of his own title, not on the weakness of his adversary's title.⁶² The burden is upon a plaintiff in ejectment to prove his title;⁶³ and, if the plaintiff has no title, the title of the defendant is not important.⁶⁴ The rule holds, however, only where title is asserted against title, and not where the defendant claims no title but merely asserts that the plaintiff has not proved a perfect title.⁶⁵

As against an intruder or trespasser, a "prior possession" under a claim of right by the plaintiff is sufficient to permit him to recover.⁶⁶ If neither party can show title, the one claiming under the first possessor may recover;

62. *Roberts v. Baumgarten*, 110 N. Y. 380; *Jarvis v. Lynch*, 157 N. Y. 445; *Stewart v. Russell*, 91 App. Div. 310, 86 N. Y. Supp. 625; *aff'd*, 184 N. Y. 601; *Bailey v. Twin Lake Association*, 91 App. Div. 500, 86 N. Y. Supp. 788; *White v. Hill*, 100 App. Div. 207, 91 N. Y. Supp. 623; *Aubuchon v. New York, New Haven & Hartford R. R. Co.*, 137 App. Div. 834, 122 N. Y. Supp. 581; *Sheridan v. Cardwell*, 141 App. Div. 854, 126 N. Y. Supp. 781; *Fletcher v. City of New York*, 87 Misc. 109, 149 N. Y. Supp. 289; *Mangam v. President of Sing Sing*, 86 Hun, 604, 33 N. Y. Supp. 843, 67 St. Rep. 454; *Goodhart v. Street*, 12 Misc. 360, 33 N. Y. Supp. 687, 67 St. Rep. 388; *Roggen v. Avery*, 63 Barb. 65; *Richardson v. Pulver*, 63 Barb. 67; *Henry v. Reichert*, 22 Hun, 394; *Wallace v. Swinton*, 64 N. Y. 188; *Bowers v. Arnoux*, 33 Super. Ct. 530; *Lamont v. Cheshire*, 65 N. Y. 30; *Doherty v. Matsell*, 11 Civ. Pro. 392; *Brady v. Hennion*, 8 Bosw. 528; *Chamberlain v. Taylor*, 105 N. Y. 185; *Buttery v. R., W. & O. R. R. Co.*, 14 St. Rep. 131; *Doherty v. Matsell*, 3 St. Rep. 517.

The possessor of lands can be evicted therefrom by one claiming them only by proof, not only of title in the claimant, but of paramount title. *Morey*

Tax title.—The fact that the defendant in an action of ejectment brought by the State to recover possession of lands sold, and bought in for unpaid taxes, gave no proof of title, nor evidence that he entered under claim of title, is immaterial, where the tax sales were void and judgment has been rendered, for that reason, in favor of defendant. It is a well-settled general rule of law that the plaintiff in ejectment must succeed on the strength of his own title, not on the weakness of the defendant's title. *People v. Inman*, 197 N. Y. 200.

63. *Tyndall v. Fleming*, 123 App. Div. 837, 108 N. Y. Supp. 239; *Meehan v. Dobson*, 131 N. Y. Supp. 37.

64. *Sweet v. Buffalo, N. Y. & P. R. R. Co.*, 79 N. Y. 293; *Trustees of Southampton v. Betts*, 163 N. Y. 454.

65. *People v. Tuthill*, 176 App. Div. 631, 163 N. Y. Supp. 843.

66. *Thompson v. Burhans*, 61 N. Y. 52, 79 N. Y. 93; *McRoberts v. Bergman*, 132 N. Y. 73, 43 St. Rep. 559; *Townshend v. Thompson*, 18 N. Y. Supp. 870, 46 St. Rep. 847; *Snyder v. Church*, 70 Hun, 428, 53 St. Rep. 674, 24 N. Y. Supp. 337; *aff'd*, 149 N. Y. 587; *Mission of the Immaculate Virgin v. Cronin*, 14 Misc. 372, 36 N. Y. Supp. 77; *Hopkins v. Mason*, 42 How. Pr. 115.

facts insufficient to establish an adverse possession may be sufficient to support ejectment against a third person.⁶⁷

Where legal title is established by neither party, the one showing the prior possession in himself or in those through whom he claims, although for a period less than that which is requisite to confer a title by adverse possession, will be deemed to have the better right. Therefore, though the defendant proves merely naked possession in himself without claim of title, it is sufficient to enable him to succeed in his defense if the plaintiff fails to prove title on its part.⁶⁸ Where plaintiff establishes title by proper and sufficient conveyance and possession prior to the entry by defendant, and that entry is not attempted to be justified by any claim of right, the burden of establishing a better title than plaintiff's is cast upon defendant.⁶⁹ Where possession is relied on as the basis of the action, it must be clearly and unequivocally proved.⁷⁰

Possession of land is *prima facie* evidence of title and sufficient against the defendant, who is unable to show a better title. The benefit of such a possession is not lost to the possessor, if he leaves the land temporarily vacant, and a city as well as an individual may obtain title by adverse possession, and such title cannot be questioned by one who occupies the attitude of a mere subsequent intruder without any title; the fact that he purchased the same from persons who also had no title in no way fortifies his position.⁷¹

When "prior possession" is not sufficient proof of title, it is not sufficient to prove a paper title to the lands unless it be traced back either to the sovereign or to some one who was the common source of the titles claimed by both parties. In other cases, in addition to the paper title, possession in some one through whom the plaintiff claims must be proved.⁷²

Jackson v. Harder, 4 Johns. 202;
Smith v. Lorillard, 10 Johns. 339;
Jackson v. Rightmyre, 16 Johns. 314.

Title abandoned.—But a mere possessory title which has been abandoned will not support the action. Livingston v. Walker, 7 Cow. 637; Whitney v. Wright, 15 Wend. 171.

67. Hunter v. Starin, 26 Hun, 529;
Duncan v. Harder, 4 Johns. 202; Smith v. Lorillard, 10 Johns. 338; Hopkins v. Mason, 61 Barb. 469; Rodie v. Sedgwick, 35 Barb. 319.

The maintenance of a flagman's shanty is a sufficient occupation of land to justify the institution of an

action of ejectment, and the right to a recovery is not affected by a removal of such shanty during the pendency of the action. Archibald v. N. Y. C. & H. R. R. Co., 1 App. Div. 251, 37 N. Y. Supp. 336, 72 St. Rep. 689; *aff'd*, 157 N. Y. 574.

68. People v. Inman, 197 N. Y. 200.

69. Dunham v. Townshend, 118 N. Y. 281.

70. Ludlow v. Myers, 3 Johns. 388.

71. Mayor, etc., of New York v. Carleton, 113 N. Y. 284.

72. Baker v. Duff, 136 App. Div. 13, 120 N. Y. Supp. 184; *aff'd*, 202 N. Y. 570; Aubuchon v. New York, New

A plaintiff in ejectment having proved a deed of the premises in question to her predecessor in title, and his possession thereunder, makes a *prima facie* case and is entitled to recover unless the defendant proves that the plaintiff's predecessor did not have legal title, or that he himself acquired title by adverse possession.⁷³ Where the plaintiff shows a chain of title from a source acknowledged to be valid, he need not show possession in each of the intermediate grantees.⁷⁴ Proof of a patent from the State, and *mesne* conveyances to himself, is *prima facie* evidence sufficient to entitle plaintiff to recover, where the premises are unoccupied.⁷⁵ Where one who brings ejectment traces his paper title back to the State, he need not show possession.⁷⁶

Haven & Hartford R. R. Co., 137 App. Div. 834, 122 N. Y. Supp. 581; Sheridan v. Cardwell, 141 App. Div. 854, 126 N. Y. Supp. 781; Lane v. Gould, 10 Barb. 254; Safford v. Hynds, 39 Barb. 625; Clute v. Voris, 31 Barb. 511; Downing v. Miller, 33 Barb. 386.

Ancient deed.—The fact that plaintiff in ejectment claimed under a deed more than thirty years old does not change the rule requiring proof of the title or possession of the grantor in such case. McClellan v. Zwingli, 24 N. Y. Supp. 371, 53 St. Rep. 751.

Ancient deeds coming from the proper custody may be received in evidence in an action of ejectment, without showing acts of ownership under them, but such deeds do not establish title in the parties, in the absence of proof establishing some modern possession to form part of plaintiff's chain of title. N. Y. C. & H. R. R. Co. v. Brennan, 12 App. Div. 103, 42 N. Y. Supp. 529.

Sheriff's sale.—To recover in ejectment under a purchase at a sheriff's sale, on a judgment against defendant, the judgment and judgment-roll must be shown, and that defendant was in possession, and the title acquired by the sheriff's sale. Townshend v. Weston, 4 Duer, 342; Dickenson v. Smith, 25 Barb. 103; Smith v. Colvin, 17 Barb. 157; Kellogg v. Kellogg, 6 Barb. 116.

Beach.—In an action of ejectment to recover a strip of beach land above high water mark on Long Island Sound,

the defendant relied upon his own title and upon failure of the plaintiff to prove title. The plaintiff, by presenting all records discoverable by diligent search relating to the land in question, fulfilled its duty. Town of Oyster Bay v. Stehli, 169 App. Div. 257, 154 N. Y. Supp. 849; aff'd, 221 N. Y. 515.

In an action to recover possession of lands on the seashore where the plaintiff does not trace his title to the original patentee nor show possession in himself or his grantors, he cannot recover. The mere payment of taxes, claim of title, and assertion of ownership even if made upon the land, will not show actual possession which raises a presumption of title sufficient to maintain the action. Greenleaf v. Brooklyn, etc., R. R. Co., 141 N. Y. 395.

73. New York Central & H. R. R. Co. v. Moore, 137 App. Div. 461, 121 N. Y. Supp. 884; aff'd, 203 N. Y. 615; Kahler v. Thron, 155 App. Div. 744, 140 N. Y. Supp. 1002; Arents v. Long Island R. R. Co., 89 Hun, 126, 69 St. Rep. 1, 34 N. Y. Supp. 1085; aff'd, 156 N. Y. 1.

74. Arents v. Long Island R. R. Co., 89 Hun, 126, 34 N. Y. Supp. 1085, 69 St. Rep. 1; aff'd, 156 N. Y. 1.

75. Becker v. Howard, 47 How. Pr. 423; rev'd, 4 Hun, 259, and aff'd, 66 N. Y. 5.

76. N. Y. C. & H. R. R. Co. v. Brennan, 12 App. Div. 103, 42 N. Y.

A grant by the State, evidenced by a patent duly issued, cannot be impeached collaterally upon the trial of an action of ejectment.⁷⁷

An action founded only upon adverse possession can be maintained even against the owner, where the plaintiff's claim of title is not founded upon a written instrument, judgment or decree. Plaintiff must show an actual, continued occupation of the premises under claim of title. Under such circumstances, where the land has been protected by a substantial inclosure or been usually cultivated or improved, the premises actually occupied can be deemed to have been held adversely.⁷⁸ An undisturbed possession for thirty-eight years is such title as will support ejectment against one who had recovered in a former ejectment by default, and turned the plaintiff out of possession, and this though the plaintiff's possession did not correspond with the paper title.⁷⁹ When plaintiff shows an adverse possession for twenty years he is entitled to recover even against a defendant whose possession for a less period is lawful;⁸⁰ but adverse possession for a period less than twenty years does not, of itself, authorize a recovery against a defendant lawfully in possession.⁸¹ Ejectment cannot be maintained by a party other than the people unless the plaintiff, his ancestor, predecessor, or grantor was seized or possessed of the premises in question within twenty years before the commencement of the action.⁸²

If the defendant admits that he went into possession under the plaintiff, the latter will be permitted to recover.⁸³ And the plaintiff is not obliged to trace his title back of a common grantor.⁸⁴

B. Plaintiff's right to possession.

The plaintiff cannot recover unless he shows that he had at the time of the commencement of the action the right to the exclusive possession of the premises.⁸⁵ Where both of

Supp. 529; *Harison v. Caswell*, 17 App. Div. 252, 45 N. Y. Supp. 560.

77. *DeLancey v. Piepgras*, 138 N. Y. 26, 51 St. Rep. 680.

78. *Barnes v. Light*, 116 N. Y. 34.

79. *Wright v. Dieffendorf*, 3 Johns. 269.

80. *Jackson v. Dieffendorf*, 3 Johns. 269; *Jackson v. Oltz*, 8 Wend. 440.

81. *Jackson v. Rightmyre*, 16 Johns. 314; *Grew v. Swift*, 46 N. Y. 204.

82. Civil Practice Act, § 34; *Hubbell v. Sibley*, 50 N. Y. 468; *Miner v.*

Beekman, 50 N. Y. 337; *Sheridan v. Cardwell*, 141 App. Div. 854, 126 N. Y. Supp. 781; *Doherty v. Matsell*, 16 St. Rep. 593.

83. *Sagoharie v. Dobbin*, 3 Johns. 223.

84. *Zahm v. Dopp*, 46 St. Rep. 920, 19 N. Y. Supp. 863.

85. *People v. Van Rensselaer*, 9 N. Y. 291; *Butler v. Frontier Telephone Co.*, 109 App. Div. 217, 95 N. Y. Supp. 684; *aff'd*, 186 N. Y. 486; *Country Club Land Association v. Lohbauer*,

the parties to this action have rights in the property which they may continue to hold and enjoy, neither is in a position to eject the other therefrom.⁸⁶

C. Actual possession of defendant.

The theory on which an action of ejectment is maintained is that the plaintiff, having had the possession of the premises, has been ousted therefrom and the defendant has entered into and withholds possession.⁸⁷

The plaintiff must show that he was formerly in possession; that he was ousted or deprived of his possession in whole or in part, and that he has a right to re-enter and take possession.⁸⁸ Whenever one person enters upon and takes permanent possession of the real property of another, claiming title thereto, whether it arises over a disputed boundary or otherwise, an unlawful ouster has been made, for which an action of ejectment is the proper remedy.⁸⁹ Where the plaintiff fails to prove that the defendant was in possession of any part of the premises in question at the time of the commencement of the action, the action cannot be maintained.⁹⁰

110 App. Div. 875, 97 N. Y. Supp. 11; aff'd, 187 N. Y. 106; *Lewis v. Ryan*, 123 App. Div. 497, 108 N. Y. Supp. 274; *Layman v. Whiting*, 20 Barb. 559; *Bryan v. Butts*, 27 Barb. 503; *Bartow v. Draper*, 5 Duer, 130; *Pierce v. Tuttle*, 53 Barb. 155; *Doherty v. Matsell*, 3 St. Rep. 517; *People ex rel. v. Mayor*, 10 Abb. 111; *McLean v. McDonald*, 2 Barb. 534; *Hunter v. Trustees of Sandy Hill*, 6 Hill, 407; *Trull v. Granger*, 8 N. Y. 115; *Doherty v. Matsell*, 11 Civ. Pro. 392; *Moore v. Townshend*, 54 Super. Ct. 245, 10 St. Rep. 463.

^{86.} *Burns Bros. v. City of New York*, 178 App. Div. 615, 165 N. Y. Supp. 615.

^{87.} *Failure to answer a letter written by a guardian ad litem of the infant, who claims to be entitled to a fee simple in certain real estate, which letter demanded possession of the premises from the infant's father, who claimed he was in possession as tenant by curtesy, is sufficient to sustain a finding of unlawful withholding of the premises.* *White v. White*, 20 App. Div. 560, 47

^{88.} *Butler v. Frontier Telephone Co.*, 109 App. Div. 217, 95 N. Y. Supp. 684; aff'd, 186 N. Y. 486.

^{89.} *Leprell v. Kleinschmidt*, 112 N. Y. 364.

^{90.} *People v. Van Rensselaer*, 9 N. Y. 291; *Kraus v. Birnbaum*, 200 N. Y. 130.

Question of boundary.—Where the complaint in an action of ejectment alleges an ouster of plaintiffs by defendants from a strip of land, which the answer admits, setting up the defendants' right of possession, and it appears on the trial that plaintiffs built a new fence along their line so as to straighten certain crooks made by the sliding of the old fence down hill, and that defendants tore down a part of the new fence, claiming it encroached on their land four or five feet, it is error to dismiss the complaint on the ground that the old fence having been acquiesced in for twenty years was the proper boundary, and that the tearing down of the fence was merely a trespass, and that no ouster authorizing an action in ejectment had been shown.

The possession of the defendant may be both a question of fact and of law.⁹¹ Where the action is brought by a tenant in common or a joint tenant against his cotenant, the plaintiff, beside proving his right, must also prove that the defendant actually ousted him or did some other act amounting to a total denial of his right.⁹²

D. Identification of property.

One bringing ejectment must show clearly that the lands in suit are included in the description.⁹³ Evidence as to location must not be of such an indefinite character as to permit the court or jury to reach a determination only by way of speculation.⁹⁴ It is essential that the deeds introduced to show plaintiff's chain of title should contain such a description of the premises granted as to enable the court and jury to determine that it includes the premises in question.⁹⁵

ARTICLE V.

PARTY DEFENDANTS.

A. Civil Practice Act, § 996. Necessary and optional defendants.

Where the complaint demands judgment for the immediate possession of the property, if the property is actually occupied, the occupant thereof must be made defendant in the action. If it is not so occupied, the action must be brought against some person exercising acts of ownership thereupon, or claiming title thereto or an interest therein, at the time of the commencement of the action. Any other person claiming title to, or the right to the possession of, the real property sought to be recovered, as landlord, remainderman, reversioner, or otherwise adversely to the plaintiff, may be joined as defendant.

B. Occupant.

If the premises are actually occupied, the occupant is the only necessary party;⁹⁶ he must be made a party defendant.⁹⁷

368, 124 N. Y. Supp. 42. Although the plaintiff in ejectment after alleging that the defendant tore down fences and unlawfully took possession of a portion of the land further alleges that she herself is in possession, the court should dismiss the complaint upon the theory that the plaintiff has failed to prove her own title or an ouster by the defendant, if she gives evidence that she and her predecessors had fenced in the disputed strip of land for over twenty years so as to constitute adverse possession, that the defendant tore down the fences and prevented the plaintiff from rebuilding the same and when the answer itself alleges title in

the defendant. *Kraus v. Birnbaum*, 132 App. Div. 567, 116 N. Y. Supp. 916; rev'd, 200 N. Y. 130.

91. *Good v. Brown*, 181 App. Div. 808, 168 N. Y. Supp. 1028.

92. Civil Practice Act, § 1004. And see, *supra*, Art. III-D-3.

93. *Finelite v. Sinnot*, 5 N. Y. Supp. 439.

94. *Jarvis v. Lynch*, 157 N. Y. 445.

95. *Jarvis v. Lynch*, 91 Hun, 349, 36 N. Y. Supp. 220, 70 St. Rep. 794; aff'd, 157 N. Y. 445.

96. *Beyers v. Grande*, 58 Misc. 398, 109 N. Y. Supp. 447; *Schuyler v. Marsh*, 37 Barb. 350.

97. *Bradt v. Church*, 110 N. Y. 537;

If the premises are actually occupied by a tenant, the action must be against the tenant and not against the landlord.⁹⁸

A person is properly made a party who is alleged to be in possession of part of the property under the other defendants.⁹⁹ To justify an action against an occupant, his occupancy must be against the plaintiff,¹ and must be actual.²

The words of section 996, "the occupant thereof," may be read as meaning an occupant and not all the occupants, and although plaintiff in ejectment may make every occupant a defendant, he is not required to do so, and the defendant cannot object to the non-joinder of any person alleged to be in occupancy of a part of the premises when such joinder would not in any wise benefit the party sued or be necessary for the determination of his rights.³ When in an action against several defendants it appears they occupy, in severalty, distinct portions of the premises, he may elect against which he will proceed.⁴ Several occupants of a building, although occupying different portions, may be joined in an action of ejectment.⁵

Danihee v. Hyatt, 151 N. Y. 493; *Beddell v. Arnold*, 15 App. Div. 576, 44 N. Y. Supp. 541; *People v. Ambrecht*, 11 Abb. 97; *Taylor v. Crane*, 15 How. Pr. 358; *Lucas v. Johnson*, 8 Barb. 244; *Pulen v. Reynolds*, 32 How. Pr. 353; *Banyer v. Empie*, 5 Hill, 48; *Schuyler v. Marsh*, 37 Barb. 350.

98. *People v. Mayor of New York*, 28 Barb. 240.

99. *Bank v. Levinus*, 5 Civ. Pro. 368.

1. *Strong v. City of Brooklyn*, 68 N. Y. 1.

2. *Allen v. Dunlap*, 42 Barb. 585.

A church edifice used and occupied by a religious society is deemed to be occupied by the corporation and not by the trustees. *Lucas v. Johnson*, 8 Barb. 244.

A soldier of the United States in charge under his superior officers is not an actual occupant. *People v. Ambrecht*, 11 Abb. 97; *aff'd*, 24 How. (N. Y.) 610, n.

Railroad.—It is held that ejectment lies against a railroad company for laying its rails over land dedicated by plaintiff to public use as a street and running its cars thereon. *Carpenter v. O. & W. R. R. Co.*, 24 N. Y. 655; *Ad-*

ams v. S. & C. R. R. Co., 10 N. Y. 328; *Williams v. N. Y. C. R. R. Co.*, 16 N. Y. 97; *Wager v. T. & U. R. R. Co.*, 25 N. Y. 526.

A railroad company that has laid a track over which trains pass has such occupancy or possession as to authorize ejectment against it. It is substantially in the exclusive possession of the company. *Gas Light Co. v. Rome, etc., R. R. Co.*, 11 Civ. Pro. 239.

Contract to purchase.—Ejectment lies against one who enters into possession with the assent of another under a contract to purchase, after default in payment of purchase money. *Pierce v. Tuttle*, 53 Barb. 155; *Powers v. Ingraham*, 3 Barb. 576.

Life tenant.—Ejectment lies against a tenant for life holding over without notice to quit. *Livingston v. Tanner*, 14 N. Y. 64.

3. *Hennesey v. Paulsen*, 147 N. Y. 255, 69 St. Rep. 539.

4. *Dillaye v. Wilson*, 43 Barb. 261; *Fosgate v. Herkimer, etc., Manuf. Co.*, 9 Barb. 287.

5. *Pearce v. Ferris*, 10 N. Y. 280. As to whether the action survives, see *Mosely v. Mosely*, 11 Abb. 105.

C. Agent.

If land is occupied, ejectment must be against the person actually possessing it, though as a mere servant. But if no one lives on the land, and the servant tills it for his employer, the latter must be sued.⁶

D. Co-tenant.

Tenants in common of the plaintiff are not necessary parties to the action.⁷ Tenants in common of the defendant will not be admitted to defend, unless they show that they are interested in the result of the suit.⁸

E. Landlord.

The landlord is not a necessary party to an action of ejectment against his tenant to recover the demised premises. But he may be let in to defend.⁹

If the plaintiff in the action of ejectment fails to make a tenant in occupation of the premises a party, bringing the action against the landlord only, and the latter joins issue without pleading the non-joinder of the tenant, by his omission to so plead he waives the defect of the non-joinder and as he is a proper party, the action must be tried upon the question of plaintiff's title and right to possession although the recovery of the land cannot be enforced as against the tenant's occupancy.¹⁰ And, where the landlord stated, when the summons and complaint were served upon him, that he lived in and was in possession of the house, and, upon the faith of this, service was made on him, he is estopped from denying his actual possession.¹¹

F. Husband and wife.

One having a right of dower in the premises is not a necessary party to an action of ejectment, unless she is the sole occupant.¹² Generally a married woman ought not to

6. *Shaver v. McGraw*, 12 Wend. 558.

7. *Beyers v. Grande*, 58 Misc. 398, 109 N. Y. Supp. 447.

8. *Jackson v. White*, 2 Cow. 585.

9. *Shaver v. McGraw*, 12 Wend. 558. See *Stiles v. Jackson*, 1 Wend. 316. To entitle a person to be admitted to defend, he must ordinarily show that a privity of interest existed between him and the defendant when the action commenced, and that the possession was then consistent with and

connected with the possession of the latter, and liable to be divested or disturbed by a claim adverse to that possession. *Jackson v. McEvoy*, 1 Caines, 151.

10. *Clason v. Baldwin*, 129 N. Y. 183, 37 St. Rep. 213.

11. *Finnegan v. Carraher*, 47 N. Y. 493.

12. *Beyers v. Grande*, 58 Misc. 398, 109 N. Y. Supp. 447.

be joined with her husband when he is the occupant;¹³ but, if both go into possession under a claim of title as joint tenants, both are proper parties.¹⁴ Where a farm is in the apparent joint occupation of husband and wife, the question of occupancy is one for the jury.¹⁵

Where the premises are actually occupied, the action must be brought against the occupant. When land is in the actual possession of a married woman claiming title thereto, acts of the husband assisting her to maintain possession will not make the husband occupant of the land, so as to support an action or judgment against him.¹⁶ Where the husband and wife lived together, and the premises were conveyed to and paid for by the wife, she is the occupant and the proper party to the action of ejectment, and such action cannot be maintained against the husband.¹⁷

G. Claimant.

If the premises are not occupied, the action may be brought against one claiming adversely to plaintiff.¹⁸

When brought against a person claiming title, it must be upon something more than an idle declaration that he owns the land.¹⁹ The fact that a person has left chattels upon the property does not justify the maintenance of the action of ejectment against him.²⁰ But if the lands are occupied, a person not in possession of property, though claiming an interest therein, is not a necessary party,²¹ though he may be a proper party. It is sufficient that a party claims and defends the title of the tenant in possession.²²

Persons who have claims against the property, nominal or real, analogous to a lease by virtue of a tax title, are not necessary parties,²³ but where mortgagees are also purchasers under a subsequent foreclosure of their mortgage, they may be joined with the tenant in possession under them, where the action is brought by one claiming under the

13. *Rose v. Bell*, 38 Barb. 25.

14. *Stewart v. Patrick*, 68 N. Y. 450.

15. *Martin v. Rector*, 30 Hun, 138.

16. *Danihee v. Hyatt*, 151 N. Y. 493.

17. *Danihee v. Hyatt*, 81 Hun, 238, 62 St. Rep. 663, 30 N. Y. Supp. 707; aff'd, 151 N. Y. 493.

18. *Abeel v. Van Gelder*, 36 N. Y. 513; *Carter v. Hunt*, 40 Barb. 89.

Purchasers.—When a party claims to own unoccupied premises and has contracted to sell them to others who are exercising acts of ownership over

such purchasers defendants. *Edwards v. Tanner Fire Ins. Co.*, 21 Wend. 467.

19. *Fosgate v. Herkimer Mfg. Co.*, 12 N. Y. 580; *Banyer v. Empie*, 5 Hill, 48; *Abeel v. Van Gelder*, 36 N. Y. 513; *Lucas v. Johnson*, 8 Barb. 244.

20. *Bedell v. Arnold*, 15 App. Div. 576, 44 N. Y. Supp. 541.

21. *Van Buren v. Cockburn*, 14 Barb. 118.

22. *Abeel v. Van Gelder*, 36 N. Y. 513; *Finnegan v. Carraher*, 47 N. Y. 493.

mortgagee, on the ground that the mortgage was void for usury.²⁴ But a mortgagee of lands has such interest in the subject of ejectment against his mortgagor, as to entitle him to be made a party defendant.²⁵

In an action for the possession of real property, parties should not be brought in on a mere allegation by plaintiff that they have or claim some interest in the property accrued since suit brought, if they resist the application and deny the claim.²⁶ One who claims in opposition to the title of the defendant cannot be admitted as a co-defendant.²⁷

H. Infant.

An infant may be sued in ejectment.²⁸ But, where infant remaindermen do not claim title or the right to the possession of the land in controversy, and do not act in hostility to plaintiff's title, they are not proper parties.²⁹

I. State.

An action of ejectment to recover possession of lands sold to the State under a void tax sale is properly brought against the comptroller.³⁰

J. Receiver.

In an action against a corporation and receivers thereof, appointed in the Federal court, for the immediate possession of property occupied by such receivers, the receivers are necessary parties defendant.³¹ Where the defendant claims title under and by virtue of a deed executed to him as receiver by a corporation, by order of the court, the deed suffices to show title in defendant sufficient to maintain ejectment against him.³²

ARTICLE VI.

COMPLAINT.

A. In general.

Under Rule 240 of the Rules of Civil Practice, the complaint in an action to recover real property or the possession thereof must describe the property claimed with reasonable

24. *More v. Deyoe*, 22 Hun, 208.

25. *Sand v. Church*, 32 App. Div. 139, 52 N. Y. Supp. 854.

26. *Cagger v. Sholtes*, 82 Hun, 378, 63 St. Rep. 557, 31 N. Y. Supp. 250.

27. *Jackson v. Flint*, 2 Cow. 594.

28. *McCoon v. Smith*, 3 Hill, 147.

29. *Sisson v. Cummings*, 8 St. Rep. 573; s. c., 106 N. Y. 56.

30. *Saranac Land & Timber Co. v. Roberts*, 125 App. Div. 333, 109 N. Y. Supp. 547; aff'd, 195 N. Y. 303.

31. *Barwin Realty Co. v. Batterman Co.*, 169 App. Div. 415, 155 N. Y. Supp. 178.

32. *Schuyler v. Marsh, Receiver, etc.*, 37 Barb. 350.

certainly in such manner that, from the description, possession of the property claimed may be delivered. An equivalent requirement was formerly contained in section 1511 of the Code of Civil Procedure.³³ The tendency of modern decision has been to reduce the certainty required in pleading within convenient limits.³⁴ If damages for the withholding of the property are claimed, they should be demanded in the complaint.³⁵

B. Essential allegations.

The complaint must allege that the plaintiff is seized of an estate in the premises claimed, and that he is entitled to the immediate possession of them, and that the defendant unlawfully withholds the possession from him.³⁶ And ordinarily a complaint with such allegations is sufficient.³⁷ It must show that the plaintiff is out of possession,³⁸ and that

33. See *Chism v. Smith*, 210 N. Y. 198; *Jarvis v. Lynch*, 91 Hun, 349, 36 N. Y. Supp. 220; *aff'd*, 157 N. Y. 445; *Barley v. Roosa*, 35 St. Rep. 898, 13 N. Y. Supp. 209; *Baker v. Carrington*, 34 Misc. 54, 68 N. Y. Supp. 405. In *Rowland v. Miller* (44 St. Rep. 826, 18 N. Y. Supp. 205) it was held that an alleged description in a complaint described only a straight line and nothing else and that the complaint was demurrable.

34. *Seward v. Jackson*, 8 Cow. 427.

35. Civil Practice Act, § 990. And see, *infra*, Damages, Art. X.

36. *Alvord v. Hetzel*, 2 How. Pr. (N. S.) 88; *Walter v. Lockwood*, 23 Barb. 228; *People v. Mayor of New York*, 28 Barb. 240; *Moore v. Lehman*, 52 Super. Ct. 283.

Action for benefit of grantee.—A complaint in an action for ejectment brought in the name of the grantor for the benefit of the grantee, held adversely to the grantor, is not defective because it fails to allege a withholding of the premises from the plaintiff grantor, but alleges simply a withholding from the plaintiff's grantee subsequent to the delivery of the deed. *Carey v. Lange*, 153 App. Div. 372, 138 N. Y. Supp. 555.

A complaint in an action in partition which seeks incidentally to eject the defendant from the lands as not being the owner thereof sufficiently states a

right to the latter relief where it in substance alleges that the plaintiff and others are seized in fee simple and entitled as tenants in common to the immediate possession of the lands described and that one of the defendants (whom it is sought to eject) is in occupation of the premises and wrongfully and unlawfully withholds possession thereof from the plaintiff and the parties entitled thereto as owners in fee. But the complaint is subject to demurrer where, in addition to the allegations aforesaid, the plaintiff attempts to plead title by alleging that the title of the plaintiff and others was acquired under the statute of descent as of the surviving next of kin of a certain person who died seized and possessed of the premises. *Hunter v. Willard*, 176 App. Div. 204, 162 N. Y. Supp. 364.

37. *Chism v. Smith*, 210 N. Y. 198; *Warner v. Nelligar*, 12 How. Pr. 402; *Ensign v. Sherman*, 14 How. Pr. 439.

Additional allegations.—Where a complaint states all the elements of an action in ejectment, its statements of additional facts as to damages, and upon which an application for a receiver might be based, do not change the cause of action to one of equity. *Bucher v. Carroll*, 19 Hun, 618.

38. *Taylor v. Crane*, 15 How. Pr. 358.

the defendant is in possession.³⁹ The plaintiff's right of possession is an essential allegation which cannot be omitted.⁴⁰

The nature of the plaintiff's claim need not be stated in detail, but the general form or character of the interest must be averred.⁴¹ It is sufficient to allege that plaintiff has the lawful title as the owner in fee.⁴² If an equitable title is relied on, it should be so stated.⁴³ If the action is to enforce a forfeiture for breach of covenant, the facts constituting the breach must be pleaded.⁴⁴ A complaint alleging that plaintiff was the owner of the fee is a sufficient allegation of

39. *Banyer v. Empie*, 5 Hill, 48; *Redfield v. Utica, etc.*, R. R. Co., 25 Barb. 54; *Child v. Chappell*, 9 N. Y. 246; *Moore v. Lehman*, 52 Super. Ct. 283.

Removal of cloud.—While a complaint which alleges that plaintiff owns title to the lands described therein and demands judgment for the surrender of possession cannot be upheld as a complaint in ejectment, in the absence of an averment that the defendant is in actual possession or that the property is vacant and the defendant claims title thereto, it may be upheld as an action to remove a cloud on title where it avers facts showing that the defendant's title is apparently good but is in fact totally bad. *Sanders v. Parshall*, 67 Hun, 105, 22 N. Y. Supp. 20; *aff'd*, 142 N. Y. 679, 51 St. Rep. 551.

Allegation of deed.—It is not sufficient that a complaint in ejectment alleges that plaintiff's husband executed a deed of the property to defendant, without averring that defendant is occupant or exercises acts of ownership or claims title or interest in the property. *Connolly v. Newton*, 85 Hun, 552, 66 St. Rep. 704, 33 N. Y. Supp. 102.

Possession of state commission.—A complaint in ejectment alleging that plaintiff is possessed in fee of certain forest lands, and that the forest, fish and game commission is in possession of the land, and withholds it is demurrable, as the commission can have no possession, and there is no statute which confers upon it, in the absence

of any overt act on its part, such possession as would withstand ejectment against it. *Racquette Falls Land Co. v. Middleton*, 41 Misc. 461, 84 N. Y. Supp. 1081.

40. *Lewis v. Ryan*, 123 App. Div. 497, 108 N. Y. Supp. 274. *Moore v. Lehman*, 52 Super. Ct. 283.

Conclusion of law.—An allegation that plaintiff is entitled to the possession of land, and to its rents and profits, is a mere allegation of a conclusion of law, and is not sufficient to show a cause of action; the facts on which the conclusion is based should be stated. *Sheridan v. Jackson*, 72 N. Y. 170.

41. *Walter v. Lockwood*, 2 Barb. 228; *Austin v. Schuyler*, 7 Hun, 275; *Rogers v. Sinsheimer*, 50 N. Y. 646; *Clark v. Crego*, 47 Barb. 599; *aff'd*, 51 N. Y. 646.

42. *Sanders v. Leavy*, 16 How. Pr. 308.

43. *Peck v. Newton*, 46 Barb. 173.

44. *City of New York v. Smith*, 64 How. Pr. 89.

A complaint alleging that plaintiff deeded premises, the title to which she had derived from her husband, to the defendants in consideration of caring for the plaintiff and her infant daughter, and upon a contemporaneous agreement on failure to perform the deed should be void; that defendants failed to perform, after entering upon the premises, sets out a cause of action in ejectment. *Jones v. Nichols*, 42 App. Div. 515, 59 N. Y. Supp. 564.

title without setting up the source and chain of title.⁴⁵ Neither the complaint nor answer in ejectment should set out the pleader's title, as this is a matter of evidence.⁴⁶

Where a plaintiff elects to frame his complaint in ejectment, so as to set out in detail the facts upon which he claims title, the defendant may demur, for, unless the facts support the plaintiff's claim, his subsequent allegation of ownership is merely an unwarranted conclusion of law.⁴⁷

In ejectment between co-tenants actual ouster should be averred, or some act which amounts to a total denial of plaintiff's rights.⁴⁸

C. Amendment.

A complaint cannot be amended on the trial so as to change the cause of action into one to compel the defendant to purchase land, at a price to be fixed by the court, or remove its road from the land.⁴⁹ An action in ejectment cannot on trial be amended to one for the encroachment of a cornice.⁵⁰ But an amendment has been allowed in an action to determine conflicting claims to real property so as to set forth a cause of action in ejectment.⁵¹ And an action for ejectment has been by supplemental pleading substantially turned into an action to redeem from a mortgage.⁵²

On a claim for the whole property, judgment cannot be had for an undivided part, without amendment.⁵³ But, if the plaintiff proves title to a smaller quantity of land than he has claimed in his complaint, he may recover according to his proof, and the complaint may be amended accordingly.⁵⁴ Thus, where a complaint described twenty-five acres in a single parcel, the court properly allowed an amendment to

45. *Baker v. Carrington*, 34 Misc. 54, 68 N. Y. Supp. 405.

46. *Mitnacht v. Hawthorne*, 31 Misc. 378, 64 N. Y. Supp. 493.

47. *Ely v. Azoy*, 39 Misc. 669, 80 N. Y. Supp. 620.

48. *Edwards v. Bishop*, 4 N. Y. 61.

49. *Gas Light Co. v. Rome, etc.*, R. R. Co., 24 St. Rep. 154, 5 N. Y. Supp. 459.

50. *Vrooman v. Jackson*, 6 Hun. 326.

51. *Brown v. Leigh*, 49 N. Y. 78.

52. *Madison Ave. Baptist Church v. Baptist Church*, 73 N. Y. 82.

53. *Cook v. Wardens, etc.*, St. Paul's Church, 5 Hun. 293; *aff'd*, 67 N. Y. 594; *Holmes v. Seeley*, 17 Wend. 75; *Cole v. Irvine*, 6 Hill, 634; *Gillet v. Stanley*, 1 Hill, 121; *Smith v. Long*,

12 Abb. N. C. 133. But see *Vrooman v. Weed*, 2 Barb. 330.

Amendment of description.—In *Budd v. Bingham* (18 Barb. 494), under the Revised Statutes, a description was held so imperfect as to be incapable of amendment, while in *Olendorf v. Cook* (1 Lans. 37), after a description of the premises had been given on the trial, an amendment was allowed.

Amendment on appeal.—In *Smith v. Long* (3 Civ. Pro. 396) it is held that under a claim for an entire piece of ground the plaintiff cannot, without an amendment, have judgment for an undivided part of it, but such amendment may be allowed on appeal.

54. *Kellogg v. Kellogg*, 6 Barb. 116.

the complaint and permitted a recovery for eleven acres thereof.⁵⁵ A variance between the description of the premises claimed in the complaint and that shown on the trial is not a failure of proof for which a non-suit should be granted.⁵⁶

D. Joinder of causes of action.

A single complaint which embraces causes of action for injuries to real property, for ejectment, and for injuries to personal property was defective under the Code of Civil Procedure, for misjoinder of causes of action, as no two of these causes of action could be joined in the same action.⁵⁷ Trespass *quare clausum fregit* and ejectment could not be joined.⁵⁸ A plaintiff could not, in one action, claim the recovery of the premises, confirmation of his title, and a decree for the conveyance of an outstanding title.⁵⁹

A complaint in ejectment for non-payment of the rent reserved in three separate leases of different premises contains three causes of action, which should be separately stated and numbered.⁶⁰

A statement in ejectment, in connection with other allegations, to the effect that defendant stretched wires over the land, and a prayer that they be removed is not to be treated as surplusage.⁶¹

Where a complaint in ejectment, after the usual statements, described the buildings upon the several parcels and the business carried on in each and demanded judgment for possession and damages for withholding, including rents and profits, it was not demurrable as improperly uniting several causes of action.⁶²

55. *Barley v. Roosa*, 35 St. Rep. 898, 13 N. Y. Supp. 209.

56. *Russell v. Conn*, 20 N. Y. 81.

57. *Wait v. Hudson Valley Ry. Co.*, 43 Misc. 304, 88 N. Y. Supp. 825.

58. *Smith v. Hallock*, 8 How. Pr. 73; *Budd v. Bingham*, 18 Barb. 494.

59. *Lattin v. McCarthy*, 8 Abb. Pr. 225.

60. *Overbagh v. Oathout*, 90 Hun, 506, 35 N. Y. Supp. 962, 70 St. Rep. 642.

61. *Plummer v. Gloversville Electric Co.*, 20 App. Div. 527, 47 N. Y. Supp. 228.

62. *Frazier v. Dewey*, 1 App. Div. 138, 37 N. Y. Supp. 973.

E. Forms of complaint.**1. Short form.****SUPREME COURT — COUNTY OF MONROE.**

EDWIN A. BARNES, PLAINTIFF, <i>agst.</i> HARVEY E. LIGHT AND MARY H. LIGHT, DEFENDANTS.	}	116 N. Y. 34.
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The plaintiff above named, by way of complaint against the defendants above named, alleges upon information and belief as follows:

That he is the owner in fee and entitled to the immediate possession of the premises described as follows:

(Insert description.)

That on and prior to the first day of October, 1882, plaintiff was possessed of said premises, and being so possessed thereof, that the defendants afterwards and on or about the 1st day of October, 1882, entered into the said premises and that they unlawfully withhold from the plaintiff the possession thereof to his damage five hundred dollars.

Wherefore plaintiff demands judgment:

1. That he is the owner in fee of said premises.
2. That he is entitled to the immediate possession thereof.
3. For five hundred dollars damages besides costs.

HENRY W. CONKLIN,
Plaintiff's Attorney.

2. Another short form.**SUPREME COURT.**

JOHN H. HOWE <i>agst.</i> ALFRED BELL.	}	143 N. Y. 190.
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Plaintiff complains of the defendant and for a cause of action alleges:

1. That said plaintiff is the owner in fee and entitled to the possession of all that tract or parcel of land situate in the city of Rochester, county of Monroe and State of New York, and bounded and described as follows:

(Insert description.)

2. That on the 3d day of September, 1889, this plaintiff was in possession of said above-described premises claiming title thereto; that subsequently and before the commencement of this action the defendant unlawfully entered upon said premises and is now in possession of the same, claiming title thereto, and has excluded and continues to exclude the plaintiff from possession thereof, to the damage of the plaintiff of five hundred dollars (\$500).

Wherefore plaintiff demands judgment against the defendant for the recovery of said lands and premises in fee and the possession thereof, with five hundred dollars (\$500) damages for withholding the same, besides the costs of this action.

NATHANIEL FOOTE,
Plaintiff's Attorney.

3. Setting out plaintiff's title as trustee.

SUPREME COURT — COUNTY OF ULSTER.

EDWIN YOUNG, AS TRUSTEE UNDER THE
WILL OF THOMAS CORNELL, DECEASED,
agst.

SARAH B. OVERBAUGH.

145 N. Y. 158.

Plaintiff complains of defendant and alleges:

1. That one Thomas Cornell, late of Kingston, New York, deceased, was, at and before his death, seized in fee of all that piece or parcel of land situate, lying and being in the city of Kingston, Ulster county, New York, bounded and described as follows:

(Insert description.)

and was, at and before his death, entitled to the possession of said premises.

2. That being so seized he died on the 30th day of March, 1890, leaving a will by which this plaintiff and Catharine Ann Cornell were constituted and appointed trustees thereunder and executors thereof.

3. That on the 3d day of April, 1890, said will was duly proved as a will of real estate, and admitted to probate in the office of the surrogate of the county of Ulster, and the said Catharine Ann Cornell thereupon and on the same day voluntarily renounced her appointment as such trustee and executrix, by an instrument in writing signed by her and duly filed and recorded in said surrogate's office.

4. That afterwards and on the 3d day of April, 1890, the plaintiff was, by the Surrogate's Court of the said county of Ulster, duly appointed as sole executor of said last will and testament of said Thomas Cornell, by letters testamentary duly issued to said plaintiff, and that said plaintiff has duly qualified and entered upon the discharge of his duties as such executor and trustee, and was at the time of the commencement of this action, and is acting in the execution of a trust created by said will.

5. That the said Thomas Cornell, in and by the terms of his last will and testament, gave, devised and bequeathed the lands and premises above described to his executors and trustees to be held by them and their successors in trust for the uses and purposes in said will set forth.

6. That said plaintiff by reason of the facts hereinbefore alleged is the owner of said lands and premises, and is seized of the entire estate therein, subject only to the execution of the said trust as created and set forth by said will, and is entitled to the immediate possession of said lands and premises.

7. That the defendant is in the possession of said premises and claims a right thereto, and refuses to give up the possession thereof to the plaintiff, although the same has been duly demanded, and wrongfully withholds the same from the plaintiff.

Wherefore the plaintiff demands judgment:

1. For the possession of said premises.

2. For one thousand dollars, the plaintiff's damages by the withholding of the same, together with his costs.

H. C. SOOP,
Attorney for Plaintiff.

4. Title to highway.

SUPREME COURT — ERIE COUNTY.

CHARLES EELS
agst.
 THE AMERICAN TELEPHONE AND TELE-
 GRAPH COMPANY.

143 N. Y. 133.

The above-named plaintiff by John M. Bull, his attorney, for his cause of action against the above-named defendant alleges:

1. That he is the owner in fee simple of the farm of land known as part of lot No. 29, section 1, township 11 and range 5, in the town of Alden, county of Erie, and State of New York, bounded as follows:

(Insert description.)
 subject to the use of said road for highway purposes only.

2. That ever since the 4th day of August, 1856, and up to the 1st day of September, 1888, plaintiff has been in possession of said premises and is now entitled to the immediate possession thereof as such owner.

3. That as plaintiff is informed and believes the defendant is a domestic corporation created by and existing under the laws of the State of New York.

4. That the plaintiff being in possession of said premises, the defendant by its agents and servants did on or about the 1st day of September, 1888, unlawfully enter upon said premises lying between the center line of said Cayuga Creek road and the southerly side thereof, and eject this plaintiff therefrom and dig holes in, and erect twelve telegraph poles upon and stretch wires over said premises throughout the whole length thereof, and the defendant is now in possession of the same and in the actual occupancy thereof.

5. That said defendant possesses and occupies said premises for other than highway purposes without leave of the plaintiff, without paying or offering to pay the plaintiff any compensation therefor and without any right or title thereto, and now unlawfully withholds possession thereof from the plaintiff, to his damage five hundred dollars.

Wherefore the plaintiff prays for judgment against the defendant that it remove said poles and wires from said premises and surrender to plaintiff possession thereof and pay him five hundred dollars damage for withholding the same, besides the costs of this action, and for such other relief as may be just.

JOHN M. BULL,
Plaintiff's Attorney.

ARTICLE VII.

DEFENSES.

A. Title in third person.

Except as against a trespasser or intruder, when "prior possession" may be sufficient, it is incumbent on the plaintiff to prove his title to the premises and his right to the possession thereof.⁶³ While a trespasser or intruder cannot set title in a third person,⁶⁴ as against a defendant claiming title, an outstanding title in a third person will defeat the action, though the defendant does not claim under it.⁶⁵ Such title, to be available as a defense, must be out of the plaintiff at the commencement of the suit.⁶⁶ An outstanding estate in a tenant by the curtesy will defeat the action.⁶⁷ Whatever shows that the plaintiff is not entitled to immediate possession constitutes a defense to an action of ejectment.⁶⁸

A conveyance in trust by the lessor after suit brought will not bar ejectment.⁶⁹ A defendant cannot, however, avail himself of an outstanding title, barred by the statute of limitations, or which has never been fully vested in the grantee.⁷⁰ Nor will a defendant be permitted to set up an escheat to the State for the purpose of defeating plaintiff's title.⁷¹ A vendee who has refused to accept a deed under his contract cannot set up an outstanding mortgage as a defense.⁷² Where both parties claim under the same person by quit-claim deed, the defendant in possession may show that their common grantor had no title.⁷³

B. Acquisition of title by defendant.

A deed of premises from the plaintiff to the defendant is a complete defense in ejectment, and if plaintiff claims the

63. See *supra*, Art. IV-A, Title of Plaintiff.

64. *Jackson v. Harder*, 4 Johns. 202.

A tort-feasor cannot set up a defect in title of plaintiff, as assignee in bankruptcy, by reason of irregularities in the bankruptcy proceedings. *Stevens v. Hauser*, 39 N. Y. 302.

65. *Loop v. Harrington*, 9 Cow. 86; *Bloom v. Burdick*, 1 Hill, 130; *Reformed Church v. Schoolcroft*, 5 Lans. 206.

66. *Raynor v. Timerson*, 46 Barb. 518.

67. *Adair v. Lott*, 3 Hill, 182; *Dodge v. Wellman*, 43 How. Pr. 427;

Cramer v. Benton, 4 Lans. 291; *Hicks v. Sheppard*, 4 Lans. 335; *Hoppough v. Strubble*, 60 N. Y. 430; *Thompson v. Egbert*, 1 Hun, 484.

68. *Hunter v. Trustees of Sandy Hill*, 6 Hill, 407; *Kurkel v. Haley*, 47 How. Pr. 75.

69. *Walton v. Leggett*, 7 Wend. 377.

70. *Chapman v. D., L. & W. R. R. Co.*, 3 Lans. 261; *Hoag v. Hoag*, 35 N. Y. 469.

71. *Croner v. Cowdrey*, 139 N. Y. 471.

72. *Pierce v. Tuttle*, 53 Barb. 155.

73. *Henry v. Reichert*, 22 Hun, 394.

execution of the deed was for a special purpose, which does not appear on its face, his remedy is in equity for its reformation.⁷⁴ If the defendant, after the suit was brought, became the assignee of a mortgage upon the premises which was forfeited before trial, he may defend as assignee in possession, and by supplemental pleadings the suit may become one for foreclosure or redemption.⁷⁵ That the defendant is in possession, under a lease from the assignee, of an unpaid mortgage, is a complete defense in case the lease was prior to the assignment.⁷⁶ But a satisfied mortgage paid off by the defendant will not bar ejectment.⁷⁷

Possession of real estate by a mortgagee, acquired by force or fraud, will not constitute a defense in ejectment brought by the owner.⁷⁸ But the fact that a defendant obtained possession of the property by force does not prevent him from showing title in himself.⁷⁹ Redemption by an occupant of land from a sale for unpaid taxes gives him no title against the owner suing in ejectment.⁸⁰

C. Estoppel to deny plaintiff's title.

A tenant is estopped from denying the title of his landlord, but this rule does not apply where the defendant went into possession under a lease from plaintiff's predecessor supposing the latter owned demised premises, but on subsequently ascertaining such was not the fact, abandoned that possession and attorned to the true owner.⁸¹ A defendant who, while standing in the relation of tenant to the plaintiff, has been appointed general guardian of some of the owners of same, is not permitted to deny the right of his landlord; nor is the right under which he claims to occupy the premises any defense to the action to recover their possession by plaintiff.⁸²

A defendant, claiming a practical location of a disputed boundary, may show acquiescence in the line claimed to have been so established for at least twenty years.⁸³

74. *Hall v. LaFrance Fire Engine Co.*, 158 N. Y. 570.

75. *Madison Avenue Baptist Church v. Oliver Street Baptist Church*, 73 N. Y. 82.

76. *Porter v. McGrath*, 41 Super. Ct. 84.

77. *Watson v. Cris*, 11 Johns. 437.

78. *Howell v. Leavitt*, 95 N. Y. 617.

79. *Stansbury v. Farmer*, 9 Wend. 201; *Jackson v. Morse*, 16 Johns. 197.

80. *Wiley v. Greenfield*, 64 App. Div. 220, 71 N. Y. Supp. 1046.

81. *DeForest v. Walters*, 153 N. Y. 229.

82. *Cornell v. Hayden*, 23 St. Rep. 270.

83. *Clark v. Davis*, 28 Abb. N. C. 135. See, also, *Second Methodist Episcopal Church v. Humphreys*, 142 N. Y. 137, 58 St. Rep. 616.

Where plaintiff was never in possession, and defendant's title by adverse possession is complete, the defendant has a right to fortify his title or purchase peace at any price, and of whomsoever he chooses without being estopped thereby from setting up his title.⁸⁴

Where, in an action by the State for ejectment, it appears that seven years prior to the entry of the defendant into possession, the State recovered a judgment in ejectment against the defendant's grantor, and that the defendant, being confronted with the probability of a similar action against himself, executed, acknowledged and delivered an instrument admitting and conceding the property to be owned by the People of the State, he is estopped from asserting any title to the premises as against the plaintiff.⁸⁵

D. Champertous conveyance to plaintiff.

In an action of ejectment, the defense that the conveyance to plaintiff was champertous under section 260 of the Real Property Law, providing that a grant of land is void, at the time of the delivery thereof, if the property is in the actual possession of one claiming under a title adverse to that of the grantor, is unavailable to one who makes no claim of title but is simply in possession, without claiming right thereto.⁸⁶ Thus, where the deed of the defendant in an action of ejectment does not include the lands which are the subject-matter of the action, he may not, although in possession, assert that the deed to the plaintiff was void for champerty by reason of such possession.⁸⁷ To avoid a deed under such statute, the adverse possession must be under a claim of some specific title, not necessarily a good title, but still a paper title as distinct from a general assertion of ownership, a title under some written instrument purporting to convey the lands to the claimant, or else some judgment, decree or executed process of a court.⁸⁸

E. Another action pending.

Proof of pendency of another action between the same parties, to recover possession of the same premises, is a defense.⁸⁹

84. *Greene v. Couse*, 38 St. Rep. 926.

85. *People v. Beguelin*, 184 App. Div. 759, 172 N. Y. Supp. 530.

86. *Belcher v. Belcher*, 134 App. Div. 726, 119 N. Y. Supp. 144.

87. *Wilson v. Boyce*, 143 App. Div. 782, 128 N. Y. Supp. 438.

88. *Green v. Horn*, 207 N. Y. 489.

89. *Ritter v. Worth*, 58 N. Y. 627, rev'g 1 T. & C. 406.

F. Equitable defense.

Section 262 of the Civil Practice Act preserves the right to interpose equitable defenses in actions at law. Hence, in an action of ejectment, the defendant may interpose any equitable defense which he may have to the action, and it is not necessary that an independent suit be brought in equity for the protection of his rights.⁹⁰ A defendant may allege and prove that he is equitably the owner of the premises and entitled to a conveyance thereof or that the land was intended to be conveyed to him but by mistake in the description was not included.⁹¹

An equitable title is a good defense to an action of ejectment and the same state of facts which would entitle a defendant to the reformation of the deed would establish his equitable right to the possession of land and defeat an action of ejectment.⁹² It is an equitable defense that plaintiff received the legal title as security for moneys advanced by him to defendant to enable him to pay for the premises.⁹³

In an action by an heir to recover an undivided share of his ancestor's estate, the defendant may set up as a defense that a conveyance of other lands was made to plaintiff by the ancestor by way of advancement.⁹⁴ But proof of some equitable right or title in the third person with whom defendant does not connect himself is no defense to the superior legal title in plaintiff.⁹⁵

The defendant may secure relief by way of specific performance of a contract to purchase,⁹⁶ by the removal of a

90. *Dixey v. Dixey*, 196 App. Div. 352, 187 N. Y. Supp. 879; *Schierloh v. Schierloh*, 72 Hun, 150, 55 St. Rep. 348, 25 N. Y. Supp. 676; *aff'd*, 148 N. Y. 103; *Glacken v. Brown*, 39 Hun, 294; *Requa v. Holmes*, 26 N. Y. 338; *Traphagan v. Traphagan*, 40 Barb. 537; *Cavalli v. Allen*, 57 N. Y. 508; *Carpenter v. Ottley*, 2 Lans. 451; *Pierce v. Tuttle*, 53 Barb. 155.

91. *Young v. Overbaugh*, 145 N. Y. 158; *Chaffin v. Gantz*, 17 Misc. 425, 39 N. Y. Supp. 712; *Cooper v. Monroe*, 77 Hun, 1, 59 St. Rep. 418, 28 N. Y. Supp. 222; *Kenyon v. Youlan*, 25 St. Rep. 299, 6 N. Y. Supp. 784.

A conveyance which by mistake does not describe the whole lot that the grantor intended to convey followed by the entry of the grantee into the entire premises and the possession thereof

under claim of title for more than twenty years operates as a transfer of the title to the whole lot intended to be conveyed to the grantee who, as well as those claiming under him, may defend an action of ejectment brought against him without previous resort to a court of equity to reform his deed. *Mutual Trust Co. v. Polymero*, 54 Misc. 379, 105 N. Y. Supp. 1024.

92. *Glacken v. Brown*, 39 Hun, 294; *Willard v. Bullard*, 18 St. Rep. 794, 3 N. Y. Supp. 683.

93. *Dodge v. Wellman*, 43 How. Pr. 427.

94. *Bell v. Champlain*, 64 Barb. 396.

95. *Wing v. De La Rionda*, 131 N. Y. 422, 43 St. Rep. 305.

96. *Cooper v. Monroe*, 77 Hun, 1, 28 N. Y. Supp. 222, 59 St. Rep. 418.

Where the purchaser under a con-

cloud from his title;⁹⁷ or by the reformation of the deed under which he claims.⁹⁸ But affirmative equitable relief will be granted to the defendant only when all the parties necessary to the determination are parties to the action.⁹⁹

Where a recovery is attempted to be prevented by the interposition of an equitable counterclaim, such answer must contain all the elements of a complaint.¹ An equitable defense must be pleaded.² And he is bound to establish it as if he had brought an action for equitable relief.³

G. Joinder of parties.

It is no defense in an action of ejectment that an occupant who claims a special right in the property is not made a party.⁴ Where the plaintiff has failed to make tenants who are the actual occupants of the premises parties, and the complaint does not disclose the omission, the remedy of the defendant is to set up the non-joinder by answer; otherwise the objection is waived.⁵

H. Pleading of defendant.

A general denial of the allegations of the complaint is sufficient to put in issue the title of the plaintiff,⁶ his right

tract is in default in his payment and the vendor brings ejectment, the purchaser may set up any equitable defense that he may have; he may tender full performance and ask judgment that the vendor convey to him or may say that he defaulted because the vendor was unable to perform, and ask that upon his surrender of possession the vendor repay him what he has paid, or he may set up any other equity arising out of the contract. *Rhoades v. Freeman*, 9 App. Div. 20, 41 N. Y. Supp. 135.

97. *De Forest v. Walters*, 153 N. Y. 229; *Earle v. Willard*, 5 Wkly. Dig. 155.

98. *Perrior v. Peck*, 39 App. Div. 390, 57 N. Y. Supp. 377; *aff'd*, 167 N. Y. 582.

99. *Cramer v. Benton*, 4 Lans. 291; *Hicks v. Sheppard*, 4 Lans. 355.

1. *Dewey v. Hoag*, 15 Barb. 365.

2. *Traphagen v. Traphagen*, 40 Barb. 537; *Thurman v. Anderson*, 30 Barb. 651; *Requa v. Holmes*, 16 N. Y. 193,

19 How. Pr. 430, 26 N. Y. 338; *Corkhill v. Landers*, 44 N. Y. 218; *Chase v. Peck*, 21 N. Y. 581; *Crary v. Goodman*, 12 N. Y. 266; *Dewey v. Hoag*, 15 Barb. 365; *Pope v. Cole*, 64 Barb. 406; *Phillips v. Gorham*, 17 N. Y. 270; *Webster v. Bond*, 9 Hun, 437; *Stone v. Sprague*, 20 Barb. 509; *Cavalli v. Allen*, 57 N. Y. 508; *Hoppough v. Struble*, 60 N. Y. 430.

Conclusion.—An allegation in an answer that the premises in question equitably belong to the children of the defendant and that any title plaintiff may have is, for their use and benefit, is of no avail, no facts being pleaded. *De Silva v. Flynn*, 9 Civ. Pro. 426.

3. *Dyke v. Spargur*, 143 N. Y. 651.

4. *Hennessey v. Paulsen*, 12 Misc. 384, 33 N. Y. Supp. 638; *aff'd*, 147 N. Y. 255, 69 St. Rep. 539.

5. *Clason v. Baldwin*, 37 St. Rep. 213, 13 N. Y. Supp. 681; *modified*, 129 N. Y. 183.

6. *Benton v. Hatch*, 122 N. Y. 322; *Terrell v. Wheeler*, 13 Civ. Pro. 178.

of possession,⁷ or that the defendant is withholding possession of the premises.⁸

It is neither necessary nor proper for the defendant to set out the evidence of his own title.⁹ Anything tending to disprove plaintiff's allegations of seizin and right of possession is admissible under a general denial.¹⁰ Under a general denial the defendant, if not a mere trespasser or intruder, may show title out of the plaintiff at the commencement of the action without even connecting himself with such outstanding title in any way,¹¹ since the plaintiff can only recover on the strength of his title, not on the weakness of his adversary's.¹² Under a general denial, evidence is admissible to show an estoppel.¹³

An answer setting out what was the general issue under the former practice, to the effect that defendant is not guilty of unlawfully withholding the premises claimed by plaintiff, as alleged in the complaint, does not prevent defendant from giving any evidence of matter which would defeat the action of the plaintiffs, and does not relieve the plaintiff from the necessity of showing a right to the possession of the premises as against the defendant at the time of the commencement of the action.¹⁴ But it has been held that a mere denial of possession, or of unlawful withholding, does not put the plaintiff's title in issue.¹⁵ A defendant who claims title by adverse possession cannot deny occupancy.¹⁶

A defendant in an action of ejectment cannot show as a defense upon the trial that he and his grantors have been in the uninterrupted adverse possession of the land for more than twenty-one years immediately preceding the commencement of the action, unless he has set up such adverse possession as a defense in his answer.¹⁷

7. *Gilman v. Gilman*, 111 N. Y. 265; *Crowley v. Murphy*, 11 Misc. 579, 32 N. Y. Supp. 806, 66 St. Rep. 189.

8. *Gilman v. Gilman*, 111 N. Y. 265.

A claim of title and possession set up in the answer is sufficient to constitute an ouster within section 1004 of the Civil Practice Act. *Petersen v. DeBaum*, 36 App. Div. 259, 55 N. Y. Supp. 249.

9. *Terrell v. Wheeler*, 13 Civ. Pro. 178.

10. *Hughes v. Hughes*, 10 Misc. 180, 62 St. Rep. 488, 30 N. Y. Supp. 937.

11. *Gillett v. Stanley*, 1 Hill, 121; *Schauber v. Jackson*, 2 Wend. 18; Ray-

nor v. Timerson, 46 Barb. 518.

12. *Lamont v. Cheshire*, 65 N. Y. 30; *Wallace v. Swinton*, 64 N. Y. 188.

13. *Creque v. Sears*, 17 Hun, 123.

14. *Gilman v. Gilman*, 111 N. Y. 265.

15. *Ford v. Sampson*, 30 Barb. 183.

16. *Porter v. McGrath*, 41 Super. Ct. 84.

17. *Hansee v. Mead*, 27 Hun, 162; *Dezengremel v. Dezengremel*, 24 Hun, 457; *Church v. Hempstead*, 27 App. Div. 412, 50 N. Y. Supp. 325; *Burlew v. Hunter*, 41 App. Div. 148, 58 N. Y. Supp. 453. See *Baker v. Oakwood*, 123 N. Y. 16.

A defense to the effect that defendant has a right of way by prescription or necessity over the *locus in quo*, or that the latter is a public highway, is affirmative in its nature, and must be pleaded to be available.¹⁸ The objection that a deed under which the plaintiff in ejectment claims title is void under the Champerty Act is matter of defense, and must be set up by answer.¹⁹

In an action of ejectment brought by a devisee of land against a legatee whose legacy was charged on the land, such legacy is not available as a counterclaim.²⁰

I. Forms of answers.

1. Plea of title by purchaser.

SUPREME COURT.

DANIEL E. DONOVAN

agst.

JAMES H. VANDEMARK.

} 78 N. Y. 244.

The above defendant, in answer to the complaint of the above plaintiff, respectfully shows to the court:

1. He denies each and every allegation in said complaint contained.

2. As a second and further answer the defendant shows and denies that under the will of Andries Schoonmaker, deceased, the real estate described in the complaint in this action became vested in George Chambers, or that by such will the said George Chambers acquired any interest therein, or that by reason of such will, or the conveyance or order mentioned in said complaint, the above plaintiff became entitled to the possession of the real estate mentioned in the complaint in this action, or acquired any right, title or interest therein.

3. As a third and further answer, the defendant shows that on or about the 1st day of January, 1871, this defendant entered into an agreement in writing with the said Abraham E. Schoonmaker, who then was, and up to the time of the sale hereinafter mentioned continued to be, the owner of said premises, which said agreement gave this defendant the use and occupation, and the right to quarry cement on that portion of said premises now in possession of this defendant for the term of ten years following the date of said agreement. That said agreement is now in force, and the defendant in possession in pursuance thereof, and that under such agreement this defendant has paid and expended large sums of money, to wit: The sum of \$10,000 in the improvement of said property and in the development of the same, and rendering the same useful for the purposes of this defendant, and that the greater part of such expenditure would be an entire loss if this defendant was ejected from said property. That under such agreement this defendant has paid, and

18. *Burlew v. Hunter*, 41 App. Div. 148, 58 N. Y. Supp. 453.

19. *Ten Eyck v. Witbeck*, 55 App.

Div. 165, 86 N. Y. Supp. 921; *aff'd* without opinion, 170 N. Y. 564.

20. *Dinan v. Coneys*, 143 N. Y. 544.

the said Abraham E. Schoonmaker has received, large sums of money, to wit: The sum of \$5,000 as the rents of said property under the said agreement. That said agreement was made and said property improved and developed, and the said rents paid to the said Schoonmaker with the knowledge and consent of the said Chambers, and without any objection or protest on his part. That such improvements were made and such money paid and expended before July 26, 1875.

4. As a fourth and further answer, the defendant shows that the said Abraham E. Schoonmaker, being the owner of said property as aforesaid, on or about March 28, 1866, in connection with his wife, mortgaged said premises to Catharine Wells and Augustus Schoonmaker, Jr., administratrix and administrator of James Wells, deceased, in the sum of \$825, and said mortgage was duly recorded in the Ulster county clerk's office; that said mortgage was subsequently duly assigned to Frederick Schoonmaker by said mortgagees, which said assignment was also duly recorded in said clerk's office. That subsequently, default having been made in the payment of said mortgage, an action was commenced in this court in favor of the executors of the last will and testament of said Frederick Schoonmaker and against the said Abraham E. Schoonmaker and wife and others, for the purpose of foreclosing the said mortgage and selling the premises described therein. That such proceedings were had in said action; that a judgment of foreclosure and sale was entered therein in the Ulster county clerk's office on April 23, 1875. That in pursuance of such judgment the said premises were subsequently duly sold at public auction at the court house, in the city of Kingston, and purchased at such sale by James H. Vandemark, this defendant, for the sum of \$1,400; and this defendant has received the referee's deed on such sale, which said deed has been duly recorded, and by virtue of which said mortgage, action, judgment and sale, this defendant became and now is the owner of said premises.

Wherefore this defendant demands the judgment of this court dismissing said complaint with costs.

F. L. & T. B. WESTBROOK,
Defendant's Attorneys.

2. Adverse possession.

SUPREME COURT — BROOME COUNTY.

HALLAM ELDREDGE
agst.
THE CITY OF BINGHAMTON.

} 120 N. Y. 309.

1. The defendant the city of Binghamton answering the complaint of the plaintiff herein, on information and belief, denies each and every allegation of said complaint contained in the first count thereof.

2. For a second and further answer the defendant admits that so much of the premises described in the complaint as are contained within the limits of State street as laid out and recorded by the city of Binghamton as a public street, is in use as a public street, and with the exception of this admission, the defendant denies each and every allegation of the second count of said complaint.

3. For a third and further answer the defendant, upon information and belief, denies each and every allegation of said complaint not hereinbefore admitted or denied.

4. For a fourth and further answer, the defendant alleges on information and belief that the plaintiff, his ancestors, predecessors and grantors have not, nor have either of them been seized or possessed of the premises in question within forty years last past before the commencement of this action.

5. For a fifth and further answer the defendant alleges on information and belief that by chapter 32 of the Laws of 1833 passed February 23d, the construction of a canal by the canal authorities to pass through the then village of Binghamton was authorized; which canal has always been known as the Chenango canal; and that by said act and general laws of the State, the canal authorities were authorized to take possession of and acquire the title to the necessary land to build said canal; and that in pursuance of said act, and under and by virtue of the general laws of the State, such proceedings were had within a few years after the passage of said act, that the State acquired title to a strip of land running through said village of Binghamton where said canal was built and adjacent thereto; and that said land, the title to which was thus acquired by the State, included within its limits all the land within the limits of said State street as afterwards laid out, and as hereinafter referred to. That by chapter 391 of the Laws of 1878, the right to take possession of said canal lands for the purpose of laying out a street was given to the city of Binghamton by the State; and for the particulars of said act the defendant refers to the same, together with the amendments of the same chapter 190 of the Laws of 1880. That under and by virtue of said acts, the common council of the city of Binghamton passed a resolution on the 9th day of June, 1879, accepting the release of the State, a copy of which resolution (marked Exhibit A) is attached to this answer, and is hereby referred to as forming a part of the same; and that said resolution was duly approved by the mayor of said city.

That in pursuance of the laws above referred to, the acceptance of said canal lands above referred to and the powers vested in the city of Binghamton by its charter, the defendant, before the commencement of this action, duly laid out and recorded said State street in the manner required by law to make the same one of the public streets of the city of Binghamton, and the same by virtue of said proceedings became one of the public streets of the city of Binghamton.

That said State street as recorded comprises all or a portion of the land described in the plaintiff's complaint, and that the defendant has only interfered with said lands in the manner described and in no other way and only within the limits of said canal lands in the manner described for the purpose of making said State street one of the public streets of the defendant.

6. For a sixth and further answer defendant further alleges all of the allegations of the fifth subdivision of the answer, to save unnecessary repetition, the defendant realleges and says further that more than thirty years before the right was given to the defendant to said canal lands as a street, the State of New York took possession of the said canal lands by virtue of legal proceedings, claiming the absolute title to said lands, and the State of New York has been in undisputed

possession of said lands for over thirty years before the defendant was authorized to take said lands as aforesaid claiming the absolute title to the same and thereby the State of New York acquired absolute title to said lands by adverse possession and the defendant succeeds to the rights of the State as hereinbefore described and the possession of the State and defendant has been continuous, unbroken and adverse for forty years or more prior to the commencement of this action.

Wherefore the defendant asks that the plaintiff's complaint be dismissed with costs.

A. D. WALES,
Attorney for Defendant.

3. Setting up equitable defense.

SUPREME COURT — COUNTY OF ULSTER.

EDWIN YOUNG, AS TRUSTEE UNDER THE
WILL OF THOMAS CORNELL, DE-
CEASED,

agst.

SARAH B. OVERBAUGH.

145 N. Y. 158.

The defendant, answering the complaint of the plaintiff herein, shows to the court:

1. She denies that Thomas Cornell, deceased, was at the time of his death, or for many years before, entitled to the possession of the premises described in the complaint, or that he was the equitable owner thereof, and denies that this plaintiff is the equitable owner of such property, or that he is entitled to the possession thereof.

2. This defendant further shows, that she is, and of right ought to be the owner, and is entitled to possession of the premises described in the complaint. That the said premises were by said Thomas Cornell, deceased, promised and agreed to be conveyed to this defendant for and in consideration of this defendant residing and remaining in the city of Kingston and of certain expenditures and improvements which were to be made and were made upon the premises by her.

This defendant shows that many years since said Thomas Cornell agreed to give this defendant the property in question upon terms and conditions which she has complied with in full on her part, and that relying upon the said promise and agreement of the said Thomas Cornell, and at his request and with his knowledge, this defendant has paid, laid out and expended large sums of money, in erecting a house and other buildings upon the property, in improving and caring for the same and making it more valuable; that the said moneys were paid out and expended with the knowledge and at the suggestion of said Thomas Cornell, and that this defendant went into and has remained in the possession of the premises at the request of the said Thomas Cornell, and on such promise and request paid the taxes and insurance thereon and kept the same in repair and treated them as her own property.

Wherefore defendant demands:

1. That the complaint be dismissed.
2. That the plaintiff be adjudged and decreed to deliver to the defendant a good and sufficient conveyance of the premises described in the complaint.
3. That she have her costs of this action.

PARKER & FIERO,
Attorneys for Defendant.

ARTICLE VIII.

ADVERSE POSSESSION OF DEFENDANT.

A. Elements of adverse possession, in general.

There are five elements necessary to constitute an effective adverse possession: First, the possession must be hostile and under claim of right; second, it must be actual; third, it must be open and notorious; fourth, it must be exclusive, and fifth, it must be continuous. If any of these constituents is wanting, the possession will not effect a bar of the legal title.²¹ One who without a paper title to land seeks to establish title by adverse possession against the holder of the legal title should be held to strict proof.²²

B. Hostility.

1. In general.

An action of ejectment cannot be maintained by a party other than the people, unless the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the premises within twenty years before the commencement of the action.²³ But the person who establishes a legal title to the premises is presumed to have been possessed thereof within the time required by law; and the occupation of the premises by another person is deemed to have been under and in subordination to the legal title unless the premises have been held and possessed adversely to the title for twenty years before the commencement of the action.²⁴

21. *Belotti v. Bickhardt*, 228 N. Y. 296.

22. *Staples v. Schnackenberg*, 148 App. Div. 161, 132 N. Y. Supp. 1092.

23. Civil Practice Act, § 34. And see *supra*, Art. IV-A, Title of Plaintiff.

24. Civil Practice Act, § 35; *Stevens v. Hauser*, 39 N. Y. 302; *Doherty v. Matseil*, 119 N. Y. 646; *Archibald v. N. Y. C., etc., R. R. Co.*, 157 N. Y.

574; *Pell v. Pell*, 65 App. Div. 388, 73 N. Y. Supp. 81; *aff'd without opinion*, 169 N. Y. 607; *Burns Bros. v. City of New York*, 178 App. Div. 615, 165 N. Y. Supp. 615; *Porter v. McGrath*, 41 Super. Ct. 84; *Doherty v. Quinn*, 3 St. Rep. 517.

The words "legal title," as used in section 35 of the Civil Practice Act creating a presumption of possession

The burden is on one claiming title by adverse possession to show that he and his predecessors have held the premises in hostility to the true owner.²⁵

On the other hand, a possession accompanied by the usual acts of ownership is deemed to be adverse until it is shown to be subservient to the title of another.²⁶

Entry and possession under a deed or judgment may be deemed adverse,²⁷ but evidence that the person occupying real estate had a deed therefor is not sufficient to raise presumption that the possession was adverse, without showing that the possession was taken under such deed.²⁸ Possession, under a title not adverse to the grantor, is not sufficient.²⁹

The mere fact of twenty years' possession is not conclusive and does not constitute an adverse possession so as to defeat the assertion of the paper title, but to accomplish such result possession must be inconsistent with the right of possession of the person holding the paper title.³⁰ No

where a party in ejectment establishes a legal title, mean something more than a paper title. *Aubuchon v. New York, New Haven & Hartford R. R. Co.*, 137 App. Div. 834, 122 N. Y. Supp. 581.

25. *McGreggor v. Comstock*, 17 N. Y. 162; *Stevens v. Hauser*, 39 N. Y. 302; *Ruess v. Ewen*, 34 App. Div. 484, 54 N. Y. Supp. 357; aff'd, 165 N. Y. 633; *Pell v. Pell*, 65 App. Div. 388, 73 N. Y. Supp. 81; aff'd without opinion, 169 N. Y. 607; *Kelly v. Kelly*, 72 App. Div. 487, 76 N. Y. Supp. 558; *Hindley v. Metropolitan Elevated R. Co.*, 42 Misc. 56, 85 N. Y. Supp. 561; aff'd, 103 App. Div. 504, 93 N. Y. Supp. 53; rev'd, 185 N. Y. 353.

Trustee.—Where, under a will, a trustee has power only to distribute the income of trust property, he cannot acquire title thereto by adverse possession. *Dresser v. Travis*, 39 Misc. 358, 79 N. Y. Supp. 924.

To make possession without paper title a bar in ejectment, it must be shown, by strict proof, to have been hostile in its inception. *Jackson v. Parker*, 3 Johns. Cas. 124; *Brandt v. Ogden*, 1 Johns. 156.

26. *Monnot v. Murphy*, 207 N. Y. 240.

27. Civil Practice Act, § 37; *Green v. Horn*, 128 App. Div. 686, 112 N. Y.

App. Div. 726, 102 N. Y. Supp. 43.

Title not asserted under deed.—Upon evidence that a party never had possession of premises, never asserted any title through a deed, or took any steps to obtain possession, never paid any taxes or exercised any acts of ownership and never claimed to own the premises or to have any knowledge or possession of a deed, except so far as the presumption went from its being on record in the county clerk's office; it was held that there was no adverse possession which would support presumption of a grant. *Mannix v. Rioridan*, 75 App. Div. 135, 77 N. Y. Supp. 357.

Possession adverse to judgment.—The fact that one had obtained a judgment that he was the owner of certain lands and that another had no title thereto does not prevent the statute of limitations from running on behalf of the latter as against the title under the judgment. *Monnot v. Murphy*, 207 N. Y. 240.

28. *Cutting v. Burns*, 57 App. Div. 185, 68 N. Y. Supp. 269.

29. *Nash v. Kemp*, 49 How. Pr. 522; *Moody v. Moody*, 16 Hun, 189.

30. *Miller v. Warren*, 94 App. Div. 192, 87 N. Y. Supp. 1011; aff'd, 182 N. Y. 539.

possession can be deemed adverse to a party who has not at the time the right of entry and possession.³¹ Thus, possession does not begin to be adverse as against a person entitled, after the determination of a prior estate, during the continuance of that estate.³² The possession of a tenant for life is rightful and not adverse to a remainderman or reversioner. No right of action for possession of real property accrues to a remainderman or reversioner during the life of one holding such property as a tenant for life.³³ The possession of a vendee, under an executory contract, cannot become adverse until he has complied with the conditions of his contract as against his vendor; then it may become adverse.³⁴

2. Claim of title.

Possession to be adverse must be under a claim of title;³⁵ a squatter acquires no title.³⁶

A single statement by a party acknowledging that he claims no title fastens a character upon his possession, which makes it unavailable for the establishment of a right by

31. *Robinson v. Phillips*, 56 N. Y. 634; *Doherty v. Quinn*, 3 St. Rep. 517.

32. *Fleming v. Burnham*, 100 N. Y. 1; *Cramp v. Dady*, 162 App. Div. 321, 147 N. Y. Supp. 619; *McCormack v. Coddington*, 46 Misc. 510, 95 N. Y. Supp. 46.

33. *Jefferson v. Bangs*, 197 N. Y. 35; *Partenfelder v. People*, 211 N. Y. 355.

34. *Vrooman v. Shepherd*, 14 Barb. 441; *Briggs v. Prosser*, 14 Wend. 227; *Jackson v. Camp*, 1 Cow. 605.

35. *Higginbotham v. Stoddard*, 72 N. Y. 94; *Bedell v. Shaw*, 59 N. Y. 46; *Smith v. Faulkner*, 48 Hun. 186, 15 St. Rep. 837; *De St. Laurent v. Gescheidt*, 18 App. Div. 121, 45 N. Y. Supp. 730; *Scheer v. Long Island R. R. Co.*, 127 App. Div. 267, 111 N. Y. Supp. 569; *Sanders v. Riedinger*, 19 Misc. 289, 43 N. Y. Supp. 127.

A telephone company erecting its lines on the land of another without a claim of title cannot acquire a right by adverse possession to continue such lines thereon. *Andrews v. Delhi & Stamford Telephone Co.*, 36 Misc. 23, 72 N. Y. Supp. 50; *aff'd*, 66 App. Div. 616, 73 N. Y. Supp. 1129.

Champerty.—To make the possession of land adverse so as to avoid a deed under the statute against champerty, such possession must be under claim of specific title adverse to the grantor, and general assertion of ownership irrespective to any particular title is insufficient. *Crary v. Goodman*, 22 N. Y. 170; *Arents v. Long Island R. R. Co.*, 156 N. Y. 1; *Biglow v. Biglow*, 39 App. Div. 103, 56 N. Y. Supp. 794; *Smith v. Faulkner*, 15 St. Rep. 637. A deed given while the true owner is in actual possession, by his tenants, is void and insufficient as a basis for an adverse possession. *McRoberts v. Bergman*, 32 St. Rep. 1111, 11 N. Y. Supp. 108.

Conclusion of witness.—Testimony of a witness that his wife claimed to own land in question, or that she occupied the land claiming to own it, is inadmissible as being a mere conclusion. Such claims of ownership must be shown by her acts and declarations. *Diefendorf v. Thomas*, 37 App. Div. 49, 55 N. Y. Supp. 699.

36. *Matter of Mayor of New York*, 44 St. Rep. 189, 18 N. Y. Supp. 82.

adverse possession.³⁷ The claim, in order to sustain the defense of adverse possession, must be of the entire title.³⁸ He must claim some specific title adverse to that of the grantor,³⁹ but the validity of the claim is not important.⁴⁰ An invalid claim is as effectual, as a constituent of the notice to the rightful owner that the occupation under it is in defiance of his title, as a valid claim.⁴¹ A claim of title may be made by acts as well as by assertions.⁴²

A title by adverse possession only arises from long-continued use or possession when a man can show no other title or right of possession, the law implying a grant from the fact of a continued use or possession without objection. If other title or right of possession can be shown no right in the premises adverse to that right or title will be implied from possession. The possession or use will be held to be under the known title. Thus, the mere statement of an unfounded claim by one in lawful possession cannot change the character of his possession nor impose any obligation on the other party to alter his position in relation thereto.⁴³

Adverse possession, even when held by a mistake or through inadvertence, may ripen into a prescriptive right after twenty years of such possession, the actual physical occupation and improvement being, in a proper case, sufficient evidence of the intention to hold adversely.⁴⁴

3. Permissive entry.

An occupancy by permission does not constitute adverse possession.⁴⁵ A person holding under a license cannot set up adverse possession, nor can his grantee.⁴⁶ Permission to build an angle of a barn across a boundary line does not

37. *De Lancey v. Hawkins*, 23 App. Div. 8, 49 N. Y. Supp. 469; *aff'd without opinion*, 163 N. Y. 587.

38. *Scheer v. Long Island R. R. Co.*, 127 App. Div. 267, 111 N. Y. Supp. 569; *Howard v. Howard*, 17 Barb. 663; *Smith v. Burtis*, 9 Johns. 180.

39. *Higinbotham v. Stoddard*, 72 N. Y. 94; *Belcher v. Belcher*, 134 App. Div. 726, 119 N. Y. Supp. 144; *Meighan v. Rohe*, 166 App. Div. 175, 151 N. Y. Supp. 785; *modified*, 216 N. Y. 677; *Cornelius v. Hall*, 32 Misc. 663, 66 N. Y. Supp. 451.

40. *American Bank Note Co. v. New York Elevated R. R. Co.*, 129 N. Y. 252; *Monnot v. Murphy*, 207 N. Y. 240; *Humbert v. Trinity Church*, 24 Wend.

587; *LaFrombois v. Jackson*, 8 Cow. 589; *Northrup v. Wright*, 7 Hill, 476; *Monroe v. Merchant*, 26 Barb. 383.

41. *Monnot v. Murphy*, 207 N. Y. 240.

42. *Buffalo Creek R. R. Co. v. Collins*, 41 App. Div. 8, 58 N. Y. Supp. 65; *Christie v. Gage*, 2 T. & C. 344.

43. *Burns Bros. v. City of New York*, 178 App. Div. 615, 165 N. Y. Supp. 615.

44. *Belotti v. Bickhardt*, 228 N. Y. 296.

45. *Burden v. S. S. R. R. Co.*, 5 Hun, 184; *aff'd*, 67 N. Y. 588.

46. *Luce v. Carley*, 24 Wend. 451; *Babcock v. Utter*, 1 Keyes, 397.

make the entry the commencement of an adverse holding.⁴⁷ Entry upon premises under an instrument stating that the party might occupy the premises up to a certain date upon certain conditions does not constitute adverse possession where the party had never surrendered the possession thus acquired.⁴⁸ An entry under license to collect rent does not constitute an adverse possession.⁴⁹

4. Landlord and tenant.

Section 41 of the Civil Practice Act provides that the possession of a tenant is deemed the possession of the landlord until twenty years after the termination of the tenancy. The effect of this section is to prevent the running of the claim to adverse possession in favor of a tenant for the period prescribed, whether he has acquired another title or whether he has claimed to hold adversely. For the twenty years the landlord has the benefit and the protection of the statutory presumption against the consequences of his fault or mistake or accident and against acts of his tenant.⁵⁰ This rule applies only where the conventional relation of landlord and tenant exists.⁵¹ The possession of the tenant is in subordination to the title of the landlord and continues so during the running of the term and for twenty years after the end of the term, notwithstanding any claim by the tenant or his successors of a hostile title.⁵²

Where the relation of landlord and tenant has been once established, the possession of the latter and of his grantee is that of the landlord, and not hostile or adverse; and this is so where the grantee has taken a deed of the fee in ignorance of the fact that his grantor stood in the relation of tenant, the latter denying any such relation.⁵³ The fact that a tenant under a lease in fee remains in possession of premises after his interest has been sold under judgments recovered by owner of the landlord's interest does not initiate an adverse possession.⁵⁴

Where there is no written lease, the tenancy will not be presumed to continue after twenty years from the last payment of rent. After that time it will be presumed that the

47. *Allerton v. Steele*, 59 App. Div. 622, 69 N. Y. Supp. 594.

48. *Harison v. Casswell*, 17 App. Div. 252, 45 N. Y. Supp. 560.

49. *Doherty v. Matsell*, 16 St. Rep. 593; *aff'd*, 17 St. Rep. 747, 1 N. Y. Supp. 426.

50. *Church v. Schoonmaker*, 115 N.

Y. 570.

51. *Sands v. Hughes*, 53 N. Y. 287.

52. *Whiting v. Edmunds*, 94 N. Y. 309.

53. *Bedlow v. N. Y. Floating Dry Dock Co.*, 112 N. Y. 263.

54. *Church v. Hempstead*, 27 App. Div. 412, 50 N. Y. Supp. 325.

former tenant held under a right adverse to his former landlord. Twenty years of such adverse possession bars an action.⁵⁵ But on a grant in fee reserving rent where rent remains unpaid for more than twenty years, though it may be presumed that rent which accrued more than twenty years past has been paid, an extinguishment of the covenant is not presumed.⁵⁶

5. As against co-tenant.

The possession of one tenant in common, as a general rule, never bars that of his co-tenants, since possession by a tenant in common and not adversely is in support of the common title.⁵⁷ Heirs obtaining exclusive possession from their ancestor cannot set up adverse possession against co-heirs.⁵⁸ But a co-tenant of real property may acquire title to the interests of the other co-tenants by adverse possession, but in order to do so the possession must be open and notorious and coupled with an assertion of exclusive and hostile ownership. A presumption that a person is occupying as co-tenant may be overcome by the character of the possession.⁵⁹

Open, notorious, and exclusive possession of property by one claiming to be a co-tenant only with accompanying acts and open claims of title, indicating publicly an intention to hold the same adversely, and the fact that no objection was made to such occupancy and claims, for a period of thirty-two years, has been held to give the holder title to the property by adverse possession.⁶⁰

If one tenant in common assumes to sell and convey the entire estate, apparently doing so, and his grantee assumes

55. *Hasbrouck v. Burhans*, 6 St. Rep. 299.

56. *Central Bank v. Heydorn*, 48 N. Y. 260; *Lyon v. Odell*, 65 N. Y. 28.

57. *Kathan v. Rockwell*, 16 Hun, 90; *Jackson v. Tibbits*, 9 Cow. 241. And see, *supra*, Art. III-D-4. Action against co-tenant.

58. *Phelan v. Kelly*, 25 Wend. 389.

59. *Edwards v. Bishop*, 4 N. Y. 61; *Culver v. Rhodes*, 87 N. Y. 348; *Zapf v. Carter*, 70 App. Div. 395, 75 N. Y. Supp. 197; appeal dismissed, 176 N. Y. 576.

Partition.—Where four parties divided property, three of the deeds carrying out the agreement were in existence, but the fourth could not be found, but there was evidence that it had been

fourth party and his grantees, it was held that there was a good title by adverse possession. *Pope v. Thrall*, 33 Misc. 44, 68 N. Y. Supp. 137.

Absolute conveyance by one of two tenants in common of the whole premises does not enable the grantee, by merely taking possession, to lay the foundation for an adverse possession, so as to oust the co-tenant, without notice in fact of the adverse claim, or such open and public acts by the adverse claimant as will make his possession so visible, hostile, exclusive, and notorious that notice to the co-tenant may fairly be presumed. *Hamerslag v. Duryea*, 38 App. Div. 130, 56 N. Y. Supp. 615.

60. *Cole v. Lester*, 48 Misc. 13, 96

to take it and comes into possession, possession then taken and held by him may be treated as an ouster of the co-tenants, and constitutes adverse possession.⁶¹

C. Actual possession.

1. In general.

One who relies on adverse possession as a defense must show during the statutory period an actual, not constructive, possession.⁶² Thus, occasional trespasses upon the premises and the occasional removal of timber or other produce will not constitute an adverse possession.⁶³ And an adverse possession cannot be founded upon the gathering of sea-weed⁶⁴ or the cutting of ice from a pond.⁶⁵

61. *Sweetland v. Buell*, 164 N. Y. 541.

62. *Ward v. Cochran*, 150 U. S. 597; *Archibald v. N. Y. C. & H. R. R. R.*, 157 N. Y. 574; *N. Y. C. & H. R. R. R. Co. v. Brennan*, 24 App. Div. 343, 48 N. Y. Supp. 675; *aff'd* without opinion, 163 N. Y. 584.

Title to a cemetery lot was held not to have been obtained by adverse possession by reason of an interment therein by the husband of the claimant, the body having been disinterred after the expiration of six years. *Meiggs v. Hoagland*, 68 App. Div. 182, 74 N. Y. Supp. 234.

Conclusion.—The question of possession by one other than the owner of the legal title involves a conclusion of law which cannot be stated by a witness, but is to be drawn from the facts. *Arents v. Long Island R. R. Co.*, 156 N. Y. 1.

63. *Price v. Brown*, 101 N. Y. 669; *People v. Turner*, 145 N. Y. 451; *McGregor v. Comstock*, 17 N. Y. 162; *Fosgate v. Herkimer Mfg. Co.*, 12 N. Y. 580; *Kent v. Harcourt*, 33 Barb. 491; *Miller v. Platt*, 5 Duer, 272; *Decker v. Hunt*, 111 App. Div. 821, 98 N. Y. Supp. 174; *Pope v. Hanmer*, 8 Hun, 265; *aff'd*, 74 N. Y. 240; *Weeks v. Martin*, 32 St. Rep. 811, 10 N. Y. Supp. 656.

A title to a water front by adverse possession is not established by occasional occupation of the shore for fishing and an occasional sale of sand therefrom. *New York Central & H. R.*

R. R. Co. v. Moore, 137 App. Div. 461, 121 N. Y. Supp. 884; *aff'd*, 203 N. Y. 615.

64. *Trustees of East Hampton v. Kirk*, 68 N. Y. 459.

Adverse possession of salt meadows which are incapable of cultivation is established where the plaintiff and his predecessors for over twenty years made a regular, open and notorious use of the lands by cutting the natural grass therefrom, that being the only use for purposes of husbandry of which the land was susceptible. *Shinnecock Hills & Peconic Bay Realty Co. v. Aldrich*, 132 App. Div. 118, 116 N. Y. Supp. 532; *aff'd*, 200 N. Y. 533. Ditches around three sides of a salt meadow, which is bounded on the fourth side by a creek, constitute a "substantial inclosure" within the meaning of section 38 of Civil Practice Act so as to give title by adverse possession. Annual mowing of the salt grass on such lands is also sufficient compliance with the requirement of said section that the lands shall be "usually cultivated." *Koch v. Ellwood*, 138 App. Div. 584, 123 N. Y. Supp. 502. Proof of occasional resort to the lands in question in the cutting of salt meadow grass is not sufficient to establish occupancy or possession in the absence of the deed describing and including the premises. *Roberts v. Baumgarten*, 110 N. Y. 380.

65. *Gouverneur v. National Ice Co.*, 33 St. Rep. 1, 11 N. Y. Supp. 87.

The fact that a person for twenty years claimed title to lands that were uninclosed, unimproved, surveyed them, marked the boundaries by monuments, and cut trees thereon from time to time and paid taxes for a few years, does not establish adverse possession, nor, in the absence of constructive possession, authorize the presumption of a grant from the true owner.⁶⁶

The actual possession and improvement of premises, as owners are accustomed to possess and improve their estates, without any payment of rent, or recognition of title in another, or disavowal of title in himself, will, in the absence of all other evidence, be sufficient to raise a presumption of the occupant's entry and holding as absolute owner, and, unless rebutted by other evidence, will establish the fact of a claim of title. Possession, accompanied by the usual acts of ownership, is presumed to be adverse until shown to be subservient to the title of another.⁶⁷

Where parties in possession of land in a city have from time to time repaired a dwelling situated thereon, fenced the premises, planted trees, and cultivated parts of the ground as a garden, and occupied the premises in the way in which city lots are usually occupied, their acts are sufficient, without any assertion of title, to establish the claim of title thereto.⁶⁸ Where the encroachment of a wall of a building on an adjoining lot has been maintained for more than twenty years, title is obtained by adverse possession.⁶⁹

Where it appears there has been an actual occupation by a grantor of plaintiff of the premises in question under an absolute conveyance, accompanied by acts of dominion, such as residence thereon, cutting the timber for firewood, the evidence establishes a legal right to possession.⁷⁰

While a person building a wharf or dock on a bulk-head line may be guilty of trespass, he is not guilty of committing or maintaining a nuisance, and his action, if long continued, may ripen into title by adverse possession.⁷¹

Evidence that plaintiff has been in possession of property more than twenty years, claiming title to beach and meadow lands under a written instrument, has cut hay

66. *Mission of the Immaculate Virgin v. Cronin*, 143 N. Y. 524.

67. *Monnot v. Murphy*, 207 N. Y. 240.

68. *N. Y. C. & H. R. R. Co. v. Brennan*, 12 App. Div. 103, 42 N. Y. Supp. 529.

69. *Roulston v. Stewart*, 40 App.

son v. Platt, 35 App. Div. 533, 54 N. Y. Supp. 842; *aff'd on opinion below*, 158 N. Y. 712.

70. *Bennett v. Kovarik*, 23 Misc. 73, 51 N. Y. Supp. 752; *aff'd on opinion below*, 44 App. Div. 629, 60 N. Y. Supp. 1133.

71. *Matter of City of New York*, 217

thereon for cattle and pastured cattle, built a bridge over a creek running through it and received rent for bath houses on the beach, and has wharves, boat houses, and other buildings upon it, has been held sufficient to require the submission of the question of adverse possession to the jury.⁷²

Where one has color of title by deed to a farm or lot, possession of part is deemed possession of the whole, but this is not applicable where the land is a large tract not capable of being used together.⁷³ One cannot assert title by adverse possession under deeds not purporting to convey the strip of land in dispute, and the actual possession arising by the occupation of a dwelling house on the front part of the lots has been held not constructive possession of a portion in the rear covered by the defendant's deed.⁷⁴

The fact that the plaintiff paid taxes and caused the land to be divided into lots is no evidence of possession, actual or constructive.⁷⁵

2. Substantial inclosure.

A substantial inclosure protecting land is deemed to show possession and occupation thereof.⁷⁶ The intent is to provide with reference to the inclosure that it shall be merely such as will give notice to the world that the ownership of the property is claimed.⁷⁷ The rule prescribing either a substantial inclosure or usual cultivation or improvement, as a condition of adverse possession by the person claiming title to the land, not founded upon a written instrument, has no application to an easement as of passage. Every user is presumed to have been under claim of title and adverse, and the burden is upon the party alleging that the user has been by virtue of a license or permission, to prove that fact by affirmative evidence.⁷⁸

72. *O'Donohue v. Cronin*, 32 App. Div. 379, 70 N. Y. Supp. 737.

73. *Thompson v. Burhans*, 61 N. Y. 52.

74. *Brainin v. New York, New Haven & Hartford R. R. Co.*, 136 App. Div. 393, 120 N. Y. Supp. 1093.

75. *Thompson v. Burhans*, 61 N. Y. 52; *Consolidated Ice Co. v. The Mayor of New York*, 166 N. Y. 92.

76. *Question for jury*.—Where plaintiff's evidence showed an actual inclosure of the property in dispute as part of his farm, continuously for more than twenty years, but defendant's evi-

dence was that the fence was temporary and mainly used to keep plaintiff's cattle from entering defendant's woods, it was held the question as to whether the portion claimed was protected by an inclosure and whether it had been usually cultivated and improved, within the meaning of the statute, was for the jury. *Barnes v. Light*, 116 N. Y. 34.

77. *Bolton v. Shriever*, 49 Super. Ct. 168.

78. *Colburn v. Marsh*, 68 Hun, 269, 52 St. Rep. 378, 22 N. Y. Supp. 990; *aff'd*, 144 N. Y. 657.

The building of a fence around land does not alone, as matter of law, necessarily constitute a taking of possession, and where the land is at the time occupied and cultivated by a tenant of one claiming title, and such occupancy continues without being interfered with in any degree and without any recognition by the tenant of any right in the builder of the fence as the owner or occupant, and when it appears the fence was built without the knowledge of such claimant, a finding is justified that the building was a mere entry, not a termination of his possession.⁷⁹ A brush and pole fence may be a substantial inclosure.⁸⁰

Entry of defendant's grantor in fencing of the land of plaintiff's grantor, with his knowledge and consent, the act being in reparation for the taking of land by the latter elsewhere, is held to make the subsequent possession adverse.⁸¹ The fact that a lot otherwise fenced in was left open on the side toward the premises owned by the grantor of the party in possession is consistent with a substantial inclosure.⁸²

It is insufficient to establish title by adverse possession to rough woodland to show that, although for part of the time since 1871 it had been surrounded by a fence, this had for a long time prior to 1906 been broken down on one side so that the tract was bounded only by a ditch on the west, in the absence of proof that the land had been cultivated in any way, or improved, or used for any purpose whatever.⁸³

The driving of piles in land adjoining a dock, and leaving them without cover or any use whatever for twenty years thereafter, is not protecting such lands by a substantial inclosure.⁸⁴ One does not obtain possession of a disputed parcel by fencing it where the defendant removes the fence the day after it is built.⁸⁵

Where an abandoned railroad right of way which was sold on foreclosure to the plaintiff's predecessor in title was unfenced, but was a portion of a larger tract of agricultural lands which were fenced, acts of tillage, use and enjoyment by the owner of the large tract may be shown to establish adverse possession of the abandoned right of way, and it is

79. *Landon v. Townshend*, 129 N. Y. 166.

80. *Hill v. Edie*, 17 St. Rep. 255, 1 N. Y. Supp. 480.

81. *Allerton v. Steele*, 59 App. Div. 622, 69 N. Y. Supp. 594.

82. *Brown v. Doherty*, 93 App. Div. 190, 87 N. Y. Supp. 563; *aff'd*, 185 N.

Y. 383.

83. *Reynolds v. White*, 143 App. Div. 595, 128 N. Y. Supp. 529.

84. *Fortier v. D., L. & W. R. R. Co.*, 93 App. Div. 24, 86 N. Y. Supp. 896.

85. *Kahler v. Thron*, 155 App. Div. 744, 140 N. Y. Supp. 1002.

not essential that a specific use of the site of the former right of way itself be shown.⁸⁶

D. Notoriety.

The general rule is that possession to be adverse must be open and notorious and such as will notify parties seeking information upon the subject that the premises are not held in subordination of any title or claim of others, but against all titles and claimants.⁸⁷ It is not necessary, however, that the true owner have had actual notice of the hostile possession, or that the claimant assert his ownership in public in so many words, for a claim of title may be made by acts as well as by assertions.⁸⁸ Evidence that the defendants, with others, occupied the land for fishing purposes is insufficient to prove open and notorious acts of ownership.⁸⁹

E. Exclusiveness.

One of the elements necessary for adverse possession is that the possession be exclusive.⁹⁰ Proof of undisturbed possession of land for more than twenty years, under deeds purporting to convey the same, does not establish title by adverse possession in the absence of proof that the entry was under the deeds in question, and was exclusive of any other right.⁹¹ No possession not under a claim of title in fee and exclusive of any other right in the land is adverse to the legal title so as to bar the owner or ripen into title by lapse of time. Section 37 of the Civil Practice Act has no application to possession under a claim to some use, term, or interest less than a fee.⁹² The possession cannot be in participation with the owners or others.⁹³

In the exercise of the power of eminent domain by or in behalf of a railroad company, the permanent public use of the land is contemplated, and the use of the railroad com-

86. *Arnold v. New York, Westchester & Boston R. Co.*, 173 App. Div. 764, 159 N. Y. Supp. 258.

87. *Sharon v. Tucker*, 144 U. S. 533; *Kelly v. Kelly*, 72 App. Div. 487, 76 N. Y. Supp. 558; *Buttery v. R. W. & V. R. R. Co.*, 14 St. Rep. 131; *Bliss v. Johnson*, 94 N. Y. 235; *Doherty v. Matsell*, 119 N. Y. 646.

88. *Green v. Horn*, 128 App. Div. 686, 112 N. Y. Supp. 993.

89. *Weeks v. Dominy*, 161 App. Div.

414, 146 N. Y. Supp. 624.

90. *Sharon v. Tucker*, 144 U. S. 533; *Heller v. Cohen*, 154 N. Y. 300; *Ruess v. Ewen*, 34 App. Div. 484, 54 N. Y. Supp. 357; *aff'd*, 165 N. Y. 633.

91. *Freedman v. Oppenheim*, 80 App. Div. 487, 81 N. Y. Supp. 110; *rev'd*, 102 App. Div. 622, 92 N. Y. Supp. 878; *rev'd*, 187 N. Y. 101.

92. *Scheer v. Long Island R. R. Co.*, 127 App. Div. 267, 111 N. Y. Supp. 569.

93. *Ward v. Cochran*, 150 U. S. 597.

pany while the easement exists is exclusive of the owner of the fee.⁹⁴

F. Continuity.

The adverse possession must continue twenty years in order to establish a defense;⁹⁵ possession for less than the statutory period is not a bar.⁹⁶ It must be continuous during the whole time.⁹⁷

The claim of adverse possession may continue unbroken by a succession of tenants and where this occurs the adverse possession may be just as effectual as though the premises were held during the whole period by one person. All that is necessary in order to make an adverse possession effectual for the statutory period by successive persons is that such possession be continued by an unbroken chain of privity between the adverse possessors.⁹⁸

Where a deed expressly excludes a particular parcel of land there is no privity of contract between the parties in regard to it, and the grantor's possession thereof cannot be tacked on to the grantee's possession for the purpose of establishing title by adverse possession in the grantee.⁹⁹

G. Nature of title acquired by adverse possession.

Prescription or adverse possession is, in and of itself, a method of obtaining title to real property.¹ Continuous adverse possession for a period sufficient to bar an action not only cuts off the owner's remedy, but divests him of his estate and transfers it to the party holding adversely. The adverse possession is conclusive evidence of title in the latter.² The title is as strong as a title obtained by grant, and it is not forfeited by an interruption of the occupation

94. *Long Island R. R. Co. v. Mulry*, 212 N. Y. 108.

95. *Clark v. Davis*, 19 N. Y. Supp. 191; *Woodruff v. Paddock*, 130 N. Y. 618.

96. *Robinson v. Phillips*, 56 N. Y. 634; *Drew v. Swift*, 46 N. Y. 204; *Jackson v. Rightmyre*, 16 Johns. 314.

97. *Wheeler v. Spinola*, 54 N. Y. 377; *Yates v. Vandebogert*, 56 N. Y. 526; *Buttery v. R. W. & V. R. R. Co.*, 14 St. Rep. 131; *Bliss v. Johnson*, 94 N. Y. 235; *Doherty v. Matsell*, 119 N. Y. 646.

98. *Belotti v. Bickhardt*, 228 N. Y. 296.

99. *Staples v. Schnackenberg*, 148 App. Div. 161, 132 N. Y. Supp. 1092.

1. *Satterlee v. Kobbe*, 173 N. Y. 96; *Freedman v. Oppenheim*, 187 N. Y. 101; *Tarplee v. Sonn*, 109 App. Div. 241, 96 N. Y. Supp. 6.

Burial lot.—In *Conger v. Kinney*, 16 N. Y. Supp. 752, 42 St. Rep. 906, and *Conger v. Treadway*, 43 St. Rep. 874, 132 N. Y. 259, it was held that the use of a plot for burial purposes for more than twenty years, under the circumstances, gave defendant title by adverse possession.

2. *Baker v. Oakwood*, 123 N. Y. 16, 33 St. Rep. 223.

thereof.³ But a railroad in possession of lands for over twenty years under condemnation proceedings brought to acquire a right of way but which were void for failure to join the true owner does not acquire title by adverse possession, but merely an easement by adverse user.⁴

Where the State, through its agents, took land for a canal, claiming to act under a statute which provided for acquisition of the fee, and remained in possession for more than twenty years, it was held that even if the statute were unconstitutional, the title of the State became complete and absolute by adverse possession.⁵

H. Extension of period to person under disability.

Under section 43 of the Civil Practice Act, infants, insane persons, or persons imprisoned for less than life, are given an additional period during which they may assert their title as against one claiming by adverse possession.⁶ Adverse possession cannot be extended by the disability for more than ten years after the disability ceases.⁷ Any disability of heirs to whom title to land descends after commencement of adverse possession against the ancestor does not extend their time for bringing ejectment therefor beyond the twenty years limited to the ancestor.⁸ The death of the plaintiff's predecessor creates no new right of possession where the statute has fully run against him during his lifetime.⁹

Mere nonresidence of the defendant does not operate to prevent the acquisition of title by adverse possession, where under a claim of title he occupied the premises personally during a portion of the year, and at other times through tenants or servants.¹⁰

Though the owner of land was an infant just born when adverse possession of it began, and died before his right of action to recover was barred, leaving infant heirs, their right of action, as his would have been, is barred, if there was no other disability than infancy, when the possession has continued thirty-one years.¹¹

3. *Sherman v. Kane*, 86 N. Y. 57.

4. *Scheer v. Long Island R. R. Co.*, 127 App. Div. 267, 111 N. Y. Supp. 569.

5. *Eldridge v. City of Binghamton*, 120 N. Y. 309.

6. *Ruess v. Ewen*, 34 App. Div. 484, 54 N. Y. Supp. 357; *aff'd*, 165 N. Y. 633.

7. *Hoepfner v. Sevestore*, 30 St. Rep.

296, 10 N. Y. Supp. 51.

8. *Messinger v. Foster*, 115 App. Div. 689, 101 N. Y. Supp. 387.

9. *Baker v. Duff*, 136 App. Div. 13, 120 N. Y. Supp. 184; *aff'd*, 202 N. Y. 570.

10. *French v. Wray*, 166 App. Div. 471, 151 N. Y. Supp. 1015.

11. *Messinger v. Foster*, 115 App. Div. 689, 101 N. Y. Supp. 387.

I. Presumption of ancient grant.

The time of possession of lands necessary to support the presumption of a lost grant cannot, under the law of this State, be less than twenty years. In order that there may be a presumption of a lost grant arising through an open possession of lands for over twenty years, it is not necessary to prove circumstances indicating the probability that a grant was actually made. The presumption exists where the circumstances indicate only a possibility of a grant.¹² Peaceable and uncontrovertible possession for forty years justifies the presumption of an ancient grant.¹³ No presumption of a grant arises from the mere fact that a person occasionally gave permission to cut grass upon unfenced and uncultivated land.¹⁴

J. Practical location of boundary.

When owners of adjoining lands and those under whom they claim title have, for more than twenty years, occupied under claim of title up to the boundaries fixed and have recognized it as correct, though it proves not to be the true line, it will not be disturbed.¹⁵ The practical location of the boundary line and the acquiescence therein by the parties for more than twenty years is conclusive as to the location of the line.¹⁶ But acquiescence by adjoining owners in the location of a fence, built off the true line but which was not continuous for the whole width of the lands, nor straight, nor permanent structure, cannot be held an acquiescence in an invisible line continued in the same course.¹⁷ Where a fence is erected off of a proper line, while the land is uncultivated, and is by agreement retained as a division fence until it should be convenient to build a better and permanent one on the true line, it does not warrant either of the adjoining owners to claim by adverse possession up to the fence.¹⁸

K. Highways.

It is a well-settled rule of law that no title by adverse possession can be obtained to lands in a highway.¹⁹ The occupa-

12. *Kellum v. Corr*, 149 App. Div. 200, 133 N. Y. Supp. 784; *aff'd*, 209 N. Y. 486.

13. *Mission of Immaculate Virgin v. Cronin*, 50 St. Rep. 641, 21 N. Y. Supp. 750.

14. *Jarvis v. Lynch*, 91 Hun, 349, 36 N. Y. Supp. 220, 70 St. Rep. 794; *aff'd*, 157 N. Y. 445.

15. *Robinson v. Phillips*, 56 N. Y.

634; *Eldridge v. Kenning*, 12 N. Y. Supp. 693, 35 St. Rep. 190.

16. *Smith v. Faulkner*, 15 St. Rep. 637.

17. *Ousby v. Jones*, 73 N. Y. 621.

18. *Jones v. Smith*, 73 N. Y. 205.

19. *Matter of City of New York*, 217 N. Y. 1.

Alley.—The maintenance for over thirty years of obstructions on part of

tion by an individual of a portion of a highway is a mere obstruction and nuisance, and no acquiescence of the highway officials will deprive the public of the right to use the whole highway.²⁰ Where plaintiff's deed conveyed to the highway and not to the center thereof, and he had never cultivated the side of the road, he does not obtain title by adverse possession.²¹

ARTICLE IX.

MATTERS OF PRACTICE.

A. Jurisdiction of court.

Ejectment is not an action of which a justice of the peace may take cognizance.²² Where a summary proceeding to dispossess a tenant for nonpayment of rent has been discontinued in an inferior court upon the erroneous supposition that the court was ousted of jurisdiction, because the defendant interposed an answer involving title, and a subsequent action has commenced in the Supreme Court, with substantially the same pleadings, that court has jurisdiction, and has the right to treat the action as in ejectment.²³

B. Expiration of plaintiff's title before trial.

If the right or title of the plaintiff in an action for the recovery of real property or the possession thereof expires after the commencement of the action but before the trial, and he would have been entitled to recover but for the expiration, the verdict, report or decision must be rendered according to the fact; and the plaintiff is entitled nevertheless to judgment for his damages for the withholding of the property to the time when his right or title so expired.²⁴ In case of expiration of plaintiff's title before verdict, the court may render judgment for the damages for withholding the premises without judgment for the possession.²⁵ Where, after the trial and before decision of the appeal, the right and title of the plaintiffs expire, the court merely affirms the

the alley gives the occupant title by adverse possession, and deprives the other abutting owners of their easement over such part. *Lambert v. Huber*, 22 Misc. 462, 50 N. Y. Supp. 793.

20. *Driggs v. Phillips*, 103 N. Y. 77.

21. *Halleran v. Bell Telephone Co.*, 64 App. Div. 41, 71 N. Y. Supp. 685; *aff'd* without opinion, 177 N. Y. 533.

22. *McMahon v. Howe*, 40 Misc. 546, 82 N. Y. Supp. 984.

23. *Jones v. Reilly*, 174 N. Y. 97.

24. Civil Practice Act, § 1007.

The removal of a wire stretched across plaintiff's premises after he brings ejectment will not defeat the action, as the rights of the parties are governed by the facts as they stood when the action was begun. *Butler v. Frontier Telephone Co.*, 186 N. Y. 486.

25. *Lang v. Wilbraham*, 2 Duer, 171.

judgment, but no execution for the possession is awarded.²⁶ No supplemental answer is necessary.²⁷ But the rule does not apply to ejectment for non-payment of rent where the plaintiff assigns his interest after suit brought.²⁸

C. Trial.

An action of ejectment must be tried by jury unless a jury is waived or a reference is directed.²⁹ The fact that plaintiff, in addition to facts sufficient for ejectment, asks other relief, does not change the character of the action, or indicate an intent on the part of the plaintiff to sue in equity and waive a right to trial by jury.³⁰ The fact that incidental equitable relief is asked in the complaint does not deprive the defendant of its right to a jury trial.³¹ A plaintiff is entitled to have the whole case, and every question of fact arising upon the evidence, submitted to the jury.³² It is the province of a jury to determine upon all the evidence the location of an indefinite boundary line disputed in an action of ejectment.³³

Where the evidence showed that the defendant and his predecessor had occupied the premises for more than twenty years and there was a conflict in the evidence as to the adverse holding, the case should be submitted to the jury.³⁴

An action of ejectment is triable in the county where the property or some part thereof is situated.³⁵

D. Evidence of declarations and admissions.

The plaintiff in an action of ejectment may prove any admissions made by the defendant showing or tending to show that he did not claim title to the premises.³⁶ But the admissibility of declarations of deceased owners presents a difficult question. The declarations of one claiming to hold adversely to his cotenant, made during the period of such adverse holding, may be proved by those claiming under him for the purpose of characterizing his possession and show-

26. *Olendorf v. Cook*, 1 *Lans.* 37.

27. *Lang v. Wilbraham*, 2 *Duer*, 171.

28. *Van Rensselaer v. Owen*, 48 *Barb.* 61.

29. *Civil Practice Act*, § 425; *Pure Strains Farm Co. v. Smith*, 99 *Misc.* 108, 163 *N. Y. Supp.* 615; *Rzepecka v. Urbanowski*, 114 *Misc.* 30, 185 *N. Y. Supp.* 389.

30. *Bennett v. Von der Bosch*, 26 *App. Div.* 311, 49 *N. Y. Supp.* 802; *appeal dismissed*, 155 *N. Y.* 693.

31. *Remsen v. N. Y., Brooklyn & M. Beach R. Co.*, 111 *App. Div.* 413, 97 *N. Y. Supp.* 902.

32. *DeForest v. Walters*, 153 *N. Y.* 229.

33. *Gilmartin v. Buchanan*, 134 *App. Div.* 587, 119 *N. Y. Supp.* 489.

34. *Tindale v. Powell*, 88 *Hun*, 193, 68 *St. Rep.* 622, 34 *N. Y. Supp.* 659.

35. *Civil Practice Act*, § 183.

36. *Conselyea v. Van Dorn*, 129 *App. Div.* 520, 114 *N. Y. Supp.* 61.

ing the *quo animo* of his occupancy.³⁷ Where the ownership, rather than the possession, of lands is in question, declarations of a deceased owner to the effect that they were not covered by his deeds are inadmissible. Such declarations are admissible only to show the nature and extent of the possession and the character and equity of the claim of title under which the property was held or other material facts resting *in pais*.³⁸ Declarations of a grantor made subsequent to the grant, although he was then in possession, are not admissible in an action brought by his grantee to characterize such possession or show that the conveyance was not intended to be absolute.³⁹

Where an action presents no issue as to the possession or ownership of adjoining lands, and merely raises a controversy over the division line between them, as controlling

37. *Cole v. Lester*, 48 Misc. 13, 96 N. Y. Supp. 67.

38. *Gilmartin v. Buchanan*, 134 App. Div. 587, 119 N. Y. Supp. 489.

Declarations excluded.—In *People v. Holmes*, (166 N. Y. 540, at 545), the court discusses the right to prove declarations and admissions of one in possession of real estate, where the question is whether such person was in possession at a given time, or whether being in possession, he was under a claim of title; stating that acts done upon the land or the admission of the party, and in many cases his declarations, are received as in the nature of and part of the *res gestæ*, but they are not competent as a substitute for or in contradiction of the paper title. That parol declarations being admissions are not admissible as evidence of title, but only to show the nature and extent of the possession and the character and quality of the claim of title under which the property was held. The rule is reiterated that a party cannot take title to lands by parol admissions of his adversary or be deprived of title by declarations of his adversary's predecessor in title, and that an examination of the cases discloses that in every instance where evidence of that character was allowed, the question of possession was in issue.

When received.—The exclusion, dur-

ing the trial of such an action brought by the owners of land, as tenants in common, to recover the possession thereof upon the expiration of a tenancy by the curtesy therein, of answers to questions put to the lessee as a witness, in which she was asked to state a conversation which he had testified had taken place between one of the reversioners and herself, and to state whether the said reversioner had said anything to her with reference to her remaining in possession of the premises under her mortgage, cannot be sustained on the ground that the inquiry was not within the issues raised by the pleadings, where the complaint alleges that the defendants are wrongfully in possession without leave of the plaintiffs and without legal right, and the answer denies the allegation; although the reversioner in question, being one of several tenants in common, could not affect the interest of his co-tenants, still he had the right to bind himself and his own interest, and as the questions were broad enough to cover a transaction in which he might have bound or affected his own right to possession, the evidence sought to be elicited was competent and material. *Barson v. Mulligan*, 191 N. Y. 306; s. c., 198 N. Y. 23.

39. *Williams v. Williams*, 142 N. Y. 156, 58 St. Rep. 625.

the right of the plaintiff to sue for a trespass, the defendant cannot prove title in third parties by declarations of former grantors of the lot not owned by the plaintiff, that the division line was not located in their time as the plaintiff now claims it to be.⁴⁰ Evidence of a conversation wherein the plaintiff's predecessor stated to the defendant's predecessor that he claimed the disputed parcel, but that the defendant's predecessor might use it until wanted, is admissible to show that the defendant's predecessor's possession was subordinate to that of the plaintiff's predecessor, and not adverse thereto.⁴¹ Statements in a purchase-money mortgage as to the dimensions of the land conveyed to the mortgagor are not admissible in an action against one who was a stranger to the transaction.⁴²

Where the Appellate Division has construed a deed in favor of plaintiff, the declarations of the grantor before the execution of the deed to defendant, tending to establish a boundary other than that made by the deed, as so construed, are inadmissible upon a new trial.⁴³

E. Evidence of boundaries.

Where monuments existing at the time of the conveyance and referred to in such conveyance have since disappeared, parol evidence of their location is competent. A conveyance is to be construed in reference to its visible locative calls, as marked or appearing upon the land, in preference to quantity, course, or distance, and any particular may be rejected if inconsistent with the other parts of the description and sufficient remains to locate the land intended to be conveyed.⁴⁴ Natural or artificial boundaries plainly referred to must control measurements and distances with which they do not agree.⁴⁵ Monuments of early surveys in the forest when found and identified are entitled to greater weight in determining boundaries than the courses and distances given by such surveys. Declarations of the occupants of land, made while pointing out a boundary line, are admissible in an action of ejectment, as the only effect of such evidence is to show the extent of their possession.⁴⁶

40. *People v. Holmes*, 166 N. Y. 540.

41. *Kahler v. Thorn*, 155 App. Div. 744, 140 N. Y. Supp. 1002.

42. *Burke v. Jackson*, 32 St. Rep. 364, 11 N. Y. Supp. 2.

43. *Harris v. Oakley*, 26 St. Rep. 824, 7 N. Y. Supp. 232.

44. *Robinson v. Kine*, 70 N. Y. 154.

45. *Katz v. Kaiser*, 10 App. Div. 137, 41 N. Y. Supp. 776; *aff'd*, 154 N. Y. 294.

46. *Skinner v. Odenbach*, 85 Hun, 595, 33 N. Y. Supp. 282, 67 St. Rep. 102.

F. Appointment of receiver.

The court will not, pending an action of ejectment at the instance of the plaintiff, appoint a receiver of the rents of the premises in suit unless equities appear.⁴⁷ The appointment of a receiver of rents and profits pending the litigation is improper in an action of ejectment brought against one in possession under a contract of sale. Such remedy is inconsistent with the nature of the action and the relief sought.⁴⁸ An injunction cannot be issued to restrain a receiver appointed in another action from paying over rents collected from the premises by him in accordance with the decree in such action.⁴⁹

Where defendant in ejectment in order to avoid the appointment of receiver gave an undertaking to secure the rents, and on the trial the defendant succeeded, but judgment was reversed and plaintiff finally had judgment for possession and the rental value, it was held that the undertaking was not merged in or superseded by the first judgment but remained operative and could be enforced.⁵⁰

G. Recovery against occupants severally.**1. Civil Practice Act, § 1005. Action against occupants of apartments.**

In a case where two or more defendants occupy different apartments in a building, in an action to recover the building and its curtilage, the plaintiff is entitled to judgment jointly against all the defendants who are liable to him.

2. Civil Practice Act, § 1006. When plaintiff may recover against one defendant subject to rights of others.

In an action for the recovery of real property or the possession thereof, where one or more answering defendants hold under another defendant, and the plaintiff elects to proceed against the latter, subject to the rights and interests of the former, if the plaintiff recovers final judgment against the defendant under whom they hold, the judgment operates as a transfer to the plaintiff of that defendant's right, title and interest, and the costs of the defendant or defendants so answering are in the discretion of the court.⁵¹

47. *People v. Mayor*, 10 Abb. 111; *Thompson v. Sherrard*, 35 Barb. 593; *Guernsey v. Powers*, 9 Hun, 78; *Burdell v. Burdell*, 54 How. Pr. 91; *Corey v. Long*, 12 Abb. (N. S.) 427. See, however, *Sheridan v. Jackson*, 5 Wkly. Dig. 443; *Ireland v. Nichols*, 37 How. Pr. 222.

48. *LaBau v. Huetwohl*, 39 St. Rep. 854, 15 N. Y. Supp. 491.

49. *Pfeffer v. Kling*, 19 App. Div. 372, 46 N. Y. Supp. 501.

50. *Clute v. Knies*, 102 N. Y. 377.

51. **Easement.**—If the premises are subject to an easement in favor of one not a party, judgment may award possession subject to the easement. *Strong v. City of Brooklyn*, 68 N. Y. 1; *Reformed Church v. Schoolcraft*, 65 N. Y. 34. Such a judgment will not be ordered unless it appears that the defendant has been guilty of some unauthorized interference with plaintiff's rights. *DeWitt v. Village of Ithaca*, 15 Hun, 568.

The judgment should specify the

3. Practice under Code of Civil Procedure.

The Code of Civil Procedure contained special provision for the division of the action when it appeared from an answer that distinct parcels were occupied by different defendants,⁵² or when different persons succeeded to different parcels,⁵³ or when different persons succeeded to the real property and to the rents and profits.⁵⁴ These statutes were thought unnecessary upon the revision of the practice, and hence were omitted. Where conveyances were of separate parcels to different persons it was held that plaintiff could not bring a joint action against his grantees, and the purchaser from one of them.⁵⁵ Where a landlord and his tenants were made defendants in an action of ejectment, and the former answered asserting his right to possession, the action could not be severed and judgment for possession rendered against the tenants upon the ground that they have not answered, as the possession of the tenants was that of their landlord, and such order would deprive the latter of his rights without a hearing.⁵⁶

Under the Revised Statutes, where in an action against four defendants to recover possession of land, the complaint stated that one of them originally claimed title to the premises and the others were in possession under him, and that the defendants unjustly withheld the possession from the plaintiff, the answer merely denied the allegation of the complaint, as to withholding possession, and alleged that the one was the owner of and entitled to possession of the premises; on the trial it was proved by the defendants, subject to objection, that they occupied severally distinct parcels of the premises; it was held that, under the pleadings, the plaintiff was entitled to recover against all the defendants.⁵⁷

duration of the term (*Olendorf v. Cook*, 1 Lans. 45) and the nature and extent of plaintiff's interest where it is the fee subject to an easement. *Rogers v. Sinsheimer*, 50 N. Y. 646.

Where the defenses consisted of a claim that defendant had a right of way by prescription or necessity over the *locus in quo*, or that the latter was a public highway, the fact that the jury found in favor of the defendant on any one of such defenses does not entitle defendant to a general verdict, but only to a verdict that he has an easement in the property. *Burlew v. Hunter*, 41 App. Div. 142, 52 N. Y.

Supp. 453.

52. Code of Civil Procedure, § 1516.

53. Code of Civil Procedure, § 1522.

54. Code of Civil Procedure, § 1523.

55. *Voorhis v. Voorhis*, 24 Barb. 150.

Answer.—It was held in *Dillaye v. Wilson* (43 Barb. 261) that the fact that defendants occupied distinct portions in severalty was matter of defense and must be set up by way of an answer.

56. *Lewis v. Townsend*, 132 App. Div. 347, 117 N. Y. Supp. 48.

57. *Fosgate v. Herkimer, etc., Co.*, 12 N. Y. 580.

H. Verdict, report or decision.

Rule 241 of the Rules of Civil Practice provides that a verdict, report or decision in favor of the plaintiff in an action for the recovery of real property or the possession thereof, and the judgment rendered thereon, must specify in writing the estate of the plaintiff in the property recovered, whether it is in fee, or for life, or for a term of years, stating for whose life it is, or specifying the duration of the term, if the estate be less than a fee. The provisions of this rule were formerly contained in section 1519 of the Code of Civil Procedure.⁵⁸ A verdict which fails to define the estate of the plaintiff is fatally defective. The term "estate" has been defined as the quantity of interest which a person has in the land.⁵⁹ A verdict in favor of the plaintiff in an action of ejectment should exactly define what land he is entitled to.⁶⁰

I. New trial.

Prior to 1911 a party was entitled to a new trial, as a matter of right, upon payment of all costs and certain damages. This right to a new trial had existed for many years, but was abolished at that time.⁶¹

58. General verdict.—Where the complaint in an action of ejectment involving the location of a disputed boundary line describes the disputed parcel of land by metes and bounds, and without objection of parties two questions are submitted to the jury, *first*, whether a former deed of the plaintiff to the defendant's predecessor in title included the parcel, and, *second*, whether if it was not included in the deed the defendant had acquired title by adverse possession, and no request was made for the submission of these specific questions, the jury may render a general verdict for the plaintiff and a judgment may be entered thereon. *Ramapo Mfg. Co. v. Mapes*, 155 App. Div. 443, 140 N. Y. Supp. 490. Where the jury in an action of ejectment merely locates a disputed boundary line and finds that the plaintiff has not repossessed herself of the lands, but there is no general verdict or finding as to the plaintiff's estate in the property as required by section 1519 of the Code of Civil Procedure,

and the verdict does not describe the property to be recovered, or fix the damages, or award possession to the plaintiff, a judgment entered by direction of the court is fatally defective and will be set aside on motion. *Shanley v. Murty*, 134 App. Div. 845, 119 N. Y. Supp. 175.

59. *Meehan v. Dobson*, 131 N. Y. Supp. 37.

60. *De Clemente v. Winstanley*, 8 Misc. 45, 59 St. Rep. 455, 28 N. Y. Supp. 513.

61. By virtue of the repeal in 1911 of section 1525 of the Code of Civil Procedure which provided that, at any time within three years after the filing of the judgment roll in an action of ejectment, the court on proper application must make an order vacating a judgment rendered prior thereto is final and conclusive, and a motion to vacate it and for a new trial, made after such repeal took effect, will be denied. *Lewis v. Townsend*, 79 Misc. 61, 140 N. Y. Supp. 500; *aff'd*, 155 App. Div. 931, 140 N. Y. Supp. 1127.

ARTICLE X.**DAMAGES.****A. Civil Practice Act, § 990. Damages for withholding real property.**

In an action to recover real property, or the possession thereof, the plaintiff may demand in his complaint, and in a proper case recover, damages for withholding the property. Those damages include the rents and profits or the value of the use and occupation of the property where either can be recovered legally by the plaintiff.

B. Civil Practice Act, § 1008. Liability of purchaser, pending an action.

If the defendant in an action of ejectment aliens the real property in question after the filing of a notice of pendency of the action, and an execution against him for the plaintiff's damages is returned wholly or partly unsatisfied, an action may be maintained by the plaintiff against any person who has been in possession of the property, under the defendant's conveyance, to recover the unsatisfied portion of the damages, for a time not exceeding that during which he possessed the property.

C. Civil Practice Act, § 1011. Damages recoverable; set off by defendant.

In an action for the recovery of real property or the possession thereof, the plaintiff, where he recovers judgment for the property, or possession of the property, is entitled to recover as damages the rents and profits, or the value of the use and occupation, of the real property recovered, for a term not exceeding six years; but the damages shall not include the value of the use of any improvements made by the defendant or those under whom he claims. Where permanent improvements have been made in good faith by the defendant or those under whom he claims, while holding, under color of title, adversely to the plaintiff, the value thereof must be allowed to the defendant in reduction of the damages of the plaintiff, but not beyond the amount of those damages.

D. Right of plaintiff to recover.

Under sections 990 and 1011 of the Civil Practice Act, the plaintiff is entitled to recover damages for the withholding of the property.⁶² The claim for damages is but an incident to the action of ejectment; and, if the court has not jurisdiction of ejectment, it cannot retain the cause for damages.⁶³

62. Where a railroad corporation has possession of land upon which its road was constructed in the usual manner, the owner of such land may maintain an action of ejectment to recover the possession of his land so appropriated, and in such action plaintiff will, on recovering judgment for possession, be entitled to recover damages for withholding the property and the rents and profits or value of the use and occupation by inserting proper allegations for

that purpose in the complaint, and in such case an equity action for injunctive relief is not maintainable. *Thomas v. Grand View Beach R. R. Co.*, 76 Hun, 601, 28 N. Y. Supp. 201.

Where a vendor refuses to deliver possession to a vendee, it seems the remedy is ejectment, in which the vendee may recover mesne profits. *Preston v. Hawley*, 101 N. Y. 586.

63. *Piekello v. Lake View Brewing Co.*, 65 Misc. 365, 119 N. Y. Supp. 847.

In fact, the plaintiff cannot recover damages until it is established that he has a right to recover the premises.⁶⁴ The right of the true owner of lands is suspended as to recovery of rents and profits until he regains the right of possession.⁶⁵ But the statute does not bar a separate action for mesne profits after it is established that the plaintiff has a right to recover possession of the property.⁶⁶

In an action brought by the grantor against his grantee to recover premises by reason of breach of condition subsequent contained in a deed, if the defendant was in possession of the premises, the plaintiff is entitled by way of damages to the rents and profits, or the value of the use and occupation of the land from the commencement of the action.⁶⁷ Before the enactment of the Code of Procedure a distinction was drawn between the recovery of damages for withholding and the recovery of rents and profits;⁶⁸ but this distinction no longer exists. Previous to that code a claim for damages for withholding possession of real estate did not include the rents and profits thereof during the time the property has been wrongfully withheld; but that was a separate and distinct cause of action.⁶⁹ But under the Code of Procedure, an action to recover land, for mesne profits, and for damages, could be maintained.⁷⁰

A defendant can only be held for mesne profits for the

64. *Gas Light Co. v. Rome, etc., Railroad Co.*, 24 St. Rep. 154, 51 Hun, 119, 5 N. Y. Supp. 559.

65. *Bockes v. Lansing*, 74 N. Y. 437.

66. *Piekelko v. Lake View Brewing Co.*, 65 Misc. 365, 119 N. Y. Supp. 847; *Pierce v. Tuttle*, 1 T. & C. 139; on appeal, 58 N. Y. 650.

The right to mesne profits follows a judgment in ejectment and defendant cannot dispute it. *Benson v. Matsdorf*, 2 Johns. 369; *Jackson v. Randall*, 11 Johns. 405; *Van Allen v. Rogers*, 2 Johns. Cas. 281.

Trespass for mesne profits may be maintained by one tenant against another as a necessary sequence to a judgment in ejectment. *Longendyck v. Burhans*, 11 Johns. 461. But only where there has been an ouster. *Dresser v. Dresser*, 40 Barb. 300. Tenants in common, who have recovered in an action against a co-tenant, could unite in an action for mesne profits. *Longendyck v. Burhans*, 11 Johns. 461.

Action against tenant.—Where the action is against the tenant, and he gives notice to his landlord, in the absence of proof to the contrary, the landlord will be deemed to have assumed the defense and is bound by the judgment, and an action may be maintained against him for mesne profits without any other recovery against him. *Van Alstine v. McCarthy*, 51 Barb. 326.

67. *Trustees of Union College v. City of New York*, 173 N. Y. 38.

68. *Larned v. Hudson*, 57 N. Y. 151.

69. *Larned v. Hudson*, 57 N. Y. 151. See, however, *Cagger v. Lansing*, 64 N. Y. 417; *Grout v. Cooper*, 9 Hun, 326; *Van Allen v. Rogers*, 1 Johns. Cas. 281.

70. *Livingston v. Tanner*, 12 Barb. 481; *Hotchkiss v. Auburn, etc., R. R. Co.*, 36 Barb. 600; *People ex rel. v. Mayor*, 17 How. Pr. 56; *Vandervoort v. Gould*, 36 N. Y. 639.

period of his occupation.⁷¹ Where one from whom land has been wrongfully taken died without recovering possession, all damage done to the estate, and for the rents and profits down to the time of his death, goes to his executor and belongs to his personal estate.⁷² A recovery by devisees is limited to the time when their title accrued.⁷³ Rents and profits cannot be recovered by one out of possession in an action to remove a cloud from title.⁷⁴

E. Amount of damages.

The distinction which formerly existed between damages for wrongful withholding of land, recoverable in, and only in, an action of ejectment, and the mesne profits which might be recovered in an action of ejectment or in a subsequent action has been abolished.⁷⁵ The provisions of sections 990 and 1011 providing for a recovery, as damages for withholding the property, the rents and profits, or the value of the use and occupation of the property, may be regarded as a legislative definition of the ancient technical term "mesne profits."⁷⁶ The owner of the property withheld is not con-

71. *Byers v. Wheeler*, Hill & D. Supp. 389.

72. *Hotchkiss v. Auburn, etc.*, R. R. Co., 36 Barb. 600.

73. *Hotchkiss v. Auburn, etc.*, R. R. Co., 36 Barb. 600.

74. *Bockes v. Lansing*, 74 N. Y. 437.

75. *Gas Light Co. v. Rome, etc.*, R. R. Co., 51 Hun, 119, 5 N. Y. Supp. 459, 24 St. Rep. 154.

The measure of damages was formerly that which would apply in an action for use and occupation, what the premises were reasonably worth annually, with interest added. *Vandervoort v. Gould*, 36 N. Y. 639; *Woodhull v. Rosenthal*, 61 N. Y. 382; *Holmes v. Davis*, 19 N. Y. 488; *Low v. Purdy*, 2 Lans. 422.

It was said in *Jackson v. Wood* (24 Wend. 443) that, in New York city, interest might be added quarterly in ascertaining mesne profits.

It was said that the damages were not limited to the rent. Extra damages could be given. *Dewey v. Osborn*, 4 Cow. 338.

76. *Wallace v. Berdell*, 101 N. Y. 13. While under the former Code only

damages for withholding possession were incidental to a recovery by plaintiff in the action of ejectment, and the claim of rents and profits or for value of the use and occupation was a separate and distinct claim and so required to be separately pleaded, this requirement is dispensed with and the incidental damages plaintiff is entitled to recover under his general demand includes the rents and profits or value of the use and occupation from the time of the commencement of the action. Where, in such an action, the landlord was made sole defendant and answered denying simply the allegations in the complaint, demanding right to immediate possession and that such possession was wrongfully withheld by defendant, it was held that it was not error to confine defendant upon the trial to the questions so presented; that they having been presented upon sufficient evidence in plaintiff's favor, a judgment was proper awarding him possession, and that under the general demand for damages, plaintiff was properly allowed to prove and recover the annual rental of the

fined to the rents actually received by the party required to make restitution; the owner should have either these or the rental value, as may be just under the circumstances.⁷⁷

In ejectment by a tenant for years, if the plaintiff's title expire pending the action, he is entitled to recover the value of the lease from the time of the unlawful entry for the residue of the term.⁷⁸

Where the plaintiff recovers but fails to prove any damages resulting from an unlawful withholding of the land, he should be awarded nominal damages only.⁷⁹

The provisions of sections 990 and 1011 of the Civil Practice Act prescribe the rule of damages which may ordinarily be recovered in actions of ejectment, but there is nothing in them to indicate that they were designed to exclude, in a proper case, the right to double damages provided for in section 230 of the Real Property Law. The latter statute, however, can only be invoked upon the termination of a tenancy for life or years, when a proper notice has been served, and the tenant or any person in collusion with him wilfully holds over after the expiration of thirty days from the service of a notice to quit, and it is essential to a good cause of action thereunder that the complaint should allege the holding over to be willful, and this allegation must be

premises from the date of the commencement of the action to the time of trial. It seems, however, a recovery of these items as part of the damages included in the general demand for a time prior to the commencement of the action would not be proper. *Clason v. Baldwin*, 129 N. Y. 183, 37 St. Rep. 213.

77. *Wallace v. Berdell*, 101 N. Y. 13.

Taxes and repairs.—The party recovering should have either the rents and profits received, or the rental value, as may be just, but all necessary expenses for taxes and ordinary repairs are to be deducted. *Wallace v. Berdell*, 101 N. Y. 13.

Evidence of rental value is proper in an action to recover real property. *White v. Wheeler*, 22 St. Rep. 853, 4 N. Y. Supp. 405. See, also, *Danziger v. Boyd*, 54 Super. Ct. 365.

Trespass rule.—The rule in actions of ejectment is that damages for withholding shall include rents and profits, or the value of the use and occupation

of the property. This is the rule, when applied to cases of trespass, where it is deliberate, intentional, and continuous. *De Camp v. Bullard*, 159 N. Y. 450.

78. *Woodhull v. Rosenthal*, 61 N. Y. 382.

79. *Sackett v. Thomas*, 4 App. Div. 447, 38 N. Y. Supp. 608.

Railroad.—Where ejectment was brought against a railroad company to recover land constituting part of the public highway in front of plaintiff's premises and pending the action, the land was condemned by the railroad corporation, it was held that plaintiff was not entitled to recover more than nominal damages for the withholding of the land from his possession from the time of the railroad company's first use thereof to the time of the award by the commissioners of appraisal. *Judge v. N. Y. C. & H. R. R. R. Co.*, 56 Hun, 60, 9 N. Y. Supp. 158; s. c., 29 St. Rep. 475.

supported by proof that the holding over was deliberate, intentional, obstinate, unreasonable or perverse.⁸⁰

F. Period for which damages are allowed.

Under section 1011, the plaintiff is entitled to recover damages for six years prior to the commencement of the action;⁸¹ they cannot commence at an earlier time.⁸² But he is also entitled to such damages as accrue during the pendency of the action.⁸³ But where the premises are surrendered pending the litigation, plaintiff is only entitled to recover damages up to the time of such surrender.⁸⁴ The plaintiff can recover damages only from the time of taking title.⁸⁵ It is not necessary to plead the statutes in order to limit the plaintiff to mesne profits for six years.⁸⁶

G. Offset of improvements.

A defendant who entered in good faith, and made permanent and valuable improvements, may apply their value to the extinction of plaintiff's claim for mesne profits.⁸⁷ This right of mitigating the damages is allowed only to a *bona fide* occupant; the offset will not be allowed if the defendant has acted with knowledge of the owner's rights.⁸⁸ A claim for improvements does not constitute a cause of action, but only a counterclaim.⁸⁹

In order that a defendant may have the benefit of the

80. *Barson v. Mulligan*, 191 N. Y. 306.

81. **Commencement of action.**—Where the summons was served on tenants of the property, and was subsequently served on the owner claiming title, the action was not commenced against him under section 1011 until service upon him. *Fagan v. McDonnell*, 115 App. Div. 89, 100 N. Y. Supp. 641; *aff'd*, 191 N. Y. 515.

Only actions of ejectment.—Section 1011 of the Civil Practice Act, limiting a recovery of rents and profits or the value of use and occupation to a term not exceeding six years, applies only to actions of ejectment. *Adams v. Bristol*, 126 App. Div. 660, 111 N. Y. Supp. 231; *aff'd*, 196 N. Y. 510.

82. *Gas Light Co. v. Rome, etc., Railroad Co.*, 24 St. Rep. 154, 51 Hun, 119, 5 N. Y. Supp. 559.

83. *Danziger v. Boyd*, 120 N. Y. 628;

Willis v. McKinnon, 178 N. Y. 451; *Fagan v. McDonnell*, 115 App. Div. 89, 100 N. Y. Supp. 641; *aff'd*, 191 N. Y. 515. Compare *Chace v. Lamphere*, 22 N. Y. Supp. 404, 51 St. Rep. 108.

84. *Gilman v. Gilman*, 111 N. Y. 265.

85. *Danziger v. Boyd*, 54 Super. Ct. 365.

86. *Grout v. Cooper*, 9 Hun, 326; *Jackson v. Wood*, 24 Wend. 443; *Budd v. Walker*, 9 Barb. 493.

87. *Bedell v. Shaw*, 59 N. Y. 46; *Stephenson v. Cotter*, 25 St. Rep. 74.

In trespass for mesne profits, a *bona fide* purchaser could be allowed the value of improvements made in good faith. *Thompson v. Bower*, 60 Barb. 463.

88. *Wood v. Wood*, 83 N. Y. 575. See, also, *Woodhull v. Rosenthal*, 61 N. Y. 382; *Henderson v. Scott*, 6 Civ. Pro. 39.

89. *Pierson v. Safford*, 30 Hun, 521.

provisions of section 1011, relative to value of buildings erected by him, they must have been built while he was holding under "color of title adversely."⁹⁰ The right of offsetting improvements extends to payments which the defendant may have made upon a paramount incumbrance upon the premises. Where suit is brought to recover possession of real property and mesne profits from one who has discharged a paramount incumbrance in good faith, and in ignorance of the existence of the facts upon which the claim for possession and mesne profits is based, such holder is entitled to reimbursement for sums paid out by him in good faith in order to protect the property, and to have the same set off against the use and occupation.⁹¹

H. Pleading damages.

In order to enable the plaintiff to recover damages for withholding possession, for rents and profits, or for use and occupation, the damages must be demanded in the complaint.⁹² The commencement of the action, with the demand in the complaint for damages for the withholding of the possession, is sufficient to apprise the defendant to prepare to meet the plaintiff's proofs as to all the damages which the withholding comprehended in fact.⁹³ Where plaintiff claims mesne profits, it is too late on the trial to object to the form and particularity with which his allegations, with respect thereto, are made.⁹⁴

ARTICLE XI.

JUDGMENT.

A. Civil Practice Act, § 1009. Effect of judgment rendered after trial of issue of fact.

A final judgment, in an action for the recovery of real property or the possession thereof, rendered upon the trial of an issue of fact, is conclusive as to the title established in the action, upon each party against whom it is rendered and every person claiming from, through or under him, by title accruing either after the judgment-roll is filed or after a notice of the pendency of the action is filed in the proper office.

90. *Barley v. Roosa*, 35 St. Rep. 898, 13 N. Y. Supp. 209.

91. *Fagan v. McDonnell*, 115 App. Div. 89, 100 N. Y. Supp. 641; *aff'd*, 191 N. Y. 515; *Clute v. Emmerich*, 26 Hun, 10, citing *Misner v. Beekman*, 50 N. Y. 338.

92. *Frazier v. Dewey*, 1 App. Div. 138, 37 N. Y. Supp. 973; *Pfeffer v.*

Kling, 58 App. Div. 179, 68 N. Y. Supp. 641; *aff'd* without opinion, 171 N. Y. 668; *Wait v. Hudson Valley Ry. Co.*, 43 Misc. 304, 88 N. Y. Supp. 825.

93. *Clason v. Baldwin*, 129 N. Y. 183; *Deering v. Riley*, 38 App. Div. 164, 56 N. Y. Supp. 704; *aff'd*, 167 N. Y. 184.

94. *Candee v. Burke*, 10 Hun, 350.

B. Civil Practice Act, § 1010. Effect of judgment rendered otherwise than upon trial of issue of fact.

A final judgment for the plaintiff rendered in an action for the recovery of property or the possession thereof, otherwise than upon the trial of an issue of fact, is conclusive upon the defendant and every person claiming from, through or under him by title accruing either after the judgment-roll is filed or after a notice of the pendency of the action is filed in the proper office.

C. Form of judgment.

Under Rule 241 of the Rules of Civil Practice, the judgment must specify in writing the estate of the plaintiff in the property recovered, whether it is in fee, or for life, or for a term of years, stating for whose life it is, or specifying the duration of the term, if the estate be less than a fee. A judgment adjudging that plaintiff recover possession of the lands described in the complaint in this action, and that the defendant surrender and deliver up the possession thereof, conforms to statutory requirements; but it is better practice to describe in the judgment the land and the interest therein recovered.⁹⁵ But a judgment is defective if it does not describe the specific lands in controversy and contains no provision that the plaintiff recover possession.⁹⁶

Where the defendant, pending an action of ejectment, acquires the interest of plaintiff's co-tenants, the judgment should not direct his removal, as neither party in such a case is entitled to exclusive possession.⁹⁷

Where plaintiff in ejectment died before the date of the referee's report, a judgment entered in his favor was held to be void and set aside after affirmance and satisfaction, where the defendant did not previously discover the fact of such death.⁹⁸

Where, in an action in ejectment by the State to recover possession of certain wild forest lands, a stipulation is entered into between the parties settling the litigation, by which it is agreed that the defendants shall take judgment dismissing the complaint and adjudging them to be the owners of a certain portion of the land, and shall convey to the people certain tracts, a judgment entered in accordance with said stipulation is void and may be set aside because it

95. *Mace v. Mace*, 24 App. Div. 291, 48 N. Y. Supp. 831.

96. *Shanley v. Murty*, 134 App. Div. 845, 119 N. Y. Supp. 175.

97. *Archibald v. N. Y. C. & H. R. R. Co.*, 1 App. Div. 251, 37 N. Y. Supp.

336, 72 St. Rep. 689; *aff'd*, 157 N. Y. 574.

98. *Arents v. Long Island R. R. Co.*, 36 App. Div. 379, 55 N. Y. Supp. 401; appeal dismissed, 171 N. Y. 663.

attempts to dispose of lands belonging to the forest preserve, in violation of the State Constitution, article 7, section 7.⁶⁹

Where, after a grant of land bounded by the side of the highway to the center of which the grantor owned, the highway was discontinued and the successor of the grantor brought ejectment for the strip in front of the premises conveyed, it was held that, although he was entitled to possession, it was subject to the right of the grantee to have the part of the former highway in front of his premises kept open.¹

D. Against whom conclusive.

The effect of a judgment in ejectment is the same as in any other action; it binds the parties and their privies.² It is conclusive as to the title established in the action upon each party against whom it is rendered and every person claiming from, through, or under him by title accruing after the filing of the judgment-roll, or a notice of the pendency of the action.³ But the judgment, as a general rule, will bind no other persons.⁴ Persons in adverse possession of premises, not parties to the action, are not affected by the judgment therein, nor are their interests in anywise affected.⁵ A judg-

99. *People v. Witherbee*, 178 App. Div. 368, 164 N. Y. Supp. 915.

1. *Holloway v. Southmayd*, 139 N. Y. 390.

2. *Beebe v. Elliott*, 4 Barb. 457.

No decision in prior action.—An action of ejectment lies although there was a former action by the plaintiff's predecessor against the defendant's predecessor to recover possession, if no *lis pendens* was filed in that action and no decision was rendered. *New York Central & H. R. R. Co. v. Moore*, 137 App. Div. 461, 121 N. Y. Supp. 884; *aff'd*, 203 N. Y. 615.

3. *Skelley v. Jones*, 61 App. Div. 173, 70 N. Y. Supp. 447. See, also, *Stehli v. Town of Oyster Bay*, 111 Misc. 355, 181 N. Y. Supp. 385.

The filing of a *lis pendens* does not make the judgment binding upon persons not parties or privies. *Thompson v. Clark*, 4 Hun. 164. See *Wilson v. Davol*, 5 Bosw. 519; *Dunkle v. Wiles*, 6 Barb. 515; *Briggs v. Wells*, 12 Barb. 567; *Finnegan v. Carraher*, 47 N. Y. 493; *Sheridan v. Andrews*, 49 N. Y. 478.

4. Where a sheriff under judgment in ejectment removes a person, not a party, who had been in possession of a part of the *locus in quo* for ten years, but had no title thereto, actual or colorable, an assignment made by such person after his eviction will not pass title to his assignee or right to have the judgment entered in the action of ejectment vacated, and be allowed to defend action, or to have the party in whose favor the judgment was rendered required to restore him the premises. *Campbell v. Rockwell*, 62 App. Div. 266, 70 N. Y. Supp. 1101; appeal dismissed, 168 N. Y. 632.

Admissibility.—A judgment in a former action of ejectment adjudging the plaintiff's predecessor was entitled to possession of the land in question is admissible in evidence, even though the defendant was not a party to that action. *Skelly v. Jones*, 61 App. Div. 173, 70 N. Y. Supp. 447.

5. *N. Y. C. & H. R. R. Co. v. Brennan*, 12 App. Div. 103, 42 N. Y. Supp. 529.

ment against tenants and actual occupants is not conclusive in an action against the person under whom such occupants held for mesne profits.⁶ A judgment against tenants is not conclusive on the landlord, although he retained counsel to defend the tenants, especially where his title did not come in question.⁷ It is not conclusive, nor is it evidence, against a third person who enters into possession under a tax lease, though he subsequently acquires title through the defendant in ejectment.⁸ Possession acquired under a judgment against a life tenant has no effect on the rights of remaindermen.⁹

E. Questions decided.

A judgment-roll in a former action by a grantee of plaintiff's ancestors against defendant to recover the same lands, wherein it was adjudged the grantee was entitled to possession, is conclusive proof of the right of possession in the grantor.¹⁰ A judgment in ejectment is only conclusive, under the statute, as to the title actually litigated and established in the action; it is not the recovery which constitutes an estoppel in a subsequent action, but the decision of the question which was contested between the parties. In case of plea of former suit in bar, the point is whether the same title is sought to be litigated in both actions; if not, the former action is not a bar.¹¹ A judgment in ejectment is only conclusive as to the title established, and parol proof may be given to show the grounds of it, where such grounds do not appear of record, provided the grounds alleged to have been passed upon could legitimately have been proved under the issues.¹² A former judgment may be an estoppel, though no land is described in the record, or the description is incomplete, or in part unintelligible, if parol evidence is given showing what lands were the subject of litigation.¹³

F. Title to improvements or crops.

A judgment to recover possession of land takes all structures wrongfully erected upon it.¹⁴ When a defendant delivers possession, he must also deliver possession of the growing crops.¹⁵ As between a successful plaintiff in eject-

6. *Ainslee v. Mayor, etc., of New York*, 1 Barb. 168.

7. *Ryerss v. Rippey*, 24 Wend. 432, 4 Hill, 468.

8. *Sheridan v. Andrews*, 49 N. Y. 478.

9. *Sand v. Church*, 152 N. Y. 174.

10. *Crocker v. Lansing*, 64 N. Y. 417.

11. *Dawley v. Brown*, 79 N. Y. 390.

12. *Briggs v. Well*, 12 Barb. 567.

13. *Frantz v. Ireland*, 4 Lans. 278; *Wood v. Jackson*, 8 Wend. 9.

14. *De Lancey v. Piepgras*, 73 Hun, 607, 56 St. Rep. 835, 26 N. Y. Supp. 806; appeal dismissed, 141 N. Y. 88.

15. *Lane v. King*, 2 Wend. 524.

ment and the defendant, the crops belong to plaintiff.¹⁶ Where, during the pendency of an action of ejectment brought by a lessor against a lessee under a condition giving a right to re-enter for non-payment of rent, the lessee sublets to one who, with full knowledge of the facts, puts in a crop which is harvested, but not removed at the time the lessor is put in possession, under a judgment in ejectment the crop belongs to the lessor.¹⁷

G. Enforcement of judgment.

By virtue of a judgment in ejectment, and without a writ of possession, plaintiff may take possession of the premises if he can do so peacefully.¹⁸ An execution in an action of ejectment is authorized by section 638 of the Civil Practice Act, and its contents are prescribed by section 644. This requires that the execution particularly describe the property, and designate the party to whom the judgment awards the possession thereof; and it must substantially require the sheriff to deliver the possession of the property, within his county, to the party entitled thereto. If a sum of money is awarded by the same judgment, it may be collected, by virtue of the same execution; or a separate execution may be issued for the collection thereof, omitting the direction to deliver possession of the property. If one execution is issued for both purposes, it must contain, with respect to the money to be collected, the same directions as an execution against property, or against the person, as the case requires.

An execution issued upon a judgment for an undivided interest in real estate which commands the sheriff to put plaintiff in possession of the whole is irregular and if it has been so executed, the court will order restitution to the defendant of his interest in the premises.¹⁹ It is the duty of the sheriff to remove from the premises the personal property of the defendant,²⁰ and all persons who claim to hold possession in the right of the defendant.²¹ The sheriff, while he has the writ, may remove the defendant, or his privies, from the property as often as he, or they, intrude upon it.²²

Where a defendant in ejectment, after the plaintiff has been put in possession by virtue of an execution issued upon

Jackson v. Stone, 13 Johns. 447; Morgan v. Varrick, 8 Wend. 587; Samson v. Rose, 65 N. Y. 411.

16. Lane v. King, 8 Wend. 584; Gillett v. Balcom, 6 Barb. 370.

17. Samson v. Rose, 65 N. Y. 411.

18. People ex rel. v. Cooper, 20 Hun, 486.

19. Skinner v. Odenbach, 81 Hun,

315, 62 St. Rep. 598, 30 N. Y. Supp. 624.

20. People v. Cooper, 20 Hun, 486; Witbeck v. Van Rensselaer, 64 N. Y. 27.

21. Jackson v. Tuttle, 9 Cow. 233.

22. Witbeck v. Van Rensselaer, 64 N. Y. 27.

the judgment, takes forcible possession, a new action is not necessary, but the court has authority to direct the restoration of possession to the plaintiff and restrain the defendant from interfering therewith.²³ The execution of a writ of possession, issued in ejectment for non-payment of rent, must be an open, visible, and notorious change of possession, a merely nominal and secret execution of the writ is not sufficient, and the sheriff's return is not conclusive on that point.²⁴

Where twenty years have elapsed since the recovery of the judgment, the granting of the application for leave to issue execution or a writ of possession is discretionary and not appealable.²⁵

Where judgment for the plaintiff in ejectment, which had been affirmed at General Term, was reversed by the Court of Appeals, the Special Term has the power to and will issue a writ of possession to restore the premises in question to the defendant, although the judgment of the Court of Appeals does not provide for the issue of the writ.²⁶

A plaintiff in ejectment may have all the relief, both legal and equitable, to which he is entitled, and he cannot maintain an action at law to prove his title and right to possession, and then bring a separate suit in equity to remove the encroachment. Where plaintiff in such an action obtained judgment and collected the costs on execution, which is returned with the statement by the sheriff that it is impracticable for him to remove the encroachment upon his lands, the judgment is a bar to a subsequent action to compel the removal of such encroachment for the reason that he might have obtained such relief in the former action.²⁷

H. Costs.

A successful plaintiff is entitled to costs, of course, in an action of ejectment.²⁸ The statutory provisions exclude the discretion of the court in awarding costs where title is in question, so that it is error to award costs contrary to

23. *DeLancey v. Piepgras*, 73 Hun, 608, 56 St. Rep. 181, 26 N. Y. Supp. 807; appeal dismissed, 141 N. Y. 88, 56 St. Rep. 651.

24. *Newell v. Whigham*, 102 N. Y. 20.

25. *Van Rensselaer v. Wright*, 31 St. Rep. 897, 121 N. Y. 626.

26. *Carlton v. Mayor*, 50 Super. Ct. 177, 5 Civ. Pro. 418.

27. *Habl - Sess*, 100 N. Y. 100.

28. Civil Practice Act, § 1470, subd. 1.

Retaxation.—It seems that costs upon a recovery in ejectment, by the lessor, against a tenant under a perpetual lease, after default in payment of rent, may be retaxed upon the application of a mortgagee of the leasehold who seeks to redeem, upon payment of back rent, costs, etc. *Keeler*

100 N. Y. 100.

statute.²⁹ In an action by a vendor against his vendee, for default in payment of purchase-money, the defendant, if successful, is entitled to costs.³⁰

Where the controversy is with regard to whether or not the eaves of the buildings of one party project over the property of the other and the complaint contains a count in ejectment and the answer puts in issue the ownership of the land occupied by defendant's buildings and many other facts, the action is to recover real property within the meaning of section 1470 and the plaintiff is entitled to costs.³¹

In an action to recover two distinct parcels of land, where the plaintiff recovers but one parcel, it has been held both the plaintiff and the defendant are entitled to costs, although the complaint contains but one count.³²

When a mortgagee avails himself of an ejectment suit pending against his mortgagor to determine the title to the land covered by the mortgage a case is presented justifying an application, by a party who has established his title in hostility to the mortgagee's claim, to charge the mortgagee with the costs of the ejectment suit.³³ The trial court in setting aside a verdict upon the ground that the preponderance of evidence was against the plaintiff's claim of title should not require the defendant to pay costs.³⁴

I. Form of execution.

The People of the State of New York, to the Sheriff of the County of Ulster:

WHEREAS, A judgment was rendered on the 22d day of June, 1907, in the Supreme Court, in an action in said court, wherein Daniel E. Donovan was plaintiff, and James H. Vandemark was defendant, in favor of the plaintiff and against the defendant, for the delivery to the defendant of the possession of the following described premises (insert description in judgment), and also for the recovery by the said Daniel E. Donovan against said James H. Vandemark, for \$2,350 damages, and \$731.02 costs of this action, in all the sum of \$3,081.02 damages and costs; the judgment-roll upon which judgment was filed in Ulster county clerk's office on the 22d day of June, 1907, and docketed on the same day, and the sum of \$3,081.02, with interest thereon from the 22d day of June, 1907, is actually due thereon;

Now, therefore, you are hereby required to deliver the possession of the said real estate, above described, within your county to the said Daniel E. Donovan, plaintiff, and to satisfy the said judgment of \$3,081.02, with interest thereon as aforesaid, out of the personal property of the said judgment debtor; and if sufficient personal prop-

29. Boardway v. Scott, 31 Hun, 378.

30. Cythe v. Lafontain, 51 Barb. 186.

31. Leprell v. Kleinschmidt, 112 N. Y. 364.

32. Coon v. Diefendorf, 8 Civ. Pro. 203.

33. Sand v. Church, 32 App. Div. 139, 52 N. Y. Supp. 854.

34. Kahler v. Thron, 155 App. Div. 744, 140 N. Y. Supp. 1002.

erty cannot be found, out of the real property belonging to him, at the time when said judgment was docketed in the clerk's office of the county of Ulster, or at any time thereafter, and to return this execution to the clerk of the county of Ulster, within sixty days after the receipt hereon.

Witness, Hon. James A. Betts, one of the justices of said court at Kingston, on this 22d day of June, 1907.

JOHN E. VAN ET TEN,
Attorney for Plaintiff.

ARTICLE XII.

EMERGENCY HOUSING LAWS.

A. Civil Practice Act, § 1011-a. Limitation of actions under this article in certain cities.

A public emergency existing, no action as prescribed in this article shall be maintainable by a landlord against a tenant to recover the possession of real property in a city of a population of one million or more or in a city in a county adjoining such city, occupied for dwelling purposes, except an action to recover such possession upon the ground that the person is holding over and is objectionable, in which case the landlord shall establish to the satisfaction of the court that the person holding over is objectionable; or an action where the owner of record of the building, being a natural person, seeks in good faith to recover possession of the same or a room or rooms therein for the immediate and personal occupancy by himself and his family as a dwelling; or an action to recover premises for the purpose of demolishing the same with the intention of constructing a new building, plans of which new building shall have been duly filed and approved by the proper authority; or an action to recover premises constituting a part of a building and land which has been in good faith sold to a corporation formed under a co-operative ownership plan whereof the entire stock shall be held by the stockholders in proportion to the number of rooms occupied or to be occupied by them in such building and all apartments or flats therein have been leased to stockholders of such corporation for their own personal, exclusive and permanent occupancy to begin immediately upon the termination of any tenancy of the apartments or flats leased by them existing on the date when this section as amended takes effect.

This section shall be in effect only until the first day of November, nineteen hundred and twenty-two.

B. Validity of section.

Section 1011a of the Civil Practice Act arises from one of a series of statutes which were enacted in 1920 and amended in 1921, as a remedy for the prevailing shortage of living apartments.

The constitutionality of these laws has been sustained, both by the Court of Appeals³⁵ and by the United States Supreme Court.³⁶ These Emergency Housing Laws are further discussed in the chapter on Supplementary Proceedings in the third volume of this work.

³⁵ *Guttas v Shatzkin* 230 N. Y.

³⁶ *Marcus Brown Holding Co. v*

ELECTION LAW.*

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* For a further discussion of the matters referred to in this chapter, see Jewett's Election Manual; B., C. & G. Consolidated Laws.

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- A. Proceeding to set aside certificate of primary election.
- B. Proceeding for mandamus to compel election officers to permit relator to vote.
- C. Proceeding for mandamus directing a board of town canvassers to count the votes on a certain ballot alleged to be void.
- D. Proceeding for mandamus directing election officers to recount ballots.

ARTICLE I.

SPECIAL PROCEEDINGS UNDER THE ELECTION LAW, IN GENERAL.

A. Nature of proceedings in general.

Title to office is ordinarily tried in an action of *quo warranto*,¹ but the Election Law prescribes various proceedings for the review of primaries; for the regulation of registrations; for the investigation of ballots; and for compelling election boards to do their duties. A proceeding by mandamus under the Election Law for a recount of ballots objected to as marked for identification, or rejected as void, is a special proceeding.² Mandamus to election officers to compel them to do their duty in cases where they have no discretion has frequently been resorted to in this State.³

1. See Vol. 3, chapter on People, Actions in Behalf of.

2. People ex rel. Feeney v. Bd. of

3. People ex rel. White v. Alderman, 31 App. Div. 438, 52 N. Y. Supp. 643; modified, 157 N. Y. 431.

The Supreme Court has power by mandamus to require the several boards of inspectors to perform the duty expressly imposed upon them.⁴ It is only when there is a clear legal right that it can be enforced by mandamus. The Election Law should be construed liberally for the purpose of determining in a judicial proceeding the validity of ballots cast at any election, but courts should not disregard duties expressly imposed by statute upon inspectors for the purposes of safeguarding ballots and the canvass thereof by them.⁵ The court will not interfere with an election because certain ballots were erroneously declared void, if it appears that the result of the election would not be changed if such ballots were counted.⁶

E. Rights of voters.

The efforts of a voter to have the law as to his rights and the rights of other voters in his district fixed and determined prior to an election is commendable and should not be frustrated by a technical or strained construction of the law governing the procedure.⁷

ARTICLE II.

JUDICIAL REVIEW OF PRIMARY.

A. Election Law, § 23. Judicial review of enrollment.

If any statement in the declaration of any person, on the evidence of which his name was enrolled in the original registers for any election district by the custodian of primary records, or if any entry opposite the name of any person in such registers is false, or if any person so enrolled has died, or has removed from or no longer resides in such election district, any voter of the assembly district in which such election district is located (provided such voter is himself duly enrolled with the same political party with which the person, as to whom the application is made, was enrolled) may present proof thereof by affidavit to the supreme court, or to any justice thereof, in the judicial district, or to a county judge of the county, in which such election district is located. And thereupon such court, justice or judge shall make an order requiring the person against or as to whom the proceeding is instituted, unless he is shown to have died, as hereinafter provided, to show cause before such court, justice or judge, at time and place specified in such order, why his enrollment should not be cancelled, or, in case of his death, why it should not be stricken from the register. Such order shall be return-

4. *People ex rel. Perry v. Bd. of Canvassers*, 88 App. Div. 185, 84 N. Y. Supp. 406.

5. *People ex rel. Perry v. Bd. of Canvassers*, 88 App. Div. 185, 84 N. Y. Supp. 406.

6. *Matter of Hines*, 141 App. Div. 569, 126 N. Y. Supp. 386.

7. *Matter of Markland*, 73 Misc. 363, 132 N. Y. Supp. 735; *aff'd*, 146 App. Div. 350, 131 N. Y. Supp. 364; *aff'd*, 203 N. Y. 158.

able on a day at least ten days before a primary election, and a copy thereof shall be served on the person against whom the proceeding is instituted and on the custodian of primary records at least forty-eight hours before the return thereof, either personally or by depositing the same in the post-office of the city in which such election district is located, in a postpaid wrapper or envelope addressed to the custodian of primary records at his office, and to such person by his name and his present address, if known, and otherwise at the address which appears in the registers for such election district. If the person as to whose name the application is made is claimed to be dead, the order to show cause hereinabove provided for shall be directed to the custodian of primary records, and service thereof need only be made upon such custodian of primary records, such service to be made in the manner heretofore in this section specified; but an order requiring the custodian of primary records to show cause why the name of a person claimed to be dead should not be stricken from the register shall not be made unless the affidavit presented to the court, justice or judge by the voter instituting the proceeding shall state that such voter has personal knowledge of the death of the person with respect to whose name the application is made and unless such affidavit is substantiated either by a certificate of the health department or by other competent evidence of such death. The custodian of primary records shall produce before the court, justice or judge, the original enrollment declaration subscribed by the person against or as to whom the proceeding is instituted. The court, justice or judge shall hear the persons interested, and if it appears by sufficient evidence that any statement in the declaration of the person against whom the proceeding is instituted, on the evidence of which he was enrolled by the custodian of primary records, or any statement opposite his name in the columns of the register relating to residence or his qualifications as an elector, is false, or that such person is dead or has removed from or no longer resides in the election district for which he is enrolled, shall order the enrollment of such person cancelled, or in case of his death, that his name be stricken from the register, except as hereinafter provided. If at such hearing the person against whom the proceeding is instituted shall produce evidence that the custodian of primary records has incorrectly copied into the register the data contained in the declaration of such person, and that if correctly copied such person would be entitled to be enrolled in such election district, such order, instead of requiring his enrollment cancelled, shall require the correction of the register in accordance with such evidence. In either case the order shall require the custodian of primary records to cancel the enrollment or strike such name from the register, as the case may be, or to otherwise correct such enrollment books in accordance with such order. Upon the correction of such enrollment books in accordance with such order, the custodian of primary records shall certify such correction to the chairman of the general committee of each party to whom a duplicate set of enrollment lists has been delivered in pursuance of section sixteen of this chapter.

(B., C. & G. Consol. L., 2nd Ed., p. 2414.)

B. Election Law, § 24. Correction of enrollment with respect to persons not in sympathy with party.

If any person is not in sympathy with the principles of the political party with which such person is enrolled, any voter of the assembly district in which such election district is located (provided such voter is himself duly enrolled with the same political party with which the person as to whom the

to the chairman of the county general committee of the political party with which the voter enrolled, and the chairman of such county general committee shall issue a notice requiring the person against or as to whom the proceeding is instituted to show cause before such chairman of the county general committee, or a subcommittee appointed by such chairman, at a time and place specified in such notice why his enrollment should not be cancelled. Such notice shall be returnable on a day at least fifteen days before a primary election, and a copy of the affidavit shall be served on the person against whom the proceeding is instituted and on the custodian of primary records at least forty-eight hours before the return thereof, either personally or by depositing the same in the post-office of the city in which such election district is located, in a postpaid wrapper or envelope addressed to the custodian of primary records at his office, and to such person by his name at his present address, if known, and otherwise at the address which appears in the register for such election district. The chairman of such committee shall in his discretion personally hear the persons interested in the proceeding or appoint a subcommittee to take testimony, and in such event the action of the subcommittee shall not be final unless approved of by the chairman of such county general committee, and if it appears by sufficient evidence that such person is not in sympathy with the principles of the political party with which such person enrolled, the chairman of the county general committee shall cause to be filed a certificate with the board of elections or with the custodian of primary records setting forth reasons why the enrollment of such persons shall be cancelled, together with a record of the proceedings had in the matter.

It shall be the duty of the board of elections or the custodian of primary records to make application to the supreme court or to any justice thereof in the judicial district, or to a county judge of the county, in which such election district is located, for an order requiring the person against or as to whom the proceeding is instituted to show cause before such court, justice or judge, at a time and place specified in such order, why the decision of the chairman of such county general committee should not be confirmed. Such order shall be returnable on a day at least five days before a primary election, and a copy thereof shall be served on the person against whom the proceeding is instituted at least forty-eight hours before the return thereof in the manner hereinbefore provided. The said court, justice or judge shall have power to examine fully into the proceedings taken before such chairman or subcommittee and to receive affidavits or other evidence as to the manner in which such proceedings were conducted, and shall determine whether or not said proceeding was fairly conducted and the finding made therein was made upon sufficient grounds upon the merits, and he may approve or disapprove such finding as shall seem to him to be required to do substantial justice to the party against whom the proceeding was instituted and without regard to technical requirements. The court, justice or judge upon approving of the finding of the chairman of such county general committee shall issue an order to the board of elections or to the custodian of primary records requiring the enrollment of the voter to be cancelled on the registers. A cancellation of enrollment, under this or the preceding section, shall be made by drawing a red ink line through the enrollment number of such person and through the name of the party, and by entering in the "remarks" column, at the extreme right of the register, the words "enrollment cancelled" and the date thereof.

(B., C. & G. Consol. L., 2nd Ed., p. 2415.)^s

8. Former law.—In the city of New York the enrollment books, as made up under the Primary Election Law of 1899 from the enrollments made on the

C. Election Law, § 56. Contests; judicial review.

Any action or neglect of the officers or members of a political convention or committee, or of any inspector of primary election, or of any public officer or board with regard to the right of any person to participate in a primary election, convention or committee, or to enroll with any party, or with regard to any right given to or duty prescribed for, any voter, political committee, political convention, officer or board, by this article, shall be reviewable by summary proceedings upon the petition of any person aggrieved thereby, or upon a petition presented by the chairman of any political committee, which summary proceedings may be instituted before the supreme court or a justice thereof within the judicial district where the transaction, act or neglect of duty took place. Such proceedings shall be heard upon such notice as the court or justice thereof shall direct. In reviewing such action or neglect, the court, justice or judge shall consider, but need not be controlled by, any action or determination of the regularly constituted party authorities upon the questions arising in reference thereto, and shall make such decision and order as, under all the facts and circumstances of the case, justice may require. For the purposes of this section, service of any notice or order or other process of the court or justice thereof upon the chairman or secretary of a convention or committee or board whose action is sought to be reviewed or directed shall be sufficient. The action of any custodian of primary records in canvassing and certifying the result of any primary election or preparing and certifying the list of delegates, and alternates, if any, to a judicial district convention for a district wholly within the jurisdiction of such custodian, or of the secretary of state in preparing and certifying the list of delegates and alternates to any convention or members of a state committee, may be reviewed in like manner by the supreme court, or a justice thereof, which by order may make any change in the result of such primary election as certified to by the custodian of

four regular registration days for a general election, must stand for one year and cannot be amended or changed by judicial action, although in the meantime an enrolled voter may have died or moved out of the election district in which he had enrolled. *People ex rel. Moscovitz v. Voorhis*, 41 Misc. 360, 84 N. Y. Supp. 848, 14 Anno. Cas. 15.

The question of the sufficiency of an affidavit, on an application to strike a name from the primary enrollment, is of such public importance that the court will hear the case although the primary election has been held. Where an elector, served by mail at his latest known address, has failed to appear in a proceeding to remove his name from the roll, and the affidavit showing his removal from that residence given is not made by a lessee or occupant, janitor or proprietor of the premises but by an occupant of a house in the vicinity, and the affiant has no personal knowledge that the elector has actu-

ally moved from the election district as well, but merely states that fact as a conclusion, the affidavit is insufficient although uncontradicted to make it a mandatory duty of the court to strike the name from the enrollment. Although it seems that the Legislature may prescribe such rules and regulations applying to all the primary elections as it deems necessary and proper, yet, when the Legislature has not made adequate provision to protect an elector from having his name stricken from the roll without his knowledge, the statute should be so construed as to afford him the necessary protection. *Matter of Titus*, 117 App. Div. 621, 102 N. Y. Supp. 851; *aff'd*, 188 N. Y. 585.

As to sufficiency of proof on application to strike name from enrollment, see, also, *Matter of O'Brien*, 117 App. Div. 628, 102 N. Y. Supp. 845; *aff'd*, 188 N. Y. 585; *Matter of McGuire*, 117 App. Div. 637, 102 N. Y. Supp. 856; *aff'd*, 188 N. Y. 585.

primary records, or any change or alteration in the list of delegates and alternates to a judicial district convention prepared by a custodian of primary records or in the list of delegates and alternates to any convention or members of a state committee prepared by the secretary of state, as justice may require. The change or alteration so made, if the result is as to the nomination of a candidate for an elective office, the name of the person so adjudged to have been duly nominated in accordance with the provisions of this chapter at such primary for such elective office shall be placed upon the official ballot as the candidate for the party holding such primary; and any change or alteration so made by the court or justice thereof in the statement of the list of delegates and alternates shall be included in the statement of the list of delegates and alternates to be certified by the secretary of state or custodian of primary records to the chairman or secretary of the committee empowered by party rules and regulations to call the convention to which such delegates and alternates are elected. Proceedings taken under this section shall have precedence and priority over all other actions and proceedings in the supreme court or before a justice thereof. The court, or a justice thereof, upon such proceeding, shall have the right to subpoena and examine witnesses, or in its discretion to hear and determine the case upon affidavits. In case the court or a justice thereof should find and determine that both parties to the controversy had been guilty of frauds or that the primary has been so permeated by fraud as to render it impossible for him to determine the true result of such primary and who was elected thereat, such court or justice shall have the right to direct the holding of a new primary at the same place and in the same manner as the regular official primary, or in case of a contest over the result of a convention, which has been characterized by such frauds and irregularities as to render it impossible for such court to determine who was rightfully nominated at such convention, to direct the reassembling of such convention upon a date to be fixed by such court or justice for the purpose for which such convention was originally convened. The court, or justice thereof, in case of ordering a new primary, may include in such order directions for the canvassing of the vote of such new primary, and in the case of ordering a new convention the order shall contain directions to the proper party officials as to giving notice to each delegate and alternate delegate to such original convention of the time and place for reassembling the convention. The time fixed by this chapter for filing the certificate of nomination of any candidate for public office nominated by the convention or for filing declarations or filling vacancies, shall be subject to the power of the court or justice to fix a later day if the reassembling of the convention be ordered.

No court or justice shall have jurisdiction of a proceeding, under this section, to review the action of any custodian of primary records in canvassing and certifying the result of a primary election, or of the secretary of state in preparing and certifying the list of members of a state committee, unless the proceeding be instituted on or before the tenth day next following such primary election; and the final order at special term, in any such proceeding, must be made on or before the fifteenth day after such primary election. (Last amended by chap. 479, Laws of 1921.)

(See B., C. & G. Consol. L., 2nd Ed., p. 2429.)

D. General construction of statute.

Section 56 of the Election Law should be liberally construed.⁹ The right of review given by the section is sum-

9. *Matter of Trombley*, 150 App. dismissed, 206 N. Y. 632. Div. 14, 134 N. Y. Supp. 374; appeal

mary; and it should not be so construed as to render it ineffectual.¹⁰ The proceedings authorized by section 56 are designed to vindicate rights which are conferred and enforce the performance of duties which are imposed by the Election Law in regard to participation in primary elections, political committees, and conventions. Through those proceedings the action or neglect of certain denominated functionaries, assemblages, and organizations is reviewable, to the end that prescribed duties may not be neglected or ignored and designated rights may not be withheld, invaded, or disregarded.¹¹ Its application is confined to primary elections and party government.¹²

E. Jurisdiction.

In a proceeding under section 56 to review the determination of the secretary of state and the validity of a designation of a state committeeman, if all of the parties reside in the fourth judicial district and all the transactions out of which the controversy arose have taken place therein, a judge of such district will have jurisdiction, although the action of the secretary of state is claimed to have taken place in the third district.¹³

F. Power of court.

Section 56 of the Election Law confers on the court broad summary power to correct fraudulent practices and to compel fair conduct at primary elections.¹⁴ As a general rule, the power of review is limited to those matters which were within the jurisdiction of the board or officer whose acts are under review.¹⁵ The court reviews only such action as the

10. *Matter of Trombley*, 150 App. Div. 14, 134 N. Y. Supp. 374; appeal dismissed, 206 N. Y. 632.

11. *People ex rel. Tuers v. Dooling*, 69 Misc. 391, 125 N. Y. Supp. 857.

12. See *Matter of McShane v. Murphy*, 86 App. Div. 566, 83 N. Y. Supp. 1018; *aff'd*, 177 N. Y. 528.

13. *Matter of Trombley*, 150 App. Div. 14, 134 N. Y. Supp. 374; appeal dismissed, 206 N. Y. 632.

14. *Matter of Coughlin*, 137 App. Div. 283, 121 N. Y. Supp. 980; *aff'd*, 198 N. Y. 613.

15. *Matter of Hines*, 141 App. Div. 569, 126 N. Y. Supp. 386; *Matter of King*, 155 App. Div. 720, 140 N. Y.

County committee.—Where, at a meeting of the Democratic county committee, held after a proper certificate of petitioner's election at a former meeting as chairman of said committee had been filed with the board of elections of the county and with the Secretary of State, a resolution purporting to remove petitioner from his office as chairman was adopted, and thereafter another was chosen as chairman of said committee and a certificate of his election was filed as was the other certificate, it was held that the case did not come within section 56 of the Election Law and that the court was without jurisdiction to review the pro-

officers have taken and corrects the errors they have made.¹⁶ It has been held that the statute does not authorize a recount of the votes and a declaration of a different result based upon such recount in a proceeding against the custodians of primary record.¹⁷ But if the inspectors of election have been made parties to the proceeding, the court has power to order the custodians of primary election records to produce ballots cast for rival candidates for examination and recanvass, if the correctness of the original canvass has been challenged, and may provide that the rival candidates may be present in person and by counsel, and that examination shall be made in the presence of the custodians of the records, or

after petitioner had been elected chairman. *Matter of Ganley*, 90 Misc. 445, 154 N. Y. Supp. 773. At common law the writ of certiorari lies only to inferior courts and offices exercising judicial functions, and the act to be reviewed must be judicial in its nature and not ministerial or legislative; therefore, a Republican county committee not being a judicial officer or body, its determination that a certain person was elected chairman cannot be reviewed by certiorari. *People ex rel. Traver v. Lauterbach*, 7 App. Div. 293, 39 N. Y. Supp. 1117.

Correction of ballots.—Under an earlier statute, it was held that it did not allow the striking from the official ballot the names of candidates for office because of errors and omissions in the party proceedings preliminary to their nomination, but is limited to corrections of errors and omissions in the primary proceedings, and does not extend to the correction of ballots. *Matter of Cragg*, 121 App. Div. 921, 107 N. Y. Supp. 1124.

Removal of member from committee.

—The members of a general committee of a political party cannot remove one of their members who has been duly elected as provided in the Primary Election Law, and a member whose removal has been attempted may be restored by mandamus or his attempted removal may be enjoined. *People ex rel. Coffey v. Democratic General Committee of Kings*, 164 N. Y. 335. Where the State committee of the Democratic

party, which is the executive body of that party in the State, has no constitution or by-laws, and is elected by delegates from the respective senatorial districts, and no power resides anywhere to reject their choice, it will be enjoined from expelling, by a majority of said committee, the representatives of senatorial districts in Kings county. *Cummings v. Bailey*, 53 Misc. 142, 104 N. Y. Supp. 283; *aff'd*, 120 App. Div. 892, 105 N. Y. Supp. 1112.

Convention.—Under the former statute, it was held that a political convention had the right to decide all questions as to the delegates to that convention. But the Supreme Court had power to review the action of the convention in seating delegates, which review could be based upon such notice as the court should direct. The court had jurisdiction to determine whether or not the act of the convention in changing delegates and seating other delegates was proper. Where the court had determined that a convention improperly refused to seat delegates and improperly seated other delegates, the officers upon whom the order was served were bound to obey it. *Matter of Lazarus*, 140 App. Div. 406, 125 N. Y. Supp. 414.

16. *Matter of Tenjost*, 169 App. Div. 300, 154 N. Y. Supp. 708.

17. *Matter of Tenjost*, 169 App. Div. 300, 154 N. Y. Supp. 708. See, also, *Matter of Rush*, 42 Misc. 70, 85 N. Y. Supp. 581.

employees of their department designated by them, and that the election inspectors may likewise be present in person or by counsel. It is not necessary that a separate proceeding be taken against the officers of each election district, but there may be one proceeding against all the officers of the several districts, where each contributed to a result alleged to be incorrect.¹⁸

Where it is probable that occurrences in relation to the statement of the result of the canvass of the vote were due to ignorance and neglect in the performance of duty by certain of the inspectors of primary election, the court will order the ballot boxes opened, the enrollment books examined, the true result adjudged, the boards of inspectors of election to reconvene and make and file a statement of said result, and a certificate to be issued to the candidate lawfully elected.¹⁹

Where, through the inadvertence of an inspector of elections in not correctly announcing the number of votes cast as indicated by a voting machine, an erroneous statement of the vote has been signed by the inspectors, they may be compelled by mandamus to correct the return to accord with the vote registered by the machine, where there is no contention that the machine did not correctly register and count the votes.²⁰

Where the custodians of a primary election upon certification of the result thereof issued a certificate that a candidate did not receive a majority of the votes cast, and in a proceeding to review said election it appeared from the primary record that if ballots cast for the petitioner who was variously named as a candidate had been counted for him he would have been elected, the Supreme Court may declare his election.²¹ But the statute gives the court no power to correct mistakes made by the electors themselves. Hence, where a petition for the designation of independent candidates is defective, and the time to file such petition has expired, a justice of the Supreme Court has no power to allow an amended petition to be filed *nunc pro tunc*.²²

18. *Matter of Tenjost*, 171 App. Div. 129, 157 N. Y. Supp. 528.

19. *Matter of Ward*, 78 Misc. 15, 137 N. Y. Supp. 659; *aff'd*, 152 App. Div. 940, 137 N. Y. Supp. 1147. See, also, *Matter of Walsh v. Church*, 115 App. Div. 82, 100 N. Y. Supp. 764; *Matter of Rabbitt v. Garaud*, 89 App. Div. 119, 85 N. Y. Supp. 473.

20. *Smith v. Wenzel*, 171 App. Div. 123, 157 N. Y. Supp. 85; *aff'd*, 216 N. Y. 421.

21. *Matter of Zimmer*, 77 Misc. 336, 136 N. Y. Supp. 506; criticised, *Matter of Tenjost*, 169 App. Div. 300, 154 N. Y. Supp. 708.

22. *Matter of King*, 155 App. Div. 720, 140 N. Y. Supp. 914. *Matter of*

A justice of the Supreme Court has no power, in a proceeding to review the action of inspectors of a primary election under this section, to enjoin a person to whom a certificate of election to the county committee of a political party has been issued from participating in the meetings of the committee.²³

While, in a summary proceeding to review the action of any custodian of primary records in canvassing and certifying the result of a primary election, the court may make any change in the result of such primary election as certified to by the custodian of primary records, it will not interfere until it is shown that the action of the custodian in canvassing and certifying the result is fraudulent, erroneous or in violation of some duty or responsibility imposed by law.²⁴

The power of review vested in the court under section 56 of the Election Law does not authorize an alteration of the return of the inspectors of a primary election where, except in a single trifling particular, it is in accord with the votes cast; it does not extend to a review of threatened acts of such election officers, and while the court may make any change in the result of a primary election as certified to by the custodian of primary records, a proceeding against him under said section before a certificate of election has been issued is premature.²⁵

ARTICLE III.

NOMINATIONS AND CERTIFICATE OF NOMINATION.

A. Election Law, § 125. Conflict in names or emblems.

If two or more different parties or independent bodies shall select the same, or substantially the same, device or emblem or party name, the supreme court or any justice thereof within the judicial district or any county judge within his county shall decide which of said parties or independent bodies is entitled to the use of such device or emblem or party name, being governed as far as may be in his decision by priority of selection in the case of the device or emblem, and of use in the case of the party name. If the other party or independent body shall present no other device or party name after such decision, the custodian of primary records shall select for such other party or independent body another device or party name, so that no two different parties or nominating bodies shall be designated by the same device or party name. If there be a division within a party, and two or more factions claim the

Jackson v. Britt, 147 App. Div. 87, 131 N. Y. Supp. 877. See, also, People ex rel. Smith v. York, 34 Misc. 120, 68 N. Y. Supp. 741.

23. Matter of Holle, 160 App. Div. 369, 145 N. Y. Supp. 388; Schieffelin

v. Britt, 150 App. Div. 568, 135 N. Y. Supp. 62; aff'd, 206 N. Y. 677.

24. Matter of Sherman, 92 Misc. 589, 157 N. Y. Supp. 236.

25. Matter of Zimmer, 76 Misc. 320, 134 N. Y. Supp. 502.

same, or substantially the same, device or name, the court or judge aforesaid shall decide between such conflicting claims, giving preference of device and name to the primary, body or committee thereof, recognized by the regularly constituted party authorities.

Except as herein otherwise provided, any question arising with reference to any device, or to the party or other name designated in any certificate filed pursuant to the provisions of this article, or with reference to the construction, sufficiency, validity or legality of any certificate, shall be determined upon the application of any citizen by the supreme court, or any justice thereof, within the judicial district, or any county judge within his county, who shall make such order in the premises as justice may require, but the final order at special term must be made on or before the twelfth day or, in the case of a certificate of nomination of a town or village officer, the seventh day preceding the day of election. Such question shall be heard upon such notice to such officers, persons or committees as the said court or justice or judge thereof shall direct.

The supreme court, at special term, in any judicial district in which two or more proceedings are pending in such district under the provisions of this section may, by order, consolidate all such proceedings and provide that further proceedings therein be had before such court at special term, in all cases where the question or questions involved are identical. If one or more of such proceedings be pending before a justice or county judge, notice of such order shall be forthwith given to such justice or judge.

This section shall not apply to a certificate filed pursuant to section one hundred and twenty when the question involves a determination as to the authority of a convention or committee or the legality or effect of its action. In such case, the question shall be determined in proceedings instituted under section fifty-six of this chapter. (Last amended by chap. 479, Laws of 1921.)

(See B., C. & G. Consol. L., 2nd Ed., p. 2465.)

B. Election Law, § 134. Objections to certificates of nomination.

A written objection to any certificate of nomination may be filed with the officer with whom the original certificate of nomination is filed within three days after the filing of such certificate, excepting that if by any independent certificate of nomination any person is nominated who is at the time or shall be after the filing of such independent certificate of nomination, the candidate of a political party for the same office and the party certificate has been filed after the filing of the independent certificate of nomination, the written objection to the independent certificate of nomination may be filed within three days after the filing of such party certificate; and if written objections to such independent certificate of nomination have been already filed by the same or some other person and shall have been heard and determined or heard and not determined, there shall be a new hearing upon all the objections so filed, the written objections to an independent certificate of nomination filed after the filing of a party certificate as herein provided may contain all objections to such independent certificate notwithstanding the same or some other person has already filed objections to such certificate. If such objection be filed, notice thereof shall be given forthwith by mail to the committee, if any, appointed on the face of such certificate for the purposes specified in section one hundred and thirty-five of this article, and also to each candidate placed in nomination by such certificate. The questions raised by such written objection shall be heard and determined as prescribed in section one hundred and twenty-five of this article.

(See B., C. & G. Consol. L., 2nd Ed., p. 2474.)

C. Nature of proceeding.

A proceeding authorized by the Election Law to review a certificate of nomination is a special proceeding.²⁶ The proceeding is of a summary nature, and the rules as to pleadings, objections, and evidence are not strictly maintained as in an action.²⁷ Sections 125 and 134 are in article V of the Election Law, which treats exclusively of nominations and the making and filing of certificates thereof. It has been thought that there must have been some purpose in providing for the distinct remedies in the same law, and that it is the duty of the court to discover, announce, and effectuate the purpose.²⁸

D. Conflicting names.

It was held that the use of the word "Progressive" by any organization or individual other than "The National Progressive Party," though in conjunction with other names, would tend to create confusion and a loss of votes through inadvertence on the part of some electors, and the court had jurisdiction to pass upon the right to the use of said word in a certificate of nomination.²⁹

E. Decision of officers.

Under section 125 a court or judge has nothing to review, unless there is a determination made by the board of elections in respect to the nomination of candidates.³⁰ Under the Laws of 1890, relating to certificates of nomination and objections thereto, the decision of the county clerk, who must in the first instance pass upon the validity of the objections, was final unless an order of a competent court or justice of the Supreme Court was made on or before the Wednesday preceding the election.³¹

F. Moving papers.

The hearing, in a proceeding to review the determination of a filing officer, must be confined to the papers upon which the original determination was based.³² It will be presumed

26. *Matter of Social Democratic Party*, 182 N. Y. 442; *Matter of Mitchell*, 81 Hun, 401, 30 N. Y. Supp. 962.

27. *Matter of Fairchild*, 151 N. Y. 359.

28. *People ex rel. Tuers v. Dooling*, 69 Misc. 391, 125 N. Y. Supp. 857.

29. *Matter of Kaufman*, 78 Misc. 72, 138 N. Y. Supp. 804; modified, 152

App. Div. 940, 137 N. Y. Supp. 1124.

30. *Matter of Candidates for Members of Assembly in 32d District*, 108 App. Div. 361, 95 N. Y. Supp. 616.

31. *Matter of Woodworth*, 64 Hun, 522, 46 St. Rep. 432, 19 N. Y. Supp. 525.

32. *Matter of Fairchild*, 151 N. Y. 359, 45 N. E. Rep. 943.

in these proceedings that facts offered to be proved by affidavits presented to the officer filing the certificate and erroneously rejected by him were proved.³³ It is the general practice to hear matters of this kind upon affidavits.³⁴

G. Parties.

The provision of section 134 allowing a review upon the complaint of "any citizen" must be understood as referring to any citizen who has instituted a proceeding by filing objections with the officer filing the certificate of nomination.³⁵ When objections to a certificate of nomination are sustained by the board of elections, a review may be had on the application of the candidate, or of the committee representing the party which placed him in nomination.³⁶ A county clerk has the right to institute proceedings for the review of an order commanding him to do an official act which he deems to be a violation of the statutes of the State, and the fact that he has no pecuniary interest in the act does not affect his right to appeal.³⁷ Objections to certificates of nomination must be on notice to candidates affected.³⁸

H. Where application made.

The judicial district or county, within which to review the determination of the filing officer upon a contested certificate of nomination, is the district or county within which the complainant and respondent reside and where the transaction arose which was the subject of the determination.³⁹ But it has been held that a voter who resides in the first judicial district may review there the adverse determination of the Secretary of State, although the latter resides in the third judicial district.⁴⁰

I. Authority of court.

It is not in the province of the court to decide abstract questions of law in proceedings to review the determination of an official filing certificate of nomination, which could

33. *Matter of Adams*, 21 Misc. 396, 47 N. Y. Supp. 543.

34. *Matter of Adams*, 21 Misc. 396, 47 N. Y. Supp. 543.

35. *Matter of Social Democratic Party*, 182 N. Y. 442.

36. *Matter of Logan*, 116 App. Div. 146, 102 N. Y. Supp. 200; *aff'd*, 186 N. Y. 267. But see *Matter of Woodworth*, 64 Hun, 522, 19 N. Y. Supp.

of the county committee.

37. *Matter of Cuddeback*, 3 App. Div. 103, 39 N. Y. Supp. 388.

38. *Sweeny v. Comrs. of Elections*, 209 N. Y. 567.

39. *Matter of Fairchild*, 151 N. Y. 359.

40. *Matter of Gillespie v. McDonough*, 39 Misc. 147, 79 N. Y. Supp. 182.

have no effect upon either candidate or upon the election.⁴¹ In a proceeding to determine the duties of a board of elections regarding the placing of a name on a primary ballot, the court has power to determine the eligibility of a candidate.⁴²

On a review of a determination of the board of elections of the city of New York sustaining objections to a certificate of nomination and rejecting such certificate, the Supreme Court can consider only the facts presented to such board of elections.⁴³ Where a certificate of designation of candidates to be voted for at a primary election is sufficient on its face, in the form prescribed by the statute, apparently signed by the required number of persons authorized by statute to sign it, and the certificate of acknowledgment is regular and sufficient upon its face, the action of the board of elections in accepting it is not subject to review on the ground that the signers neither swore to nor acknowledged their signatures thereto.⁴⁴ Under the former law the sufficiency or truth of the notarial certificate could be investigated by the courts.⁴⁵

In proceedings to determine the regularity of party nominations, the decisions of party conventions, committees, or caucuses are not always binding on the court.⁴⁶

41. *Matter of Woodworth*, 64 Hun, 522, 19 N. Y. Supp. 525.

Local option.—Neither the Supreme Court nor a justice thereof has jurisdiction under this section to entertain a summary proceeding to determine the sufficiency of a petition filed by the town clerk, requiring the submission of local option questions to the electors of a town. *Matter of Town of Newburgh*, 97 App. Div. 438, 89 N. Y. Supp. 1065.

42. *Matter of Bewley*, 101 Misc. 248, 166 N. Y. Supp. 930. Compare *Matter of Independent Nominations*, 186 N. Y. 268.

43. *Matter of Horan*, 108 App. Div. 269, 95 N. Y. Supp. 607.

44. *Matter of Board of Elections*, 76 Misc. 33, 134 N. Y. Supp. 639; *aff'd*, 149 App. Div. 957, 133 N. Y. Supp. 1142.

45. *Matter of Terry*, 146 App. Div. 520, 131 N. Y. Supp. 841.

46. *Matter of Broat*, 6 Misc. 445, 27 N. Y. Supp. 176; *Matter of Hea-*

cock, 18 Misc. 311, 41 N. Y. Supp. 161. In the *Matter of Fairchild*, 151 N. Y. 359, it was held that where questions of procedure in political conventions or committees are recognized by law and by party usage and custom, the officer called upon to determine such question should follow the decision of the regularly constituted authorities of the party, and the courts will not review the determination of such officer. The decision of the State committee of a State convention that one of two regularly called conventions was regular is to be regarded as controlling upon the courts. It is also held in *Matter of Redmond*, 5 Misc. 369, 55 St. Rep. 150, 25 N. Y. Supp. 381, that what constitutes regular nominations depends upon the usages of the party and not upon any rules or regulations which may be made from the decision of the courts or judges. The action of a political convention, assembled to nominate candidates for an office, in rescinding before adjournment a nomi-

The statutory requirement as to the time when certificates of nomination should be filed is mandatory, yet there may occur accidents and mistakes, causing delay in such filing, and from the effects of which the Supreme Court may give relief, provided it finds that the delay was not due to the negligence of the convention making the nomination, but to the party to whom the filing of the certificate was intrusted; but the question in each case, as to whether there has been excusable default or misfortune, depends upon the particular facts, and the determination of the question rests in the Supreme Court.⁴⁷

It is the duty of courts and judges entertaining proceedings under the Election Law to speedily decide the questions presented to them.⁴⁸ The statute provides when the final order shall be made; but such provision is directory and not mandatory, and where the court has acquired jurisdiction, and the case has been submitted within the time required by the statute, its order will be effectual, although made after the expiration of such time.⁴⁹ After the time for filing certificates to fill vacancies has expired, the jurisdiction of the court to entertain summary proceedings to review the determination of a commissioner of elections has terminated, and it will not entertain a proceeding to determine whether certificates are void or only defective when

nation made and in substituting another nominee, is not reviewable by the courts. *Matter of Nash*, 36 Misc. 113, 72 N. Y. Supp. 1057.

Rival factions.—It was held, in the *Matter of Cowie*, 33 St. Rep. 710, 11 N. Y. Supp. 838, on a motion for mandamus to compel the clerk to recognize the petitioner as the regular nominee of the Republican party for Assembly, that neither the clerk nor the court had power under the Ballot Reform Act to decide between claims of rival factions of a political party.

47. *Matter of Darling*, 189 N. Y. 570; *People ex rel. Simmons v. Ham*, 56 Misc. 112, 106 N. Y. Supp. 312.

Nunc pro tunc.—A certificate of independent nomination was presented for filing one week after the last day prescribed by law, and it was held that it could not be ordered filed *nunc pro tunc*. *Matter of McDonald*, 25 Misc. 80, 54 N. Y. Supp. 690.

The certificate of nomination for justice of the municipal court of the city of New York was not presented for filing with the county clerk until after the expiration of the seven days prescribed by statute therefor, though the minutes of the convention at which the nomination was made were duly filed with the board of elections of the city and showed such nomination. *Held*, that the county clerk would not be ordered to file the certificate, nor the board of elections be directed to print the name of the candidate. *People ex rel. Darling v. Dooling*, 56 Misc. 116, 107 N. Y. Supp. 368.

48. *Matter of Hennessy*, 164 N. Y. 393.

49. *Matter of Hennessy*, 164 N. Y. 393; *Matter of Herman*, 108 App. Div. 335, 96 N. Y. Supp. 144; *Matter of Stoddard*, 158 App. Div. 525, 143 N. Y. Supp. 739.

the time to correct defects has gone by.⁵⁰ The expiration of the time for filing certificates of nomination to fill vacancies does not impair the jurisdiction of the Appellate Division on an appeal from an order reviewing the determination of the county clerk as to which of two nominees for office was the regular nominee of a given party.⁵¹

ARTICLE IV.

REGISTRATION OF VOTERS.

A. Election Law, § 151. Additional meetings for registration.

If a special election be called by the governor or a special or other election be appointed by or pursuant to law for a time other than the day of general election, the inspectors of election of the various election districts in the political subdivision for which such special or other election is to be held shall meet in their respective districts on the second Saturday preceding such election, from eight o'clock in the forenoon to ten o'clock in the evening, for the purpose of revising and correcting the register of voters as provided in this article. This section shall not apply to cities of one million inhabitants or over.

B. Election Law, § 153. Adding and erasing names on register.

If the board of inspectors at any meeting for the registration of electors shall have neglected or refused to place upon the register of electors the name of any person who is entitled to have his name placed thereon, application may be made to the supreme court, or any justice thereof in the judicial district in which such election district is located, or of a county adjoining such judicial district, or to a county judge of the county in which such election district is located, for an order to place such name upon the register of electors; and such court, justice or judge may, upon sufficient evidence, and upon such notice of such application, of not less than twenty-four hours, to the board of inspectors and such other persons interested, as the court, justice or judge may require, order such inspectors to convene as a board of registration on the second Saturday before such election, and to add the name of such person to such register of electors, and such register shall be corrected accordingly; but no court, justice or judge shall order the name of any person to be added to the register of electors unless it shall have been omitted therefrom through the fault, error or negligence of the election officers. In case the name of any person who will not be qualified to vote in such election district, at the election for which such registration is made, shall appear upon such register, application may be made in like manner by any elector of the town or city in which such election district is located or by the state superintendent of elections or any deputy state superintendent of elections to any court, justice or judge hereinbefore designated, for an order striking such name from the register, and such court, justice or judge may, upon sufficient evidence, and upon such notice of such application, of not

50. Matter of Independence League Nominations, 51 Misc. 486, 100 N. Y. Supp. 760.

51. Matter of Emmett, 150 N. Y. 538, 44 N. E. Rep. 1102.

less than twenty-four hours, to the person interested as the court, justice or judge may require, served either personally or by depositing the same in the post-office addressed to said person by his name, and at the address which appears in the register certified by the inspectors of election, order such board to strike such name from such register of voters, and such register shall be corrected accordingly. In all applications to strike the names of voters from the register under this section an affidavit by the state superintendent of elections or any of his deputies when duly deputed by the state superintendent of elections for that purpose, that investigation was made by him pursuant to the provisions of section four hundred and seventy-five of this chapter, and that the affiant did visit and inspect the premises claimed by the voter as his residence, and did interrogate an inmate, house dweller, keeper, caretaker, owner, proprietor or landlord thereof or therein as to the said voter's residence therein or thereat, and that the said affiant was informed by one or more of said persons, naming them, that they were acquainted with and knew the persons residing therein or thereat, and that the voter did not reside at said premises thirty days before election, shall be presumptive evidence against the right of the voter to register from such premises, and in case the court, justice or judge direct that service of the order to show cause may be made by depositing the same in the post-office, such service shall not be complete until a copy of the order to show cause shall also have been served upon the custodian of primary records for the political subdivision in which such election district is located, and upon the chairman of each political committee for the political subdivision in which such election district is located. If upon the hearing of such application the court, justice or judge shall decide that the name of the elector shall be stricken from the register, the order of the court, justice or judge shall direct that the board of elections shall cause such name to be stricken from the register and also from the books of enrollment if it appears therein.

In case the elector has, through no fault or neglect of his own, been registered in a wrong election district, the board of elections, upon proper proof, and upon such notice to the chairmen of the county committees of the several parties as the board shall prescribe, may direct that his name be stricken from the register of the district in which he is not a qualified elector and, if he is a qualified elector in an adjoining election district within the jurisdiction of such custodian, may direct that he be registered in the election district in which he is a qualified elector. The proper inspectors of elections shall carry out the directions of the board. In a county having a single commissioner of elections or where the duties of a board of elections are performed by a county clerk, such officer shall not have power to make any such direction. In any such county, such direction may be made by the court, upon proper proof. No application to add a name to or strike a name from the register shall be made after a day at least two days prior to the second Saturday before election.

(See B., C. & G. Consol. L., 2nd Ed., p. 2481.)

C. Authority of court.

Where an elector's name is stricken off the registry list of an election district because it appeared that he did not reside at the place designated by him as his residence, on the presumption that he was not a resident of the district, and such

action is disputed, the court may permit the voter to swear in his vote.⁵²

Under the provisions of the Election Law as it stood in 1894, a judge at chambers had a right to strike names from the register where the name of the person not qualified or who cannot become so qualified before election appears upon this list. These provisions do not apply, however, to a case of doubt or when resting in uncertainty or depending upon inferences, or where the facts show affirmatively that the intending voter did not and cannot become qualified. If there is a dispute about the facts the judge should not intervene, but should leave the voter to swear in his vote at his peril and take upon himself the risk of his persistence.⁵³

An order to show cause why the name of a person should not be stricken from the register list need not generally be served upon any one except such person.⁵⁴

The amendment by Laws of 1905, chapter 675, with reference to the affidavit of the Superintendent of Elections being presumptive evidence against the right of an elector to vote, is constitutional, as the Legislature may prescribe what evidence of a fact shall be presumptive. The provision of this section that notice of the application to strike the name of an elector from the register may be served by mail, addressed to his residence as given, is also constitutional. On the hearing of an application to strike a name from the register, it is error to exclude competent common-law evidence of the elector's right to vote.⁵⁵

D. Duty of inspectors of election.

Inspectors act ministerially only, and have no powers except those given by statute. Mandamus is the proper remedy to compel inspectors to receive the vote of an elector.⁵⁶ Inspectors of election have no right to refuse

52. *Matter of Jacobs*, 45 Misc. 113, 91 N. Y. Supp. 596. Where a person negligently registered himself in the wrong election district, it was held that the court could not relieve him after the time for registration has expired. *Matter of Hart*, 25 Misc. 93, 53 N. Y. Supp. 1071.

53. *Matter of Goodman*, 146 N. Y. 284. Compare this with *Matter of Ward*, 48 St. Rep. 613, 20 N. Y. Supp. 606, 29 Abb. N. C. 187; *Matter of Hamilton*, 80 Hun, 511, 62 St. Rep.

677, 30 N. Y. Supp. 499, construing the provision of chapter 680 of the Laws of 1892. The latter case seems to be overruled by the statute and decision of 146 N. Y. 284.

54. *Matter of Griffith*, 16 Misc. 128, 38 N. Y. Supp. 953.

55. *Matter of Morgan*, 114 App. Div. 45, 99 N. Y. Supp. 775. See, also, 186 N. Y. 202.

56. *People ex rel. Borgia v. Doe*, 109 App. Div. 670, 96 N. Y. Supp. 389.

to allow a duly qualified and registered elector to vote, solely because some other person had previously voted on his name. Such refusal is a violation of the voter's constitutional right under the New York State Constitution (Art. 1, § 1, and art. 2, § 4). Inspectors of election are mere ministerial officers, and, if an applicant makes the required statement under the required oath or affirmation, his name must be added to the list of voters, and the inspectors have no discretion to refuse to add it. Where a voter offers his vote to the inspectors, and, if challenged, takes the proper oath, and, after answering fully the questions touching his right to vote, offers to take the general oath, it is the absolute duty of the inspectors to receive his vote. If in such a case the inspectors refuse to take his vote, and he is a legal voter, he can compel them to take it by mandamus. If it appears from undisputed facts that he is not entitled to vote, the writ should not be granted.⁶⁷

ARTICLE V.

JUDICIAL INVESTIGATION OF BALLOTS.

A. Election Law, § 374. Preservation of ballots.

After the last tally sheets and returns are completed, and all the stubs and ballots, except the protested, void and wholly blank ballots, are replaced in the boxes from which they were taken, each box shall be securely locked and sealed, and deposited, by an inspector designated for that purpose, with the officer or board furnishing it, together with the separate sealed package of unused official ballots. The boxes and packages so deposited shall be preserved inviolate for six months after the election, except that they may be opened and their contents examined upon the order of any court of competent jurisdiction or may be opened by direction of a committee of the senate or assembly to investigate and report upon contested elections of members of the legislature voted for at such election and their contents examined by such committee in the presence of the officer having the custody of such boxes. Unless ordered to be preserved by such a court, or unless an examination by such a committee be pending, they shall be opened and their contents destroyed after six months, except, that in a year in which a president of the United States is to be elected, in counties in which no contest has been noted, such boxes may be opened and their contents destroyed after four months and the boxes prepared for use at the primary election as provided in section seventy-nine of this chapter. The protested, void and wholly blank ballots shall be preserved as provided in section four hundred and thirty-seven of this chapter. Any candidate shall be entitled as of right to an examination in person or by authorized agents of any ballots upon which his name lawfully appeared as that of a candidate; but the court shall prescribe such conditions as of notice to other candidates or otherwise as it shall deem necessary and proper.

(See B., C. & G. Consol. L., 2nd Ed., p. 2611.)

B. Election Law, § 381. Judicial investigation of ballots.

If any statement of the result of the canvass in an election district shall show that any of the ballots counted at an election therein were protested or were canvassed as wholly blank or void, a writ of mandamus may, upon the application of any candidate voted for at such election in such district, within twenty days thereafter, issue out of the supreme court to the board or body of canvassers, if any, of the return of the inspectors of such election district, and otherwise to the inspectors of election making such statement, requiring a recanvass of such ballots. If the court shall, in the proceedings upon such writ, determine that any such ballot was improperly canvassed, it shall order the error to be corrected. Boards of inspectors of election districts, and boards of canvassers, shall continue in office for the purpose of such proceedings.

(See B., C. & G. Consol. L., 2nd Ed., p. 2615.)

C. Preservation and inspection of ballots.

Before the recent amendments to section 374 of the Election Law, requiring the preservation of the ballots, it was thought that its purpose was that the ballots might be used in evidence upon a criminal prosecution or in an action to determine which candidate was elected to office.⁵⁸ Hence, it was held that the section was not intended to confer upon a judge out of court the power to capriciously order ballot boxes to be opened and examined, unless it was to the end that they may be used in judicial proceedings pending or about to be commenced.⁵⁹ And it was held that an order directing the opening of the ballot box and an inspection of

58. *People v. McClellan*, 191 N. Y. 341.

In quo warranto proceedings to try title to an office, the boxes in which the ballots are preserved as required by the Election Law, section 341, may be opened, and their contents recounted, on the trial, without any preliminary evidence tending to show some other miscount, error, omission, or fraud in the counting or canvassing of the votes or in the returns. *People v. McClellan*, 191 N. Y. 341.

The correction of an erroneous record or mistake made and recorded in a tally sheet is provided for in the Election Law by the requirement of section 374 for preserving the boxes of voted ballots for six months and for the opening and examination under the order of the Supreme Court or a justice thereof, in order to determine the actual vote cast. When the statement

or return of election district inspectors states a less number of votes for certain candidates than that shown by the unquestioned tally sheet, the board of county canvassers may be required by mandamus, on the petition of the candidates prejudiced by the return, to exercise the power conferred by section 432 of the Election Law of 1896 to summon the inspectors to correct their return, and also, independently of the Election Law, the inspectors may be required, by mandamus, to convene and make a correct return, and the county board of canvassers directed to canvass the corrected return. *Matter of Stewart*, 155 N. Y. 545.

59. *People v. McClellan*, 191 N. Y. 341; *Matter of Election of a Member of Assembly for the 1st District of Erie Co.*, 18 Misc. 391, 43 N. Y. Supp. 710; *Matter of Ulrich*, 67 Misc. 196, 122 N. Y. Supp. 601.

the ballots will not be granted on the application of one of the candidates, upon the claim that by mistake or otherwise the figures shown by the count of the split ballots were transposed in the statement made by the inspectors.⁶⁰ The section, in its present form, gives broader powers to the court.⁶¹ But it does not permit the issuance of an order for the examination of voting machines.⁶²

D. Recanvass under section 381.

1. Authority limited to protested, void and blank ballots.

Except as contained in the Election Law, there is no authority for a recanvass of the ballots by the inspectors; and they cannot be compelled or permitted to make another canvass.⁶³ The authority conferred upon the Supreme Court by section 381 of the Election Law is confined to a review of the protested, void and blank ballots returned by the election officers in the sealed package.⁶⁴ It is distinct and sepa-

60. *Matter of Election of a Member of Assembly for the 1st District of Erie Co.*, 18 Misc. 391, 43 N. Y. Supp. 710.

61. *Application denied.*—In an aldermanic election in New York city where the ballot clerks' returns agreed with the statements of canvass prepared by the boards of inspectors except in a single district, in which it was conceded an error was made by the inspectors in transcribing the result of the count, which mistake the respondent consented to have corrected, an application to open the ballot boxes was denied. *Matter of Slattery*, 50 Misc. 212, 100 N. Y. Supp. 419.

62. *Matter of Thomas*, 216 N. Y. 426.

63. *Matter of Hearst v. Woelper*, 183 N. Y. 274; *People ex rel. Brink v. Way*, 179 N. Y. 174; *People ex rel. March v. Bean*, 188 N. Y. 266; *People ex rel. Fiske v. Devermann*, 83 Hun, 181, 31 N. Y. Supp. 593, 64 St. Rep. 147.

When application denied.—A peremptory mandamus will not be granted to compel a recount of ballots cast at a general election rejected as void and those protested as marked for identification, where the opposing affidavits allege that packages containing such ballots were found in the county clerk's

office in a place to which all persons had an easy access; that none of such packages were indorsed; that some of them were sealed and others unsealed; that many ballots were not indorsed as required by the Election Law, and that many had actually been counted for the petitioner. *People ex rel. Perry v. Bd. of Canvassers*, 88 App. Div. 185, 84 N. Y. Supp. 406.

64. *People ex rel. Brown v. Freisch*, 215 N. Y. 356; *Matter of Larken*, 46 App. Div. 366, 61 N. Y. Supp. 597; reversed on another ground, 163 N. Y. 201; *People ex rel. Clark v. Earley*, 16 Misc. 603, 40 N. Y. Supp. 587.

Effect of void ballots.—An election will not be nullified *in toto* by the casting and counting of marked ballots. Such ballots will be thrown out as void, but will not operate to render void the ballots that were regular and in accordance with the provisions of the statute. *People ex rel. Bradshaw v. Bidelman*, 69 Hun, 596, 23 N. Y. Supp. 954.

Alternative mandamus.—Unless objection is made during the canvass to a ballot as marked for identification the inspectors are not required to so indorse it nor return it with their statement of canvass. A peremptory mandamus will not issue compelling

rate from any provision of the law relating to the ballots replaced in the ballot box which has been sealed and locked.⁶⁵

Where the correctness of a canvass of the votes of a county was unassailed, a private citizen and taxpayer is not entitled to mandamus to compel a second canvass on the ground that the original one was not made by the officers authorized by law.⁶⁶

The Supreme Court has no authority under this section or under its general power, authority, and jurisdiction to determine the validity of ballots contained in the boxes deposited with the city clerk, where there has been a clerical error in the returns by the election inspectors, nor to order a recount of such ballots.⁶⁷

Where ballots, found in sealed packages of ballots objected to because marked for identification, are returned by the election inspectors as objected to for that reason, but are marked by them as "counted, objected to as void," the court has jurisdiction to consider their validity in general.⁶⁸

If it appears that ballots marked "protested," "wholly void" or "wholly blank" have, by inadvertence or otherwise, been deposited in the ballot box instead of being placed in a separate package as required by statute, the court may determine that such ballots were improperly canvassed by the board of inspectors and order the error corrected.⁶⁹ Inspectors cannot defeat the mandamus proceeding by failing to write their names on the ballots or to make the required statement.⁷⁰

The statute providing for a recanvass of ballots is not susceptible of a construction which will justify an order of the court directing election officers to open a box of voted ballots months after the close of an election, examine the ballots contained therein, and without any marks of identification appearing on said ballots, aided only by a recollection of the situation as it existed on the night of election

the board to so indorse the ballot upon an objection made subsequent to the canvass, but an alternative order will issue in order that the fact of the validity of the ballot may be tried. *People ex rel. Bush v. Board*, 66 Hun, 265, 21 N. Y. Supp. 279.

65. *People ex rel. Brown v. Freisch*, 215 N. Y. 356.

66. *Matter of Scofield*, 102 App. Div. 358, 92 N. Y. Supp. 672.

67. *People ex rel. White v. Super-*

visors of Albany Co., 192 N. Y. 539.

68. *People ex rel. White v. Bd. of Aldermen*, 31 App. Div. 438, 52 N. Y. Supp. 643, 86 St. Rep. 643; modified, 157 N. Y. 431; *People ex rel. Obert v. Bourke*, 30 Misc. 461, 63 N. Y. Supp. 906.

69. *People ex rel. Cantor v. County Board of Canvassers*, 165 App. Div. 142, 150 N. Y. Supp. 480.

70. *People ex rel. Hasbrouck v. Supervisors*, 135 N. Y. 522.

day, endeavor to select the identical ballots declared void at the time of the canvass.⁷¹

Where it appears that the number in the final column on the tally sheets of the inspectors of election is 482, and the ballot clerks' return states that the number of official ballots actually voted is 484, a peremptory writ of mandamus will be issued requiring the election officials, viz., the inspectors and poll clerks, to reconvene and recount the ballots.⁷²

The writ of mandamus authorized by section 381 of the Election Law is the ordinary writ, and the ordinary and established rules and procedure are applicable to it.⁷³

2. Determination of candidates entitled to vote.

The power of the court in a proceeding to investigate void and protested ballots is not limited to determine whether the ballots in question are valid or void, but it may go further and determine for what particular candidates they should be counted.⁷⁴ And the court may direct the inspectors to make a statement of the result of the election on the basis of its decision.⁷⁵

Mandamus lies to compel an election board of canvassers to do its duty, but not to compel it to certify the result by specifying any particular number of votes as cast for one party or the other; the actual determination of the result of the count of ballots being the exclusive province of the board, subject to review by *quo warranto*.⁷⁶ But, although the court cannot command a recount of ballots already counted by the inspectors, a mandamus will issue to them to meet and count ballots which have been "protested as marked for identification," and which they have not counted for any candidate, and to make true return thereof and correct their statement of the votes cast in their district, and to count the ballots for the candidates whose names appear thereon.⁷⁷ The intent of the voter will be effectuated as far as possible by the court's ruling as to the counting or discarding of votes.⁷⁸

71. *People ex rel. Brown v. Freisch*, 215 N. Y. 356.

72. *Matter of Stiles*, 69 App. Div. 589, 75 N. Y. Supp. 278; overruled, 183 N. Y. 278.

73. *Matter of Whitman*, 225 N. Y. 1.

74. *Matter of "Jerome Ballots"*, 48 Misc. 441, 96 N. Y. Supp. 122.

75. *People ex rel. White v. Alder-*

men, 157 N. Y. 431.

76. *Metz v. Maddox*, 189 N. Y. 460. See, also, *People ex rel. Haverly v. Hanes*, 44 Misc. 475, 90 N. Y. Supp. 61.

77. *People ex rel. McLaughlin v. Ammenwerth*, 197 N. Y. 340.

78. *People ex rel. Nichols v. Bd. of Canvassers*, 129 N. Y. 401.

3. Compelling true statement of count.

Although inspectors of election cannot be compelled by mandamus to reconvene and recount the ballots cast, or to make return in any particular manner, they may be compelled to make a true statement according to the count they actually made. This power exists irrespective of the special provision of the Election Law.⁷⁹ On the other hand, it has been held that, if the result of an election has been improperly declared by a town board of canvassers, relator has a remedy by *quo warranto* proceedings, but not by mandamus under the provisions of section 381 of the Election Law.⁸⁰ And, it has been held, mandamus will not lie to a board of canvassers to compel it to omit from its canvass votes which are alleged to be feloniously substituted in the place of the true vote of the district, where it appears that no other return exists to be canvassed; yet, if there were two returns and the canvassers had determined to canvass the false instead of the true, the court might correct such error.⁸¹

4. Congressional election.

Although Congress is the final judge of the qualifications of its own members, until a certificate of election has been transmitted and acted upon, the courts of this State are open to a candidate who complains that a certificate is about to issue in violation of the law.⁸²

5. County Court.

By section 381 the power to order a recount and a recanvass of the votes cast at an election by the board of canvassers is vested solely in the Supreme Court, and there is no power conferred upon the County Court judicially to investigate the matter. It is doubtful whether in any event it is competent for a court to appoint a referee for that purpose.⁸³

6. Time for application.

A proceeding under section 381 of the Election Law for a judicial review of the acts of inspectors in counting void and protested ballots must be begun within twenty days after

79. *People ex rel. Henness v. Douglass*, 142 App. Div. 224, 126 N. Y. Supp. 908.

80. *Matter of Baldwin*, 80 Misc. 263, 141 N. Y. Supp. 51.

81. *People ex rel. Gregg v. Bd. of Canvassers*, 54 Hun, 595, 8 N. Y. Supp. 259.

82. *People ex rel. Brown v. Supervisors of Suffolk*, 216 N. Y. 732. See also, *Matter of Van Cott*, 34 Misc. 411, 69 N. Y. Supp. 934.

83. *Matter of Tompkins*, 23 App. Div. 224, 48 N. Y. Supp. 737.

election.⁸⁴ The words "within twenty days thereafter," as used in this section, refer to the application for relief and not to the actual obtaining and issuing of an order of mandamus within that time.⁸⁵ Where no reason for an earlier decision is shown, a candidate for public office is not entitled to an examination of ballots upon which his name lawfully appears, until the official canvass of the vote has been completed and the Secretary of State has issued his certificate of election.⁸⁶

7. Petition.

Section 381 of the Election Law does not provide for the issue of a mandamus on the relation of a party who is simply interested in the result of any action taken at an election, but only upon the application of a candidate.⁸⁷ Orders to compel a recount of protested ballots counted and for a recount of ballots rejected and not considered may be granted on a single application, but should be issued separately.⁸⁸

A petition which states merely that rejected split ballots were not passed around to all the inspectors for verification, but does not allege that any of such ballots were not void, is insufficient as a basis for a mandamus to compel a recount.⁸⁹ A mere allegation that the inspectors rejected certain ballots, and that upon a recount it may turn out that some of such ballots were valid, and that petitioner may have a majority of the legal ballots, is not sufficient to justify a mandamus.⁹⁰

The petitioner must state the particular election districts in which the facts stated appeared upon the certified return. A general allegation that in the certified original returns of the canvass of the vote in all election districts of the city void ballots appeared is not such compliance with the statute as justifies the issuance of a mandamus to include all the election districts of the city.⁹¹ An affidavit, which gives the

84. *People ex rel. May v. Strang*, 137 App. Div. 848, 122 N. Y. Supp. 617.

85. *Matter of Tamney v. Atkins*, 151 App. Div. 309, 136 N. Y. Supp. 865; rev'd on other grounds, 209 N. Y. 202.

86. *Matter of Whitman*, 105 Misc. 74, 173 N. Y. Supp. 516; aff'd, 185 App. Div. 228, 173 N. Y. Supp. 158; aff'd, 225 N. Y. 21. Compare *People ex rel. Watkins v. Board of Canvassers*, 25 Misc. 444, 55 N. Y. Supp. 719.

87. *Matter of Tamney v. Atkins*, 209 N. Y. 202.

88. *People ex rel. Watkins v. Board of Canvassers*, 25 Misc. 444, 55 N. Y. Supp. 712.

89. *People ex rel. Larkin v. Palmer*, 27 Misc. 569, 59 N. Y. Supp. 62; aff'd, 163 N. Y. 201.

90. *Matter of Hart*, 159 N. Y. 278.

91. *Matter of Ordway*, 118 App. Div. 386, 103 N. Y. Supp. 360.

wrong number of the senatorial district, is not void if the other allegations clearly show which district was intended, but a writ of mandamus cannot be granted upon affidavits on information and belief which do not state the sources of information and grounds of belief, nor excuse the failure to produce the certificates of the inspectors of election.⁹² The poll clerks are necessary parties to a proceeding to compel a recount, and the court may make proper orders bringing them in.⁹³ But the inspectors of election are not necessary parties to a proceeding to compel a recount of ballots by the board of canvassers.⁹⁴

8. Local option election.

An order of mandamus directing the inspectors of election of a town meeting where local option questions under the Liquor Tax Law were voted upon to count certain ballots which were by them returned as void is a proceeding that may not be entertained by virtue of any inherent powers of the court, but must find authorization and support in the express provisions of some statute or statutes, and is not authorized under section 381 of the Election Law.⁹⁵

Where the ballot boxes were not locked but were left practically open to the public for twenty-four hours or more after they were canvassed, and were opened by unauthorized persons and the ballots examined and interfered with, the remedy by mandamus to compel a recanvass of the votes is impossible.⁹⁶ And mandamus will not issue to correct the vote on the question taken at a previous biennial town meeting.⁹⁷

Mandamus will not issue to require the board of inspectors of election to reconvene and reject all ballots received by them for or against the questions submitted at a town local option election, where the town clerk neglected to post and publish the notice required by statute that the questions would be voted upon, since the board has no legal right to reject the ballots, and the vote being invalid the remedy for such failure to properly submit the questions is a resubmission under the provisions of the law.⁹⁸ And, where the

92. *People ex rel. Watkins v. Bd. of Canvassers*, 25 Misc. 444, 55 N. Y. Supp. 712.

93. *Matter of Stiles*, 69 App. Div. 569, 75 N. Y. Supp. 278; overruled, 183 N. Y. 278.

94. *People ex rel. Watkins v. Board of Canvassers*, 25 Misc. 444, 55 N. Y. Supp. 712.

95. *Matter of Tamney v. Atkins*, 209 N. Y. 202.

96. *Matter of Burrell*, 50 Misc. 261, 100 N. Y. Supp. 470.

97. *People ex rel. Wood v. Town Canvassers of Randolph*, 32 Misc. 131, 66 N. Y. Supp. 197.

98. *Matter of O'Hara*, 63 App. Div. 512, 71 N. Y. Supp. 613.

ballot on local option was defective in form, the remedy is not by mandamus to compel the inspectors to reconvene and reject the ballots improperly worded, but by a special election.⁹⁹

ARTICLE VI.

MANDAMUS TO COUNTY OR STATE BOARD.

.A Election Law, § 433. Mandamus to county or state boards of canvassers to correct errors.

The supreme court may, upon affidavit presented by any voter, showing that errors have occurred in any statement or determination made by the state board of canvassers, or by any board of county canvassers, or that any such board has failed to act in conformity to law, make an order requiring such board to correct such errors, or perform its duty in the manner prescribed by law, or show cause why such correction should not be made or such duty performed. If such board shall fail or neglect to make such correction, or perform such duty, or show cause as aforesaid, the court may compel such board, by writ of mandamus, to correct such errors or perform such duty; and if it shall have made its determination and dissolved, to reconvene for the purpose of making such corrections or performing such duty. Such meeting of the board of state or county canvassers shall be deemed a continuation of its regular session, for the purpose of making such corrections, or otherwise acting as the court may order, and the statements and certificates shall be made and filed as the court shall direct, and shall stand in lieu of the original certificates and statements so far as they shall vary therefrom, and shall in all places be treated with the same effect as if such corrected statements had been a part of the originals required by law.

A special proceeding authorized by this section must be commenced within four months after the statement or determination in which it is claimed errors have occurred was made, or within four months after it was the duty of the board to act in the particular or particulars as to which it is claimed to have failed to perform its duty.

B. Election Law, § 435. Mandamus to state board to canvass corrected statements of county board.

The supreme court shall, upon application of a candidate interested in the result of such new or corrected statement, or of any voter in the county from which such statement came, and upon proof by affidavit that the same has been made and filed as herein provided, and that the state board of canvassers has neglected or refused to act thereon within the time above prescribed, require said board to act upon such new or corrected statement, and canvass the same as above provided, or show cause why it should not do so; and in the event of the failure of such board to act upon such new or corrected statement and canvass the same, or show cause as aforesaid, the court may compel such board by writ of mandamus to act upon and canvass such new or corrected statement, and make a statement, certificate and declaration in accordance therewith; and if the state board of canvassers shall have made a determination, and adjourned or dissolved before receiving such new or corrected statement, the court may compel such board to reconvene for the purpose of carrying out its order and direction; and for that purpose the meeting of said board shall be deemed a continuance of its regular session.

C. State board of canvassers.

The Board of State Canvassers acts ministerially in the main in making their certificate. Their judicial power extends no further than to take notice of matters of public notoriety.¹ It has no power to act outside the returns and institute an inquiry as to the eligibility of candidates.² It has no power to decide whether vacancies in office exist. In the absence of a certificate of the Secretary of State that a vacancy exists, where votes have been cast for the office, it is its duty to make and file a statement of the facts, but it cannot grant a certificate of election to such office, and a mandamus will not lie to compel it to do so.³ It cannot act upon anything except the certified statement required to be made. This statement cannot contain anything except whole number of votes cast, names of candidates, and number of votes received by each.⁴ But mandamus lies to the board to compel it to reject and disregard a paper purporting to be a return of a board of canvassers, but which is not properly signed and certified, and does not give the results of a legal canvass, and to compel it to consider a proper return.⁵ The public has an interest in the result of the election, and any citizen has a right to invoke the aid of the court in compelling the board to perform its official duties.⁶ Until the legal presumption that the board will perform its statutory duty is overcome, a peremptory mandamus will not lie.⁷

D. County board of canvassers.

The board of county canvassers is merely an administrative body and cannot exercise the judicial function of passing upon the Constitution of the State, nor will the court direct the board to do what it has itself no power to do. It must confine itself to correcting errors.⁸ Such a board cannot be

1. *People v. Cook*, 8 N. Y. 67; *Matter of Sherwood*, 129 N. Y. 360.

2. *Matter of Sherwood*, 129 N. Y. 360.

3. *Matter of Hart*, 161 N. Y. 507.

4. *People ex rel. Derby v. Rice*, 129 N. Y. 461.

5. *People ex rel. Daley v. Rice*, 129 N. Y. 449.

6. *People ex rel. Dailey v. Rice*, 129 N. Y. 449, 41 St. Rep. 938.

7. *People ex rel. Derby v. Rice*, 129 N. Y. 465.

8. *Matter of Woods*, 5 Misc. 575, 56 St. Rep. 274, 26 N. Y. Supp. 169.

The duty of the county clerk is merely ministerial, and if the official statement of the board of county canvassers sets forth the action of the board, it is his duty to certify it and file it. *Daly v. Bd. of Canvassers*, 129 N. Y. 449, 41 St. Rep. 938.

required to include in its statement of canvass facts not prescribed by statute.⁹

Mandamus will lie to compel a county board of canvassers to send back to the inspectors for correction returns upon which the names of candidates are incorrectly given or misspelled; but the remedy will not lie to compel the canvassers to canvass returns, when it is proved that such returns are illegal because of a violation of the statute by the inspectors in receiving and counting certain votes.¹⁰

The court has no power to interfere by mandamus with the canvassing of returns regular upon their face by the county board when it is simply alleged that fraud has been committed in the counting of votes by the inspectors. If there were two returns, one true and the other false, the court might compel the board to canvass the true one.¹¹

Mandamus will issue to compel the board to send back to the inspectors, for correction, returns which do not show upon their face that any particular person received any votes whatsoever, and which do not contain a statement of the number of general ballots protested as "marked for identification."¹²

The court cannot compel the board to change the returns of a general election so as to show separately the number of votes cast for the office of Governor in the name of and under the emblem of the political party whose candidate for the office was the same as that of another political party, in order that it shall appear from the returns filed in the office of the Secretary of State whether or not such first mentioned political party polled 10,000 votes for State officers at such election, and is thus entitled to make its nominations for the next year by convention.¹³

Upon an application for a mandamus to require the board of canvassers of a county to reconvene and correct alleged errors in its canvass of the votes cast upon a question submitted, the court has no power to decide whether the question as printed on the ballot was in the form prescribed by law.¹⁴ The court, in reviewing the determination of the

9. *People ex rel. Gerling v. Board of Canvassers of Monroe County*, 163 N. Y. Supp. 987.

10. *People ex rel. Munroe v. Bd. of Canvassers*, 129 N. Y. 469.

11. *People ex rel. Gregg v. Board*, 54 Hun, 595, 8 N. Y. Supp. 259.

12. *People ex rel. Ranton v. City of*

Syracuse, 88 Hun, 203, 34 N. Y. Supp. 661.

13. *People ex rel. Boies v. Bd. of Canvassers*, 79 App. Div. 514, 80 N. Y. Supp. 25.

14. *People ex rel. Williams v. Bd. of Canvassers*, 105 App. Div. 197, 94 N. Y. Supp. 996; *aff'd*, 183 N. Y. 538.

county board of election canvassers, cannot consider affidavits as to the party intended to be voted for.¹⁵

E. Board of elections.

The court should not attempt, by mandamus, to direct a board of elections in arranging the order of the names of candidates upon the ballot, especially when the board follows the rule of action laid down by the Legislature, unless its action is so unjust, arbitrary and discriminatory as to shock the conscience.¹⁶ Mandamus does not lie to compel the board of elections of the city of New York to enroll a voter in the Republican party where through his own mistake he unintentionally placed his mark in the Democratic circle of the enrollment blank.¹⁷

F. Inspectors of election.

It is one of the functions of the remedy of mandamus to remedy an evil which would result from the neglect to perform an official duty, and it will lie against inspectors for the purpose of such a review.¹⁸ Statutory provisions authorizing mandamus in election cases do not divest the court of its common-law jurisdiction to issue a writ of mandamus commanding the inspectors of election to convene and perform their duties as prescribed by statute.¹⁹ A peremptory mandamus will lie to inspectors to compel them to affix their

15. *People ex rel. Kathan v. Bd. of Canvassers*, 75 App. Div. 110, 77 N. Y. Supp. 620.

16. *Walsh v. Boyle*, 166 N. Y. Supp. 681.

17. *Matter of Jackson v. Britt*, 147 App. Div. 87, 131 N. Y. Supp. 877.

18. *People ex rel. McLaughlin v. Ammenwerth*, 197 N. Y. 340.

19. *People ex rel. Brink v. Way*, 92 App. Div. 82, 86 N. Y. Supp. 892; *rev'd*, 179 N. Y. 174.

Name on ballot.—Where a soldier ballot marked “Dr. Brush” had not been protested, and the inspectors of election had credited the vote to Edward F. Brush because such intention of the voter was clearly apparent, a writ of mandamus will not lie to compel the inspectors of election to correct their return. *People ex rel. Fisk v. Anderson*, 181 App. Div. 705, 168 N. Y. Supp. 839; *aff'd*, 222 N. Y. 678. But where a ballot was marked with the

word “Fiske” and the inspectors failed to find the voter’s intent to be for the relator Edwin W. Fiske and there was no protest in regard to the ballot, the court, on application for a writ of mandamus to correct the return, has no authority to count said vote for the relator. *People ex rel. Fiske v. Schum*, 181 App. Div. 717, 168 N. Y. Supp. 967; *aff'd*, 222 N. Y. 679, 222 N. Y. 684.

Local option.—A mandamus directing the inspectors of election of a town meeting where local option questions under the Liquor Tax Law were voted upon to count certain ballots which were by them returned as void is a proceeding that may not be entertained by virtue of any inherent powers of the court, but must find authorization and support in the express provisions of some statute or statutes. *Tamney v. Atkins*, 209 N. Y. 202.

signatures to election returns when it appears that they refuse so to do upon the ground that fraudulent votes were cast by persons who nevertheless had complied with the statutory tests; inspectors of election are simply ministerial officers without discretionary power to reject a vote.²⁰ Filing an incorrect copy of canvass by inspectors with city clerk is not a compliance with the law, and for this failure of duty mandamus will lie to compel them to file another.²¹ Mandamus will lie to compel inspectors to correct clerical errors in violation of the law, where they have not complied with the statutory provisions; the error is not cured by the stipulation of the candidate apparently elected upon the face of the returns consenting that the clerical errors be corrected.²²

The court will compel inspectors by mandamus to do their duty and nothing more. When they have made and signed the statement required by law, their duties are fully discharged, and they become *functus officio* as a board. They have no right to reconvene two days later, indorse the ballots, and attach them to such statement. Peremptory mandamus can only be granted to compel a body to reject the ballots, where the election officer has, during or immediately after the completion of the canvass, declared his belief that the ballots were marked for identification.²³ But inspectors of election cannot be compelled by mandamus to recanvass the vote and pass upon the validity of ballots which they had before counted as valid.²⁴

Certiorari will not lie to review the acts of an election board in receiving votes and announcing the result, as they are final in character. The effect of an alternative mandamus is to relegate to the inspectors the whole matter of canvassing the votes, and no specified directions as to how it should

20. *People ex rel. Stapleton v. Bell*, 119 N. Y. 175.

21. *Matter of Application of Gleason v. Blanc*, 14 Misc. 620, 72 St. Rep. 371, 36 N. Y. Supp. 938.

22. *People ex rel. Ranton v. City of Syracuse*, 88 Hun, 203, 34 N. Y. Supp. 661, 68 St. Rep. 256.

23. *Matter of Kline*, 17 Misc. 672, 40 N. Y. Supp. 600; *People ex rel. Bush v. McKenzie*, 66 Hun, 265, 49 St. Rep. 527, 21 N. Y. Supp. 279.

Recanvass.—Where local inspectors, not provided with tally sheets as required by section 334 of the Election Law, after they had canvassed soldiers'

votes, returned the result, a candidate for mayor, upon affidavit that he had been informed by an inspector and watcher that the true results of the count had been transposed by the inspectors, is not entitled to a writ of mandamus to correct the return, as the court has no power in such a proceeding to open the ballot box and direct a recanvass of the votes. *People ex rel. Fisk v. Bantz*, 181 App. Div. 702, 168 N. Y. Supp. 965; *aff'd*, 222 N. Y. 676.

24. *People ex rel. Cantor v. Forman*, 154 N. Y. Supp. 689.

be directed beyond the direction that they were to follow the language of the statute.²⁵

G. Town election board.

The functions of an election board of a town in receiving votes and announcing the result are not judicial but ministerial, and hence cannot be reviewed by certiorari.²⁶ Such a board cannot be compelled by mandamus to declare the relator elected to an office where another candidate received more votes but it is claimed that he was ineligible, as the board has no jurisdiction to determine the question of eligibility.²⁷ Upon an objection to the counting of the ballots cast at an election, it is the duty of the inspectors to declare the result of the election, and any objection to the ballots, upon the ground that they were marked for identification, cannot be determined in a mandamus proceeding, and an order directing a peremptory writ of mandamus may issue commanding the board of town canvassers to reconvene and declare the result of the town election and to issue a certificate of election to the candidates receiving the greatest number of ballots.²⁸

Where it appears that the board of canvassers omitted to indorse their reasons upon the back of ballots rejected as void, and omitted to place these ballots in a sealed package and file the same with the original statement of the canvassers, and that they improperly replaced these void ballots with the others in the ballot box, any person aggrieved or interested would be entitled to a writ of mandamus, without seeking authority therefor in the Election Law, compelling the board of canvassers to convene and do what they omitted to do.²⁹

H. Voting machine.

Mandamus is the proper remedy for the correction of an election return falsely stating the vote registered by a voting machine, although the Election Law does not so provide. Such a correction does not require a recount of the votes, and the remedy of mandamus in no sense compels a judicial act.³⁰ Objections, if substantial, that the use of a voting

25. *People ex rel. Phillips v. Sutherland*, 9 App. Div. 313, 75 St. Rep. 629, 41 N. Y. Supp. 181.

26. *People ex rel. Van Sickle v. Austin*, 20 App. Div. 1, 46 N. Y. Supp. 526.

27. *People ex rel. Halsted v. Canvassers of Cortlandt*, 95 St. Rep. 727, 61 N. Y. Supp. 727.

28. *People ex rel. Bradley v. Shaw*, 133 N. Y. 493, 45 St. Rep. 866.

29. *People ex rel. Maxim v. Ward*, 62 App. Div. 531, 71 N. Y. Supp. 76.

30. *Matter of Smith v. Wenzel*, 171 App. Div. 123, 157 N. Y. Supp. 85; *aff'd*, 216 N. Y. 421.

machine violates the requirements of the Constitution, should be determined in a direct proceeding by mandamus, or otherwise, to compel the rejection of the machines and the use of the paper ballot, in which the subject can be fully investigated and the question fairly determined.³¹

I. Discretion of court.

The court, in its discretion, may decline to interfere to correct irregularities which do not affect the result of an election.³² When a relator seeks a determination by mandamus of a canvassing board that he has been elected to an office in the possession of another, claiming title thereto, who is not a party to the proceeding, the court may refuse the remedy as a matter of discretion, leaving him to his remedy in the action provided by law for the determination of a title to an office.³³

The right of a claimant to an office cannot be tried by mandamus where the person claimed to have been elected illegally is actually in possession of the office under a *bona fide* claim and an election that is not merely colorable. If the claimant contends that he had a majority of legal votes he must procure a *quo warranto* to oust the actual occupant before he can obtain a mandamus to force his own admission.³⁴

There is no occasion to issue an alternative mandamus, where, after the proof is all in, it appears that there is no material dispute of fact and that the right of the applicant, if he has any, depends merely upon the decision of question of law.³⁵

ARTICLE VII.

CORRUPT PRACTICES.

Article XVI (sections 540-562) of the Election Law contains what is known as the Corrupt Practices Act. It provides in general for the filing of statements of campaign expenses, and contains provisions authorizing a proceeding to compel candidates or campaign committees to file a sufficient statement or account.³⁶

31. *People ex rel. Deister v. Wintermute*, 194 N. Y. 99.

32. *People ex rel. May v. Strang*, 137 App. Div. 848, 122 N. Y. Supp. 617.

33. *Matter of Hart*, 159 N. Y. 278.

34. *People ex rel. Gaige v. Reardon*,

35. *People ex rel. Bantell v. Morgan*, 20 App. Div. 48, 46 N. Y. Supp. 898.

36. "Political committee" defined.—Under sections 540 and 546 of the Election Law, a "political committee" exists wherever three or more persons co-operate to bring about the election

The purpose of the article is to compel publicity in regard to campaign funds; and, in case of improper expenditures, to render easy the prosecution of the offender; and to that end it should receive a fair and liberal construction.³⁷ The proceeding must be based upon a petition which states facts showing a failure to comply with the provisions of the law and the names of the persons or committees charged with such failure.³⁸

ARTICLE VIII.

APPEALS.

A. Who may appeal.

A county clerk has the right to institute proceedings for the review of an order commanding him to do an official act which he deems to be a violation of the statutes of the State, and the fact that he has no pecuniary interest in the act does not affect his right to appeal.³⁹ But a person who is not one of the candidates in a certificate of nomination, but who is substituted as a party in place of the county clerk in a proceeding to review the determination of the clerk on the filing of a certificate of nomination, cannot appeal from an order of a justice of the Supreme Court ordering the county clerk to print on the official ballot the names of certain nominees.⁴⁰

B. Determinations reviewable.

The Special Term is expressly authorized by statute to review summarily the decision of the board of elections and to make such order in the premises as justice may require, and the order of the Special Term is appealable.⁴¹ Mandamus is not the proper remedy to test the title to a public office of which there is a *de facto* incumbent. Hence, an

tion at an election, and if they make any expenditure of money in so doing they must report their receipts and disbursements. Thus, as the Home Rule Tax Association of the State of New York circulated literature seeking to defeat a constitutional amendment at the polls, and sought to induce electors to vote against the proposition, it constituted a "political committee" and must file a report of its receipts and expenditures in its political campaign. *Matter of Woodbury*, 174 App. Div. 569, 160 N. Y. Supp. 902; *aff'd*, 220 N. Y. 675.

37. *Matter of McLennan*, 65 Misc. 644, 122 N. Y. Supp. 409; *aff'd*, 142 App. Div. 926, 127 N. Y. Supp. 1131; *aff'd*, 204 N. Y. 608.

38. *Matter of McLennan*, 65 Misc. 644, 122 N. Y. Supp. 409; *aff'd*, 142 App. Div. 926, 127 N. Y. Supp. 1131; *aff'd*, 204 N. Y. 608.

39. *Matter of Cuddeback*, 3 App. Div. 103, 39 N. Y. Supp. 388.

40. *Matter of Woodworth*, 64 Hun, 522, 19 N. Y. Supp. 525.

41. *Matter of Halpin*, 108 App. Div. 271, 95 N. Y. Supp. 611.

appeal from the denial of an application for a peremptory mandamus to compel canvassers to exclude votes cast at election will be dismissed if thereafter the canvassers certified that another person was elected and he is in possession of the office.⁴² An order of the Appellate Division determining a proceeding by mandamus to compel a recount and the allowance or rejection of ballots objected to as marked for identification or rejected as void is one finally deciding a special proceeding, and where only questions of law are involved it is appealable, as of right, to the Court of Appeals, and in such case it is the duty of that court to examine the ballots and determine their validity.⁴³

C. Action of Appellate Court.

It is not the province of the appellate court to decide abstract questions of law which can have no effect upon the candidate or the election; and, when such questions are the only ones before the court, the appeal may be dismissed.⁴⁴ Yet, in some cases, the appeal has been decided after an election, although the remedy is ineffective.⁴⁵ Where conflicting decisions have been reached in different departments, the Court of Appeals may be justified in deciding the question, although the question may be of no practical importance in the particular case.⁴⁶

On appeal from an order of the Appellate Division affirming on certiorari proceedings of a board of aldermen determining an election contest, no question of law is presented for review as to the validity of ballots cast, where the return does not show what the action of the board was on specific ballots.⁴⁷

42. *People ex rel. Beverford v. Bauer*, 137 App. Div. 67, 122 N. Y. Supp. 61.

43. *People ex rel. Feeney v. Bd. of Canvassers, Richmond Co.*, 156 N. Y. 36.

44. *Matter of Woodworth*, 64 Hun, 522, 19 N. Y. Supp. 525.

45. *Matter of Emmett*, 9 App. Div. 237, 41 N. Y. Supp. 500; rev'd, 150 N. Y. 538.

46. *Matter of Madden*, 148 N. Y. 136.

47. *People ex rel. Krulish v. Fornes*, 175 N. Y. 114.

Disputed ballots not before court.— Upon the canvass of the votes cast at

a town meeting the board of canvassers rejected one vote as being void, and indorsed the same "marked for identification," and upon an application for a peremptory writ of mandamus compelling the board to count the said ballot, in the order to show cause why the peremptory writ should not be granted, the justice granting the same directed the ballot box to be presented to the court at which the said order was returnable, and upon the return of the order the justice opened the ballot box and examined the ballots, and thereupon made an order directing the board to reconvene and count the said ballots. *Held*,

ARTICLE IX.

PRECEDENTS.

A. Proceeding to set aside certificate of primary election (Matter of Rabbitt v. Garand, 89 App. Div. 119).

1. Order to show cause.

IN THE MATTER OF THE COMPLAINT OF
JOHN RABBITT, SOLOMON DOTTER,
JOHN COFFEY, JOHN SEROR AND ED-
WARD O'LEARY, CITIZENS OF THE
STATE OF NEW YORK,

agst.

JOHN C. GARAND AND TIMOTHY O'HEARN
AS PRIMARY INSPECTORS; EDWARD
O'HEARN, WILLIAM E. CAIN, CHARLES
RILEY, JAMES CLARK, JOHN GROM-
LEY, JR., AND JOHN FRANEY, AS CUS-
TODIAN OF PRIMARY RECORDS OF THE
COUNTY OF ALBANY.

On reading and filing the petition, etc. (Recital of petition and accompanying affidavits.),

Ordered, that the above-named John C. Garand and Timothy O'Hearn, composing the board of primary inspectors of the Democratic primary in the third election district of the fourth ward of the city of Cohoes, and Edward O'Hearn, William E. Cain, James Clark, John Gromley, Jr., Charles Riley and John Franey, as custodian of primary records of the county of Albany, show cause before me at the supervisors' room in the court house in the city of Troy, Rensselaer county, N. Y., on the 12th day of October, 1903, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, why an order should not be made and entered, directing the said John C. Garand and Timothy O'Hearn, composing the board of primary inspectors in and for the third election district of the fourth ward of the city of Cohoes, to reconvene and make, sign and file a return of the true vote cast at the Democratic primary election in the said election district of said ward, and the alleged return, heretofore, and on the 16th day of September, 1903, filed with the custodian of primary records, of the county of Albany be canceled and set aside, and any and all certificates granted and made by said custodian of primary records to the said Edward O'Hearn, William E. Cain, Charles Riley, James Clark and John Gromley, Jr., in anywise certifying that they were elected and nominated at said primary, be can-

that an appeal from such order should be dismissed where the ballot in question was not produced before the reviewing court nor any copy thereof from which the appellate court could

determine whether or not the judge properly decided that the ballot was valid. *People ex rel. Courtney v. Un-ger*, 85 App. Div. 249, 83 N. Y. Supp. 83.

celed and set aside; and why an order should not be made declaring the petitioners herein elected, and said custodian of primary records directed to issue to said petitioners a certificate showing their election and nomination, and said custodian of primary records be directed to place upon the official ballot of the fourth ward, to be used at the election to be held November 3, 1903, in the Democratic column, the names of your petitioners, John Seror, as candidate for alderman, and Edward O'Leary, as candidate for supervisor, and for such other and further relief as to the court may seem meet and proper.

Let a copy of the petition, affidavits and order to show cause be served upon (naming parties), by delivering a copy thereof to each of them personally or if such service cannot be made, by delivering a copy thereof at their respective places of residence, on or before the 8th day of October, 1903. Service on or before the 8th day of October, 1903, shall be sufficient service.

Dated, October 6, 1903.

2. Petition.

(Same title.)

To the Supreme Court of the State of New York:

The petition of John Rabbitt, Solomon Dotter, John Coffey, John Seror and Edward O'Leary, complainants, respectfully shows:

1. That each of your petitioners are citizens of the State of New York, county of Albany and city of Cohoes, and residents of and duly qualified electors of the fourth ward of said city of Cohoes, and enrolled upon the primary records of said ward for the current year as Democrats.

2. That the Democratic party cast in excess of 10,000 votes at the general election in 1902, the same being an election at which a Governor of the State of New York was being elected, and said Democratic party is entitled to representation in the board of election inspectors pursuant to the provisions of the Constitution of the State of New York and the laws of said State.

3. That the general committee of the Democratic party of the county of Albany, in and about the year 1901, duly adopted a resolution declaring that said committee desired to come in under the provisions of the Primary Election Law, and extended the same to the city of Cohoes; and a duly attested copy of said resolution was duly filed with the Secretary of State of the State of New York and the county clerk of the county of Albany prior to the 1st day of July, 1903, and said resolution is still in full force and effect.

4. That the fourth ward of said city of Cohoes is composed of three election districts, which have been duly subdivided into two primary election districts—one including the first and second election districts of said ward, and the other comprises the third election district of said ward.

5. That on the 15th day of September, 1903, an official primary of the Democratic party was held in and for said fourth ward of the city of Cohoes for the purpose of electing three members of the Democratic general committee to represent said ward, the terms of the present incumbents in said office expiring on the 1st day of December, 1903, and electing delegates, committees, and nominating an

alderman and supervisor to represent said ward, as appears by the candidates named upon the tickets "A" and "B" annexed hereto; that at said primary election two sets of tickets, containing different candidates, were being voted — one of which a copy is hereby annexed and marked "A" and the other a copy of which is hereto annexed and marked "B;" that your petitioners are the persons who were candidates for said office upon the ticket marked "A," viz., for members of the Democratic general committee, petitioners John Rabbitt, Solomon Dotter and John Coffey; for alderman, petitioner John Seror, and for supervisor, petitioner Edward O'Leary. That said primary was opened at about 2 P. M. on said 15th day of September, 1903, and continued until about 9 o'clock P. M. of that day. That John C. Garand and Timothy O'Hearn, mentioned in the title to these proceedings, were the inspectors of said primary in said third election district and acted as such.

6. Upon information and belief, that only fifty-eight ballots in all were actually cast at said primary election in said third district of said fourth ward in said city of Cohoes. That the information and belief of deponents is founded upon the affidavits of Michael Moore and Thomas Ryan, respectively verified the 5th day of October, 1903, and which are hereto annexed and made a part hereof.

7. Upon information and belief that of the ballots so cast at least thirty-four were cast for the candidates upon the ticket marked "A." That the information and belief of deponents is based upon the affidavits of David Ashworth, Michael Moore and Thomas Ryan, verified respectively October 5, 1903, and hereto annexed and made a part of this petition.

8. Upon information and belief that at 9 o'clock P. M. of said 15th day of September, 1903, and before the ballot box was opened for the purpose of canvassing the votes and before the canvass of the votes was commenced in said third district of said fourth ward, the said inspectors of election forcibly and with arms ejected from the polling place each and every of the watchers duly designated by the candidates upon said ticket "A" and all the sympathizers with said ticket, and each and every person in said room, except the said inspectors and the watchers appointed by the candidates upon said ticket marked "B." That immediately the doors of said polling place were closed and fastened, the public excluded therefrom and all persons excluded from said polling place during the canvass of said votes, except the said inspectors and the said watchers named by the candidates upon the ticket marked "B." That the information and belief of deponents as to the allegations contained in this count or paragraph of the petition is based upon the facts set forth in the affidavits of Thomas Ryan, David Miggins, John H. Riley and Phileas C. Dandurand, verified respectively October 5, 1903, and hereto annexed and made a part of this petition.

9. Upon information and belief, that immediately thereafter and on September 16, 1903, and for the purpose of defrauding your petitioners of their rights, the said John C. Garand and Timothy O'Hearn, pretending to act as such primary inspectors, made and filed with the custodian of primary records a statement in writing purporting to be a return of the votes cast in said third election district at said primary — setting forth that eighty-two ballots were cast at said primary, and that sixty-one of the same were cast for the candidates

upon ticket hereto annexed marked "B," and twenty-one for the candidates upon ticket hereto annexed marked "A;" that said statement was untrue and fraudulent and made for the purpose of defrauding these petitioners of their just rights. That the information of the deponents as to the allegations set forth in this count or paragraph of the petition is founded upon the facts set forth in the affidavit of Walter H. Wertime, verified the 5th day of October, 1903, and hereto annexed.

10. Upon information and belief, deponents further allege that the ballots cast at said primary were kept in the possession of said Timothy O'Hearn and John C. Garand and their sympathizers from the 15th day of September, 1903, until the 22d day of September, 1903; that the information of deponents as to the allegations set forth in this count or paragraph of the petition is based upon the facts set forth in the affidavit of Walter H. Wertime, verified the 5th day of October, 1903, hereto annexed and made a part hereof.

11. That the candidates named upon ticket "A" as such candidates received a majority of eight (8) of the votes cast at the primary held on said 15th day of September, 1903, in and for the first and second election districts of the fourth ward of said city in Cohoes.

12. Upon information and belief that your petitioners were duly elected at said primary election and are entitled to receive from the custodian of primary records of the county of Albany a certificate that your petitioners have been elected as aforesaid; that the information of deponents' allegations set forth in this count or paragraph of this petition is based upon the facts hereinbefore alleged and upon all the affidavits hereto annexed.

13. That Edward O'Hearn, William E. Cain, Charles Riley, James Clark and John Gromley, Jr., mentioned in the title of these proceedings, are the persons named upon the ticket hereto annexed and marked "B" as candidates as follows: For the office of members of the Democratic general committee, Edward O'Hearn, William E. Cain and Charles Riley; alderman, John Gromley, Jr., and for supervisor, James Clark. That John Franey is the county clerk of the county of Albany, and as such is the custodian of the primary records in and for said county.

Wherefore, your petitioners pray that an order be made and entered directing the said John C. Garand and Timothy O'Hearn, composing the board of primary inspectors in and for the third election district of the fourth ward of the city of Cohoes to reconvene and make, sign and file a return of the true vote cast at said primary, and that the alleged return heretofore and on the 16th day of September, 1903, filed with the custodian of primary records of the county of Albany, be canceled and set aside and that any and all certificates granted and made by the said custodian of primary records to the said Edward O'Hearn, William E. Cain, Charles Riley, James Clark and John Gromley, Jr., in anywise certifying that they were elected or nominated at said primary be canceled and set aside, and that your petitioners be declared elected, and that said custodian of the primary records be directed to issue to your petitioners a certificate showing their election; and that said custodian of primary records be directed to place upon the official ballot for said fourth ward to be used at the coming election, in the Democratic column, the names of your petitioners. John Seror as a candidate for alder-

man and Edward O'Leary as candidate for supervisor; and for such other and further relief as the court may deem just and meet.

(Signatures and verification.)

3. Final Order.

(Caption and title.)

An order to show cause having been made by me on the 5th day of October, 1903, upon the petition (recitals); and at the time of the return of said order the respondents having filed an answer to said petition controverting certain portions thereof, and proof having been thereupon offered by the petitioners to substantiate the allegations of the petition, and before the taking of said proof had been completed the respondents in open court, having withdrawn their said answer and disavowed questioning the merits of the petition.

And it appearing to my satisfaction from the petition, affidavits and the proceedings and proof had and taken before me, and I find:

1. That the petitioners herein are citizens of the State of New York.

2. That on the 15th day of September last an official primary election of the Democratic party was duly held in the fourth ward of the city of Cohoes for the election of three members of the general committee and the nomination of a supervisor and an alderman for said ward.

3. That said fourth ward is composed of three election districts, the first and second of which comprise one primary district and the third another primary district.

4. That at said primary election two tickets were voted for, upon one of which the petitioners John Rabbitt, Solomon Dotter and John Coffey were named for general committeemen, and petitioners John Seror as candidate for alderman, and Edward O'Leary as candidate for supervisor, and upon the other of said tickets, the respondents Edward O'Hearn, William E. Cain and Charles Riley were named committeemen, and respondents James Clark as candidate for supervisor, and John Gromley, Jr., as the primary candidate for alderman.

5. That at the primary held in and for the first and second election district, the petitioners received a majority of eight (8) votes cast; that at said primary held in and for the third election district of said fourth ward only fifty-eight (58) ballots were cast, of which the petitioners as candidates as aforesaid received thirty-four (34), the number of votes cast for the respondent candidates not having been proved; that immediately upon the close of the polls and before any canvass of the votes were commenced the respondents inspectors of said primary forcibly ejected from the polling place the watchers appointed by the petitioners herein and all other persons except the watchers appointed by the respondents herein and excluded the public from said room and securely fastened the door in such a manner as to prevent ingress and egress to and from said polling place; that such exclusion of the watchers and public continued until the canvass, if any, was completed.

6. That said respondents inspectors thereupon made an alleged statement and return wherein they set forth that eighty-two (82) ballots were cast at said primary, of which the petitioners received twenty-one (21), and the respondents Edward O'Hearn, William E. Cain, Charles Riley, James Clark and John Gromley, Jr., sixty-one (61); that said alleged certificate and statement of the result was

filed in the office of the custodian of primary records of the county of Albany, on the 16th day of September, 1903; that the poll list as also returned to the custodian of primary records had checked as voting eighty-two (82) persons, some of the names on said poll list checked as voting were persons who had died some time prior to said primary election, and some of whom were enrolled Republicans.

7. And it appearing to my satisfaction that said alleged return was false, fraudulent and untrue as to the number of votes cast and as to the number of votes received by the petitioners herein; and that the material allegations of the petition are true; now on motion of Walter H. Wertime, attorney for the petitioners, and upon said petition, affidavits and due proofs of service thereof, and all the proof and proceedings had before me; it is

Ordered, adjudged and decreed, that the certificate and statement of the canvass and result of the Democratic primary election made by said primary inspectors and filed with the custodian of primary records of the county of Albany, on September 16, 1903, be and the same hereby is canceled, set aside and declared null and void and of no effect; it is further

Ordered, adjudged and decreed, that the true result of the primary election of the Democratic party held in and for the third election district of the fourth ward of the city of Cohoes, on the 15th day of September, 1903, to be as follows: Total number of ballots cast fifty-eight (58), of which John Rabbitt, Solomon Dotter and John Coffey, as candidates of the members of the Democratic general committee, and John Seror, as candidate for the nomination for alderman, and Edward O'Leary, as candidate for the nomination for the office of supervisor, each received thirty-four (34) votes; and the said John C. Garand and Timothy O'Hearn, as inspectors of primaries of the Democratic party in and for the third election district of the fourth ward of the city of Cohoes, be and they hereby are ordered and directed to forthwith reconvene and make and sign a statement of the result of the said primary election as so determined, and forthwith file the same with the custodian of primary records of the county of Albany; it is further

Ordered, adjudged and decreed, that the said John Rabbitt, Solomon Dotter, John Coffey, be and they are hereby declared to be elected as members of the Democratic general committee in and for the fourth ward of the city of Cohoes; and it is further

Ordered, adjudged and decreed, that the petitioner John Seror be and hereby is declared to be the nominee of the Democratic party in and for the fourth ward of the city of Cohoes, as candidate for alderman; and it is further

Ordered, adjudged and decreed, that the petitioner Edward O'Leary be and he hereby is declared to be the nominee of the Democratic party in and for the fourth ward of the city of Cohoes, as candidate for the office of supervisor; and it is further

Ordered, adjudged and decreed, that each and every certificate heretofore made and granted by John Franey, as custodian of primary records of the county of Albany, to said Edward O'Hearn, William E. Cain, Charles Riley, James Clark and John Gromley, Jr., or to each or any of them, in anywise certifying that they or any of them were elected or nominated at said primary, be and the same hereby are canceled, set aside and declared null, void and of no effect;

Adjudged, decreed, and the said John Franey, as custodian of primary records of the county of Albany, is directed to issue to said John Rabbitt, Solomon Dotter and John Coffey, and each of them, a certificate showing their election as members of the Democratic general committee in and for the fourth ward of the city of Cohoes, pursuant to the primary election held therein on the 15th day of September, 1903; and it is further

Ordered, adjudged and decreed, that the said John Franey, as county clerk of Albany county, be and he hereby is directed to place upon the official ballot of the fourth ward of the city of Cohoes, to be used at the election to be held November 3, 1903, in the Democratic column, the names of the petitioners John Seror as candidate for alderman and Edward O'Leary as candidate for supervisor.

W. O. HOWARD,

Justice Supreme Court.

Enter in Albany county.
Dated October 19, 1903.

B. Proceeding for mandamus to compel election officers to permit relator to vote (People ex rel. Borgia v. Doe, 109 App. Div. 670).

1. Order to show cause.

(Title as in affidavit.)

Upon reading the affidavit of Philip Borgia hereto annexed, verified this 7th day of November, 1905, and upon motion of Frederick W. Steele, Esq., attorney for the relator herein, let the respondents herein, and each of them above named, show cause at a Special Term of this court, at the county court house, borough of Manhattan, city of New York, on the 7th day of November, 1905, at 1 o'clock in the afternoon, or as soon thereafter as counsel can be heard, why an order should not be made and a peremptory writ of mandamus issue directing and commanding the said respondents to permit the relator herein to vote in the twenty-sixth election district of the eighteenth Assembly district, of the county of New York, and to accept the vote of the said relator, and why this relator should not have such other and further relief as may be just and proper in the premises.

Service of this order at or before 12.15 o'clock P. M. this 7th day of November, 1905, shall be deemed timely and sufficient service.

2. Affidavit of relator.

SUPREME COURT — COUNTY OF NEW YORK.

THE PEOPLE OF THE STATE OF NEW YORK,
ON THE RELATION OF PHILIP BORGIA,

agst.

JOHN DOE, RICHARD ROE AND OTHERS,
SAID NAMES BEING FICTITIOUS.

COUNTY OF NEW YORK, ss.:

I, Philip Borgia, being duly sworn, depose and say: I am a naturalized citizen of the United States, over twenty-one years of age, and reside at No. 248 East Twenty-first street, in the twenty-sixth election district in the eighteenth Assembly district of the county and State of New York.

I have resided in the State of New York for one year last past and upwards, in the county of New York for four months last past and upwards, and in the election district aforesaid for thirty days last past and upwards.

I was duly naturalized in the United States Circuit Court in the Southern District in the State of New York, on or about the 8th day of January, 1901.

On one of the registration days of October, 1905, I duly appeared for registration at the polling place situated at No. 349 Second avenue, in the county and State of New York, which was the place of registry for qualified electors residing in the twenty-sixth election district of the eighteenth Assembly district in the county of New York, and my name was duly enrolled on the register of electors of such election district.

I appeared this 7th day of November, 1905, between the hours of 6 A. M. and 5 P. M., before the board of inspectors of said election district, being the respondents herein, and applied to the ballot clerk for the official ballots.

The respondents herein neglected and refused to permit me to vote, stating to me that some one had already voted to-day on my name. I have not voted to-day and desire to vote.

Unless I am permitted to vote before 5 P. M. to-day in said election district, I will be deprived of my right of franchise, and will be unable to vote at the general election now in progress this 7th day of November, 1905.

WHEREFORE, I pray that an order may be made by this honorable court and a peremptory writ of mandamus issue directing the respondents herein to permit me to vote, and to accept my vote forthwith, or to show cause why I should not be permitted to vote, and why my vote should not be accepted, and why I should not have such other and further relief as to the court may deem just and proper in the premises.

No previous application for the order sought herein has been made to any court or justice.

3. Order denying motion.

An order having been made herein on the 7th day of November, 1905, requiring the inspectors of election of the twenty-sixth election district of the eighteenth Assembly district of the county of New York to show cause why an order should not be made and a peremptory writ of mandamus be issued, directing and commanding the said respondents to permit the relator herein to vote in the said election district of the said Assembly district of the county of New York, and to accept the vote of the said relator and the said motion having come on to be heard, and after hearing Frederick W. Steele, Esq., attorney for the applicant herein in support of said motion, and Walter S. Logan, Esq., appearing in opposition thereto, and on reading and filing the said order to show cause, and the affidavit of Philip Borgia verified the 7th day of November, 1905, thereto annexed, and proof of due service of said order to show cause and the annexed affidavit on which it was obtained, according to the terms of said order to show cause on said inspectors of election.

Now, on the motion of Walter S. Logan, Esq., attorney for the respondents herein, it is hereby

Ordered, that the said motion be and the same hereby is in all respects denied.

(The foregoing order was reversed, on the merits, by the Appellate Division of the First Department at the December Term, 1905, thereof [see *People ex rel. Borgia v. Doe*, 109 App. Div. 670, 671] and *held*, that the writ of mandamus should have been issued as asked for by the relator.)

C. Proceeding for mandamus directing a board of town canvassers to count the votes on a certain ballot alleged to be void (*People ex rel. Courtney v. Unger*, 85 App. Div. 249).

1. Order to show cause.

SUPREME COURT — HAMILTON COUNTY.

THE PEOPLE OF THE STATE OF NEW YORK,
EX REL. WILLIAM N. COURTNEY,

agst.

GEORGE UNGER AND OTHERS.

Upon the annexed petition of William N. Courtney verified on the 28th day of March, 1901, and on motion of James R. Van Ness, his attorney, let the above-named George Unger, William P. Courtney, John Burton and Alex Dempster, who acted as the board of inspectors and canvassers at the town meeting held in the town of Arietta, Hamilton county, N. Y., March 19, 1901, and Charles Rodgers and Oscar L. Howland or their attorneys, show cause at a Special Term of the Supreme Court to be held at the court house in the village of Canton, St. Lawrence county, N. Y., on the 6th day of April, 1901, at the opening of court on that day or as soon thereafter as counsel can be heard, why a peremptory writ of mandamus should not issue out of and under the seal of this court, directed to the above-named board of supervisors and canvassers and town clerk, requiring a recount of the votes upon the ballots mentioned and described in said petition of William N. Courtney as having been voted at said town meeting and objected to or protested as marked for identification, and further commanding and directing that the votes upon the one of such protested ballots which the said inspectors refused to count be counted upon such recount as required by statute, and that said board of canvassers reconvene for that purpose, and why such further and other relief should not be accorded in the premises as may be just; and let service of this order of less than eight days, to wit: on or before the 3d day of April, 1901, be deemed sufficient cause therefor appearing in said petition annexed; it is further

Ordered, that said Charles Rodgers and Oscar L. Howland, or either of them having the custody of said ballots and the certificate and statement of the canvass of the votes cast at said town meeting, produce them and such certificate and statement of canvass before the court at said time and place where this order is returnable.

Dated, March 29, 1901.

J. W. HOUGHTON,
Justice Supreme Court.

2. Affidavit.

(Same title.)

STATE OF NEW YORK, }
COUNTY OF ALBANY, } ss.:

William N. Courtney, being duly sworn, says he is, and for ten years last past has been, a resident of the town of Arietta, Hamilton county, State of New York.

Deponent further says that a town meeting was held in said town of Arietta on the 19th day of March, 1901, for the election of one (1) supervisor, one (1) town clerk, two (2) justices of the peace, three (3) assessors, three (3) commissioners of highways, one (1) overseer of the poor, one (1) collector, two (2) inspectors of election and five (5) constables.

That Emerson Nye was a candidate at said town meeting for the office of supervisor of said town.

That Michael Tommany was a candidate at said town meeting or town election for the office of justice of the peace; that William Dunham was a candidate thereat for the office of assessor; that T. J. Crowley was a candidate thereat for the office of commissioner of highways; that William Lamkey was a candidate thereat for the office of overseer of the poor; all of them, except deponent, being on the Republican ticket.

Deponent further says that George Unger, William P. Courtney, John Burtin and Alex Dempster acted as inspectors of election at said town meeting.

That at the close of the polls said inspectors proceeded to canvass the ballots and the votes thereon cast at said town meeting; that during the canvass three (3) ballots were protested or objected to as being marked for identification because of improper marks within the voting circle; that said inspectors thereupon made an indorsement in writing on the back of each of said three (3) ballots as follows:

“Protested as marked for identification, viz.: improper marks in the circle. Dated March 19, 1901.” And each of said inspectors signed his name on the back of each such ballot and immediately under such indorsement.

That thereupon said inspectors counted each of said three (3) ballots and the votes thereon were counted for the respective candidates receiving them.

That at the close of the canvass and after said three protested ballots were counted, it was found that said Emerson Nye had received forty-nine (49) votes for the office of supervisor and his opponent, James Walsh, had received forty-nine (49) votes; that Michael Tommany had received forty-nine (49) votes, and was one of the two justices of the peace who were elected, his opponent receiving forty-eight (48) votes; that William Dunham had received forty-nine (49) votes for the office of assessor, one more than his nearest opponent who received forty-eight (48) votes; that T. J. Crowley had received forty-nine (49) votes, for the office of commissioner of highways, one more than his nearest opponent who received forty-eight (48) votes; that William Lamkey had received forty-nine (49) votes for the office of overseer of the poor, one more than his opponent who received forty-eight (48) votes.

Deponent further says that the said persons acting as inspectors of election thereupon determined to recanvass and recount the whole of the ballots and immediately proceeded to do so. That during such recanvass nine (9) ballots other than the three (3) before mentioned were protested as being marked for identification and were thereupon indorsed by said inspectors in writing on the back of each of such nine (9) ballots as follows:

“ Protested as being marked for identification in placing voting marks in improper squares. Dated March 19, 1901.” And each of said inspectors signed his name on the back of each of said nine (9) ballots immediately under such indorsement. That thereupon the said inspectors counted all the votes received by candidates on said nine (9) protested ballots, and also counted the votes on two (2) of the said first mentioned three (3) protested ballots, but refused to and did not count any votes for any candidate on the remaining one (1) of said first-mentioned three (3) protested ballots.

Deponent further says that there was read to said inspectors subdivision 3 of section 110 of the Election Law as amended by chapter 335 of the Laws of 1898, which states, among other things: “ The votes upon each such ballot (meaning ballots objected to as marked for identification) shall be counted by them (the inspectors) as if not so objected to.”

That different members of said board of inspectors took the Election Law and read the said section, but that despite the protest of deponent and of others present at said canvass the said inspectors absolutely refused to count the votes upon said remaining one of said three protested ballots, and they did then and there add to the indorsement they had formerly placed upon its back the words “ not counted.”

Deponent further says said protested ballot not counted was marked within the voting circle above the Republican ticket and contained a vote for each of the Republican candidates at said town meeting.

Deponent further says that by the refusal of said inspectors to count the votes upon ballot the number of votes said Emerson Nye received according to the statement of canvass made by said inspectors was only forty-eight (48) and the number of votes received by Michael Tommany was only forty-eight (48) and the number of votes received by William Dunham was only forty-eight (48) and the number of votes received by T. J. Crowley was only forty-eight (48) and the number of votes received by William Lamkey was only forty-eight (48).

Deponent further says that all of said protested ballots were inclosed by said inspectors in a sealed package and indorsed with their names and delivered to one Charles Rodgers, the then acting town clerk of said town of Arietta.

That one Oscar L. Howland was elected town clerk at said town meeting and has since qualified and taken possession of the office, and on information and belief said ballots and the certificate and statement of canvass of the votes at said town meeting are now in his possession as town clerk of said town of Arietta.

Deponent further says that said town of Arietta is forty (40) miles from the nearest railroad station to Northville, N. Y., and that it will be impossible to give the full eight days' notice of motion in this proceeding in that the mandamus must issue within twenty (20) days after such town meeting; that deponent has used all and due

diligence in making this application and has made the same at the earliest time that he could. That no previous application has been made for an order or writ herein.

WHEREFORE, Your deponent prays that a mandamus issue out of this court requiring a recount of the votes of such ballots and directing and commanding that the votes of said ballot objected to or protested as marked for identification and which said inspectors refused to count be counted as required by statute upon such recount and that said board of canvassers reconvene for that purpose and that they be required to appear and show cause why such writ should not issue, and for such further or other relief as may to the court seem just and proper.

3. Affidavit in opposition to order.

(Same title.)

STATE OF NEW YORK, }
COUNTY OF ST. LAWRENCE, } ss.:

George Unger, being duly sworn, says he is a resident and elector of the town of Arietta, Hamilton county, N. Y. That on the 19th day of March, 1901, the regular annual town meeting was held in said town in which this deponent participated as an elector and inspector.

That at the opening of the polls in said town on said 19th day of March, 1901, or soon thereafter, the town board, constituting the inspectors of election, in the absence of the town clerk and because of his inability to act, appointed the relator in above-entitled proceeding and one Lawrence, a Republican politically, as poll clerks, and that neither the relator, Courtney, nor the said Lawrence were inspectors of election nor in sympathy with the Democratic ticket.

That James R. Van Ness, the attorney for the relator in above-entitled proceeding, resides in Northville, Fulton county, N. Y., about forty (40) miles from said town of Arietta in Hamilton county aforesaid, in the county of Fulton, N. Y., and was present at said town meeting from on or about the time of the opening of the polls until the same were closed, and claimed or caused to be circulated that he represented the State for the purpose of supervising said town meeting and because of the fact that the said town of Arietta was one of the towns included in the forest preserve.

That the said inspectors, believing the statements or reports made by or of the said John R. Van Ness, permitted him to go inside the guard-rail and remain there during the whole time the ballots were being cast, as a watcher.

That at the close of the polls the said town board constituting the inspectors proceeded to canvass the ballots cast for the respective candidates which canvass proceeded in the regular manner with the relator, Courtney, and the said Lawrence keeping tally, and that said Courtney and Lawrence experienced considerable difficulty in keeping tally, so that their respective sheets corresponded, and, in fact, in order to make them do so repeatedly marked on first one sheet and then the other sufficient tally marks to overcome discrepancies and to make the tally sheets compare, and that their final results were given to the board of canvassers, accepted by them as given and included in the certificate of canvass.

That considerable difficulty was experienced in the canvass of ballots because of the peculiar manner in which some voters marked their ballots, especially in the case of split tickets where the elector voted for persons in two columns on the same line who were running in groups for certain offices, and that two canvasses of the votes were made, the first one being temporary and the last one final.

That in the course of said canvasses eleven ballots with either cross X marks in the circle at the head of the party columns or in squares opposite the name of different candidates were indorsed as being marked for identification but were subsequently counted.

That one other ballot, being the one referred to in the affidavit of the relator in this proceeding, was objected to as being void but was indorsed as marked for identification by the said canvassing board under the instructions and pursuant to directions of the attorney for the relator herein, the said James R. Van Ness, but was considered and treated as void by said board and not counted in either canvass.

That the same was not properly marked within the circle at the head of the Republican party column and did not contain a vote for each of the Republican candidates at said town meeting.

That the said ballot was not counted by the said board of canvassers for the reason that the same was void and did not contain or have thereon a black pencil cross X mark in the circle at the head of a party column or any cross X mark in the squares opposite any candidate's name.

That the said void ballot and eleven ballots marked for identification were properly inclosed and sealed together with the other ballots and papers and placed in the charge or custody of Charles Rogers, the town clerk of said town, pursuant to statute.

That he was the chairman of said canvassing board and one Emerson Nye attempted to serve upon deponent a copy of the order to show cause herein, on the 1st day of April, 1901, but did not show to deponent, although requested so to do, the said original order.

GEORGE UNGER.

Sworn to before me, April 6, 1901.

JOHN R. KEELER,
Notary Public.

4. Order directing mandamus.

(Caption and title.)

The order to show cause granted by Hon. J. W. Houghton, justice of the Supreme Court, on the 29th day of March, 1901, returnable at above Special Term of the Supreme Court, now coming on to be heard: After reading and filing the petition of William N. Courtney, verified March 28, 1901, and the said order to show cause and affidavits of William P. Courtney, George Unger, John Burtin, and Alex Dempster, and after hearing James R. Van Ness, attorney for the relator, and George N. Ostrander of counsel for, and Eugene D. Scribner, attorney for defendants, in opposition thereto, and having examined the ballots in question, they having been produced under the order to show cause by the town clerk and opened by order of this court; it is

Ordered, that the prayer of said petitioner be and the same is hereby granted, and that a peremptory writ of mandamus issue out of and under the seal of this court, directed to the above-named board

of inspectors and canvassers of the town of Arietta, Hamilton county, N. Y., and to Oscar L. Howland, town clerk of said town of Arietta, requiring a recount of the votes upon the ballots mentioned and described in said petition of William N. Courtney, as having been voted at the town meeting held in said town of Arietta, March 19, 1901, and as well all the ballots voted at said town meeting, which recount of all the ballots is requested by counsel for defendant, and further commanding and "directing that the votes upon the one of such protested ballots which the said inspectors refused to count be counted upon such recount and that a vote be counted upon such ballot for each candidate upon the ticket upon such ballot marked 'Republican ticket' at the head thereof."

And further commanding and directing that said George Unger, William P. Courtney, John Burtin and Alex Dempster, reconvene as a board of inspectors and canvassers of the said town of Arietta, at the place where said town meeting was held, on the 17th day of April, 1901, at 9 o'clock in the forenoon of that day, together with Oscar L. Howland, said town clerk, who shall then and there have and produce said ballots, for the purpose of making such recount of the votes upon such protested ballots, and as well all other ballots voted at said town meeting.

Enter in Hamilton county.

D. Proceeding for mandamus directing election officers to recount ballots
(People ex rel. Maxim v. Ward, 62 App. Div. 531).

1. Notice of application.

SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW
YORK, EX REL. CHARLES B. MAXIM,

agst.

J. WILSON WARD, SEWELL P. BRALEY,
STEPHEN M. PRATT AND F. SWENSON
VANDENBURGH, COMPOSING THE BOARD
OF CANVASSERS OF THE TOWN OF BOL-
TON, AT THE TOWN MEETING HELD IN
SAID TOWN ON THE 2D DAY OF APRIL,
1901, EDWARD N. LAMB AS TOWN
CLERK OF SAID TOWN AND ROBERT T.
TAYLOR.

To the Above-named Defendants:

Take notice that, upon the affidavits of Charles B. Maxim and F. Swenson Vandenburg, each verified on the 6th day of April, 1901, with copies of which you are herewith served, a motion and application will be made at a Special Term of this court, appointed to be held at the court house, in the village of Sandy Hill, Washington county, N. Y., on the third Monday, the 15th day of April, 1901, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order directing that a peremptory writ of

mandamus issue out of this court, requiring the above-named defendants, J. Wilson Ward, Sewell P. Braley, Stephen M. Pratt and F. Swenson Vandenburg, to reassemble and recount the votes cast at the town meeting or election held in and for said town of Bolton, on the 2d day of April, 1901, and to declare the result of said election, after having counted for the relator four (4) ballots cast at said election which were rejected as void, and having deducted from the votes counted for said Robert T. Taylor a certain void ballot, and directing the defendants above named to issue a certificate of election to the said relator, and for such other or further or different relief as to the court may seem just and proper.

J. EDWARD SINGLETON,
Attorney for the Relator.

Dated April 6, 1901.

2. Affidavit for relator.

(Same title.)

STATE OF NEW YORK, }
COUNTY OF WARREN, } ss.:

Charles B. Maxim, being duly sworn, says that he is a citizen of the United States, of full age and a resident of the town of Bolton, county of Warren and State of New York, and has been such a citizen and resident at all times hereinafter mentioned, and for more than two years last past.

That the said town of Bolton held its biennial town meeting on the 2d day of April, 1901.

That previous to said town meeting, deponent had duly qualified in all respects, as required by the laws of the State of New York, as a candidate on the Democratic ticket, at said town meeting for the office of supervisor of said town, and that he was duly and legally nominated for such office prior to said town meeting.

That the defendant, Robert T. Taylor, was also a candidate for said office on the Republican ticket.

That the defendants, J. Wilson Ward, Sewell P. Braley, Stephen M. Pratt and F. Swenson Vandenburg, constituted the board of canvassers at the said town meeting, the said Stephen M. Pratt being chairman of said board. That the said Edward N. Lamb is the town clerk of the said town of Bolton.

Deponent further says that said board has omitted and neglected to discharge its duty, in that, among other things, it refused and neglected to count certain ballots cast at said town meeting which were by law required to be counted, and it still refuses to do so.

That the said board of canvassers declared void and rejected nine ballots which had been cast for said town meeting.

That after the ballots had been counted and before the result was announced, deponent demanded a recount of the ballots alleged to be void, and that said board of canvassers refused to recount said ballots.

That thereupon it was announced that Robert T. Taylor had received a majority of two (2) votes over Charles B. Maxim, this deponent, for the office of supervisor.

Deponent further says that after the announcement of the alleged result, he asked the said board of canvassers to state the vote on alleged void ballots.

That the said board of canvassers stated six (6) of the void ballots were for Charles B. Maxim and three (3) were for Robert T. Taylor.

Deponent further says that, as he is informed and believes, among the alleged void ballots which were not counted were two (2) ballots which were properly marked with a cross in the circle at the head of the Democratic ticket, and in addition thereto had a cross in the voting space on the ticket on the left of the names of two (2) candidates for the office of inspector of election, on the same line, one (1) in the Democratic and one (1) in the Republican column and were declared void for that reason only.

That two (2) other alleged void ballots which were not counted contained a cross in the circle at the head of the Democratic ticket. One of the bars of said cross was to some extent duplicated, apparently as if the voter, fearing that the first mark was indistinct, had attempted to mark it plainer, and in making his second line had somewhat diverged from the first line, and were declared void for that reason only.

Deponent further says that he is informed and believes that these four (4) ballots are in all respects correct and legal and that the vote thereon for supervisor should be counted for deponent.

Deponent further says that after the result had been announced and before any certificate of the result was signed, it was discovered that one (1) of the ballots which had been counted as a straight Republican ticket bore the mark of an erasure in the circle at the head of the Democratic ticket, thereby making it a void ballot.

That the said board of canvassers admitted that the said ballot was void, but said board refused to deduct the same from the count on the ground that the result had already been declared.

Deponent further says that the said board of canvassers neglected and omitted to do its duty in that they did not indorse upon the back of the ballots so declared void the specific reason for such rejection, as required by section 369 of the Election Law of the State of New York, and made no indorsement whatever on any of said alleged void ballots, and said board failed to inclose the same in a sealed package as required by said section, but returned the same with the other ballots to the ballot box and returned same to the town clerk.

That, as deponent is informed and believes, the five remaining ballots rejected by said board as void ballots were actually void and properly rejected.

Deponent further says that by the alleged certificate of canvass of said town meeting, it appears that Robert T. Taylor received one hundred and sixty-eight (168) and this deponent one hundred and sixty-six (166) votes. No count was had of the four alleged void ballots marked in the Democratic column and hereinbefore described, and the aforesaid admittedly void ballot was counted for the said Robert T. Taylor.

That if the said board had counted said four (4) ballots as required by law, and rejected the admittedly void ballot, which was counted for Robert T. Taylor, and made the proper return thereto, deponent would appear therein to have been elected by a majority of three (3), and the actual and legal result was that Robert T. Taylor received one hundred and sixty-seven (167) legal votes and this deponent received one hundred and seventy (170).

WHEREFORE, Deponent asks that a peremptory writ of mandamus issue out of this court requiring the above-named defendants, J. Wil-

son Ward, Sewell P. Braley, Stephen M. Pratt and F. Swenson Vandenburg, to reassemble and recount said votes and to declare the result of said election after having counted for the relator the said four (4) ballots rejected as void and having deducted from the votes counted for said Robert T. Taylor the said void ballot hereinbefore referred to, and directing said defendants herein named to issue a certificate of election to the said relator and for such other or further or different relief as to the court may seem just and proper.

Deponent further says that no previous application has been made for an order, or for the relief asked for herein.

3. Order of Special Term to produce ballots.

(Caption and title.)

An application for a writ of mandamus having been made at this term of this court, directing and requiring the above-named defendants, J. Wilson Ward, Sewell P. Braley, Stephen M. Pratt and F. Swenson Vandenburg, to reassemble and recount the votes cast for supervisor at the biennial town meeting held in and for the town of Bolton, Warren county, N. Y., on the 2d day of April, 1901:

On reading and filing affidavits of Charles B. Maxim and F. Swenson Vandenburg, both verified April 6, 1901, read in behalf of said application; and the affidavit of J. Wilson Ward, joint affidavit of Stephen M. Pratt and Sewell P. Braley, joint affidavit of Hiram T. Seaman, John Taylor and John Wildey, affidavit of Bertram S. Griffin and affidavit of Edward N. Lamb, all verified April 12, 1901, in opposition.

After hearing J. A. Kellogg, Esq., of counsel for relator, in favor of said application, and Messrs. George S. Raley and William L. Kiley of counsel for defendants in opposition, it is

Ordered, that the said Edward N. Lamb produce before this court at a Special Term thereof to be held at the chambers of Justice Stover, in the city of Amsterdam, on the 27th day of April, 1901, the ballots for town officers voted at the biennial town meeting held in and for the town of Bolton, Warren county, N. Y., on the 2d day of April, 1901; and that said Ward, Braley, Pratt and Vandenburg attend this court at said time and place to await the further order of this court for such count, inspection and order as to the court shall seem just; it is further

Ordered, that service of a copy of this order upon Messrs. Raley & Kiley, attorneys for defendants, shall be sufficient service.

4. Order of Special Term denying application.

(Caption and title.)

On reading and filing the notice served by the relator in the above-entitled proceeding, dated April 6, 1901, and the affidavit of Charles B. Maxim, verified April 6, 1901, and the affidavit of F. Swenson Vandenburg, verified April 6, 1901, and also the affidavit of George S. Raley, verified April 22, 1901, the affidavit of J. Wilson Ward, verified April 12, 1901, the joint affidavit of Sewell P. Braley and Stephen M. Pratt, verified April 12, 1901, and the joint affidavit of Hiram F. Seaman, John Taylor and John Wildey, verified April 12, 1901, the affidavit of Bertram S. Griffin, verified April 12, 1901, the affidavit of Edward N. Lamb, verified April 12, 1901, and the order

made herein at Special Term, Hon. Leslie W. Russell, presiding, dated April 15, 1901, and after hearing J. Edward Singleton, Esq., and J. A. Kellogg, Esq., of counsel for the relator, in favor of said application, and George S. Raley, Esq., and Lyman Jenkins, Esq., of counsel for the defendant Taylor, opposed.

Ordered, that the application for a peremptory writ of mandamus made by the relator in the above-entitled proceeding be and the same hereby is denied, with forty dollars (\$40) costs.

Enter in Warren county clerk's office.

(The foregoing order was reversed by the Appellate Division of the Third Department at a term thereof held in June, 1901 [see *People ex rel. Maxim v. Ward*, 62 App. Div. 531, 534], and by the opinion a writ of mandamus was directed to be issued as follows) :

“ The order denying the writ should, therefore, be reversed and a writ of mandamus directed to issue to the board of canvassers to reconvene at the office of the town clerk, in Bolton, within ten days after the service upon them of a copy of the writ, and upon at least three days' notice by the canvassers to the attorneys of the respective parties. And that they publicly taken from the ballot box the ballots by them rejected as void at the time the votes were canvassed; that they indorse upon each the specific reason for its rejection, and that they place the same in a separate sealed package and indorse on the outside thereof their names as canvassers and the number of ballots contained therein, and that they deposit such package with the town clerk of Bolton with the original statement of the canvass, and that the town clerk of Bolton bring into court, at a time and place to be fixed in the order, the said original statement of canvass, together with said package of rejected ballots, and that said board of canvassers make return of their doings, under said writ, to the court at said time and place and await the further order of the court.”

ELECTION OF OFFICERS OF CORPORATIONS, HOW REVIEWED.

See CORPORATIONS.

EMINENT DOMAIN, EXERCISE OF.

See CONDEMNATION OF REAL PROPERTY.

ERRONEOUS ASSESSMENT, HOW REVIEWED AND CORRECTED.

See TAX LAW.

EXPENDITURES OF TOWNS AND VILLAGES.*

- A. General Municipal Law, § 4. Investigation of expenditures of towns and villages.
- B. Source of statute.
- C. Nature and purpose of proceeding.
- D. General construction of statute.
- E. Expenditures investigated.
- F. Procedure.
- G. Costs.
- H. Appeals.

A. General Municipal Law, § 4. Investigation of expenditures of towns and villages.

If twenty-five freeholders in any town or village shall present to a justice of the supreme court of the judicial district in which such town or village is situated, an affidavit, stating that they are freeholders and have paid taxes on real property within such town or village within one year, that they have reason to believe that the moneys of such town or village are being unlawfully or corruptly expended, and the grounds of their belief, such justice, upon ten days' notice to the supervisor, and the officers of the town disbursing the funds to which such moneys belong, or the trustees and treasurer of the village, shall make a summary investigation into the financial affairs of such town or village, and the accounts of such officers, and, in his discretion, may appoint experts to make such investigation, and may cause the result thereof to be published in such manner as he may deem proper.

The costs incurred in such investigation shall be taxed by the justice, and paid, upon his order, by the officers whose expenditures are investigated, if the facts in such affidavit be substantially proved, and otherwise, by the freeholders making such affidavit. If such justice shall be satisfied that any of the moneys of such town or village are being unlawfully or corruptly expended, or are being appropriated for purposes to which they are not properly applicable, or are improvidently squandered or wasted, he shall forthwith grant an order restraining such unlawful or corrupt expenditure or such other improper use of such moneys.

(See B., C. & G. Consol. L., 2nd Ed., p. 3247.)

B. Source of statute.

Section 4 of the General Municipal Law is a re-enactment of section 3 of the former General Municipal Law, chapter 685 of the Laws of 1892. It was originally enacted in chapter 307 of the Laws of 1879, and the present section reads substantially the same as the original statute of 1879.

* For a further discussion of the matters referred to in this chapter, see Bender's Village Laws; B., C. & G. Consolidated Laws.

C. Nature and purpose of proceeding.

The proceeding authorized by section 4 of the General Municipal Law seems to be a special proceeding, as defined by section 5 of the Civil Practice Act.¹ Proceedings under the statute are designed, first, to prevent the present or future illegal appropriation of public moneys; and second, to determine the financial condition of the town and prevent future illegal appropriation of public moneys, by pointing out what proper and improper charges have been allowed by former town boards. Thus while the proceeding must be based upon present acts, which contemplate the unlawful expenditure of money already on hand, or hereafter to be produced from the sources of the revenue of the town, experts in their investigation are not limited to the particular year in which the illegal appropriations sought to be restrained are made.² But generally the statute is intended not to punish acts already done, but to prevent the doing of acts prejudicial to the public interest.³

D. General construction of statute.

The statute is classed as a remedial statute;⁴ and should be liberally construed to effect its intent.⁵ The fact that the petitioners have other remedies afforded them by which to prevent the waste of public moneys is not a ground of objection to the proceeding.⁶

E. Expenditures investigated.

There is no power under the statute to investigate and correct mistakes resulting merely from an error of judgment. The proceeding is limited to the correction of illegal and corrupt expenditures.⁷ Expenditures in the prosecution of a

1. *People ex rel. Guibord v. Kellogg*, 22 App. Div. 176, 47 N. Y. Supp. 1023; *Matter of Town of Hempstead*, 32 App. Div. 6, 52 N. Y. Supp. 618; *Matter of Town of Hempstead*, 36 App. Div. 321, 55 N. Y. Supp. 345; *aff'd on opinion below*, 160 N. Y. 685; *Matter of Town of Hadley*, 44 Misc. 265, 89 N. Y. Supp. 910.

2. *Matter of the Town of Hempstead*, 36 App. Div. 321, 55 N. Y. Supp. 345; *aff'd on opinion below*, 160 N. Y. 685; *Matter of Village of Kenmore*, 50 Misc. 388, 110 N. Y. Supp. 1008.

3. *Matter of Town of Eastchester*,

53 Hun, 181, 6 N. Y. Supp. 120.

4. *Matter of Town of Eastchester*, 53 Hun, 181, 6 N. Y. Supp. 120.

5. *Matter of Town of Eastchester*, 53 Hun, 181, 6 N. Y. Supp. 120.

6. *Matter of Town of Eastchester*, 53 Hun, 181, 6 N. Y. Supp. 120.

7. *Matter of East Syracuse*, 20 Abb. N. C. 131.

Proper expenditures.—Where the village trustees are required by law to audit claims against the village, and audit claims after their payment by the village treasurer, the action of the trustees in merely passing upon the vouchers when they examined the

public work are not deemed unlawful, because of a want of skill and judgment in the work it results in little or no benefit to the municipality and costs more than it would have cost had the work been done in a proper manner.⁸ But the fact that the expenditures in question have been approved by the auditing board of the municipality does not give them validity, if they are illegal.⁹ The fullest investigation of its financial affairs is not only proper, but necessary. The proper scope of the investigation is to determine whether any of the moneys of the village have been, or are, being unlawfully or corruptly expended or improvidently squandered, wasted, or misapplied, without warrant of law, so that the court may prevent all threatened unlawful use of the moneys of the village.¹⁰

treasurer's accounts at the end of the year is a substantial violation of the law. The opening of streets and construction of sewers by a committee of the board of trustees, without authority of the trustees, on land not previously acquired by the village, in disregard of the charter, and the payment of expenditures therefor without prior audit, are illegal acts, since it seems that the board of trustees has no power to delegate its authority to a committee of that body, as its execution involves the exercise of judgment and discretion. The provisions of a charter which authorize the employment of an attorney "when the business of the board of trustees of the village so requires, by the year or otherwise," justify the employment of counsel to appear before a legislative committee and the Governor to urge the passage of a law to bond the village in order to pay for proposed improvements. *Matter of Taxpayers of Plattsburgh*, 27 App. Div. 353, 50 N. Y. Supp. 356, which was reversed in 157 N. Y. 78, wherein it was held that it was not proper to appoint one of the complainants as an expert to make the investigation, at least without the consent of all parties; that the provision that the trustees might raise a specified sum for sewers did not prohibit or render illegal payments by the trustees in excess of that sum

during any one year with money belonging to the sewer fund for sewers actually constructed in previous years; that the provisions of the Public Health Law with reference to charging expenses upon a municipality must be regarded as in the nature of an amendment, in part at least, of all municipal charters. Construing sections 24 and 30 of the Public Health Law, it was further held that the costs of such an investigation must be restricted to those allowed for similar services in an action.

8. *Matter of East Syracuse*, 20 Abb. N. C. 131.

9. *Matter of Town of Eastchester*, 53 Hun, 181, 6 N. Y. Supp. 120.

10. *Matter of Village of Kenmore*, 59 Misc. 388, 110 N. Y. Supp. 1008, wherein it was said: "The oft-repeated and oft-disregarded elementary principles, which should control municipal officers in their conduct of public affairs, are clear and simple and are here restated: (1) A municipal corporation possesses and can exercise the following powers and no others. First. Those granted in express words. Second. Those necessarily and fairly implied in or indispensable to the powers expressly granted. Third. Those indispensable (not simply convenient, but essential) to the declared objects and purposes of the corporations. (2) The courts adopt a strict

F. Procedure.

As the proceeding is a special proceeding, when it is commenced in the county in which the municipality is located before the only justice of the Supreme Court residing in that county, it may, upon his subsequent disqualification to hear the proceeding, be continued by virtue of section 93 of the Civil Practice Act before a justice residing in an adjoining county.¹¹ The practice adopted in one case was as follows: The proceeding was instituted on the affidavits of thirty-three freeholders of the town, praying for an investigation of the financial affairs of the town and the accounts of the officers, and each and all of the bills and accounts audited and allowed by the officers of the town, etc. The affidavits with notice of motion were served upon the members of the town board, and upon the return thereof an order was made by the justice, appointing experts as provided in the section, and directing a hearing to be had. Upon such hearing the experts proceed to take, prove, and examine the bills and charges rendered to and audited by the town board, etc.¹²

G. Costs.

As this proceeding is a special proceeding, under the provisions of section 1492 of the Civil Practice Act, the costs to be awarded are in the discretion of the court at the same rates allowed for similar services in an action brought in the same court. In the absence of stipulation, stenographer's fees cannot be taxed as costs, but the fees of experts employed in such proceeding are treated as similar to those of a referee, and are properly taxable. The costs of the investigation cannot be taxed against the officers of the town not made parties to the proceeding, although their bills may be found to be irregular.¹³

rather than liberal construction of the foregoing powers. Actions of municipal corporations within the limits prescribed by statute will be favored and not defeated or impaired by harsh construction; but such action is to be held strictly within limits, and any ambiguity or doubt as to the extent of the grant of power will be resolved in favor of the public."

11. *Matter of Town of Hadley*, 44

Misc. 265, 89 N. Y. Supp. 910.

12. *Matter of Town of Hempstead*, 36 App. Div. 321, 55 N. Y. Supp. 345; aff'd on opinion below, 160 N. Y. 685.

13. *Matter of the Town of Hempstead*, 36 App. Div. 321, 55 N. Y. Supp. 345; aff'd on opinion below, 160 N. Y. 685. See also *People ex rel. Guibord v. Kellogg*, 22 App. Div. 176, 47 N. Y. Supp. 1023.

H. Appeals.

The proceeding being a special proceeding as defined by section 5 of the Civil Practice Act, an appeal from the final order may be taken pursuant to article 41 of the Civil Practice Act.¹⁴ Certiorari is not a proper remedy for the review of the action of the justice.¹⁵

14. People ex rel. Guibord v. Kellogg, 22 App. Div. 176, 47 N. Y. Supp. 1023; Matter of Town of Hempstead, 32 App. Div. 6, 52 N. Y. Supp. 618.

15. People ex rel. Guibord v. Kellogg, 22 App. Div. 176, 47 N. Y. Supp. 1023.

FEDERAL BANKRUPTCY LAW.

See DEBTOR AND CREDITOR LAW.

FORECLOSURE BY ACTION.*

ARTICLE I.

Nature of action and jurisdiction of courts.

- A. Nature of action.
- B. Different methods of foreclosure.
- C. Strict foreclosure.
- D. Jurisdiction of courts.
 - 1. Supreme Court.
 - 2. County courts.
 - 3. Surrogate courts.

ARTICLE II.

When action maintained.

- A. In general.
- B. Necessity of demand.
- C. Acceleration of principal on default in partial payment.
- D. Default in payment of taxes.
- E. Failure to procure insurance.
- F. Extension of payment.

ARTICLE III.

Parties.

- A. Plaintiff.
 - 1. Assignee of mortgage.
 - 2. Pledgee of mortgage.
 - 3. Joint owners of mortgage.
 - 4. Surety.
 - 5. Infant.
 - 6. Fiduciary.
 - 7. Trustee for bondholders.
 - 8. Joinder of mortgagees of contemporaneous mortgages.
- B. Defendants.
 - 1. Civil Practice Act, § 1079. Parties.
 - 2. In general.
 - 3. Mortgagor.
 - 4. Owner of equity of redemption.
 - 5. Former owner.
 - 6. Dowress.
 - 7. Personal representative of mortgagor.
 - 8. Heirs and devisees.
 - 9. Creditors of deceased mortgagor.
 - 10. Beneficiaries of trust.
 - 11. Remaindermen.
 - 12. Equitable interests.
 - 13. Occupant.
 - 14. Receiver.
 - 15. Trustee in bankruptcy.

* For a further discussion of the matters referred to in this chapter, see Weed's Practical Real Estate Law; Aron's Gist of Real Property Law; Thomas on Mortgages.

16. General assignee.
17. Subsequent lienors.
18. Prior owners or lienors.
19. Purchaser at tax sale.
20. Unsecured creditors.
21. Assignor of mortgage.
22. Surety or guarantor.
23. Persons estopped.
24. Claimants of mortgage.
25. Incompetent parties.
26. Unknown parties.
27. Municipal corporations.

ARTICLE IV.

Complaint and notice of pendency of action.

- A. Rules of Civil Practice, Rule 255. Complaint to state whether action for mortgage debt has been brought.
- B. Capacity of plaintiffs.
- C. Description of bond and mortgage.
- D. Assignments of mortgage.
- E. Default of mortgagor.
- F. Interest of defendants.
- G. Liability for deficiency.
- H. Payment of recording tax.
- I. Statement of no other action.
- J. Joinder of causes of action.
- K. Amendment.
- L. Supplemental complaint.
- M. Notice of pendency of action.
- N. Form of complaint.
- O. Form of notice of pendency.

ARTICLE V.

Answer and defenses.

- A. Denials.
- B. Admissions.
- C. Conclusions.
- D. Inconsistent defenses.
- E. Claim of paramount title.
- F. Subsequent lienors.
- G. Equities between mortgagor and assignor of mortgage.
- H. Want of consideration.
- I. Fraud.
- J. Champerty.
- K. Alteration of mortgage.
- L. Usury.
- M. Illegal assignment.
- N. Tender.
- O. Payment.
- P. Extension of payment.
- Q. Statutes of limitations.
- R. Defective title conveyed to mortgagor.

- S. Condemnation.
- T. Estoppel to assert defense.
- U. Supplemental answer.
- V. Cross-answers between defendants.
- W. Counterclaim.
- X. Relief granted defendants.

ARTICLE VI.

Miscellaneous matters of practice.

- A. Service of process.
- B. Notice of no personal claim.
- C. Form of notice of no personal claim.
- D. Guardian ad litem.
- E. Form of answer of guardian ad litem.
- F. Abatement and revival.
- G. Substitution of parties.
- H. Appearance of defendant.
- I. Consolidation.
- J. Compelling plaintiff to proceed.
- K. Discontinuance.
- L. Provisional remedies.
- M. Jury trial.
- N. Place of trial.
- O. Evidence.
- P. Lost bond or mortgage.
- Q. Foreclosure suit after action on debt.
 - 1. Civil Practice Act, § 1077. Action to foreclose after recovery of judgment for mortgage debt.
 - 2. Effect of section.
- R. Action on debt after foreclosure action.
 - 1. Civil Practice Act, § 1087. Action for mortgage debt subsequent to beginning foreclosure.
 - 2. General effect of statute.
 - 3. Foreclosure in foreign jurisdiction.
 - 4. Action by one other than holder of mortgage.
 - 5. Grounds for leave of court.
 - 6. Action against guarantor.
 - 7. Second foreclosure.
 - 8. Delay in asking leave.
- S. Stay of proceedings.
 - 1. Rules of Civil Practice, Rule 260. Notice of application for stay of sale.
 - 2. Another action pending.
 - 3. Stay of sale.
 - 4. Pending litigation between two defendants.
 - 5. Pending appeal.
- T. Receiver of property.
 - 1. When receiver appointed.
 - 2. When appointment is authorized by mortgage.
 - 3. Application by subsequent lienor.
 - 4. Notice of application.
 - 5. Powers and duties of receiver.
 - 6. Distribution of funds.

U. Costs and allowances.

1. Discretion of court.
2. In case of tender or offer of judgment.
3. Statutory allowance to plaintiff.
4. Additional allowance.
5. Fees of referee.
6. Security for costs.

ARTICLE VII.**Reference to compute amount due.**

- A. Rules of Civil Practice, Rule 256. Reference on default or admission.
- B. Rules of Civil Practice, Rule 257. Application for judgment on default or admission.
- C. Rules of Civil Practice, Rule 265. Referee to be selected by court.
- D. In general.
- E. Affidavit to obtain reference.
- F. Infant defendant.
- G. Absentee defendant.
- H. Issue raised by answer.
- I. Order of reference.
- J. Qualifications of referee.
- K. Notice of hearing before referee.
- L. Proceedings before referee.
- M. Determination of amount due.
- N. Determination of manner of sale.
- O. Confirmation of report.
- P. Form of affidavit on application for judgment.
- Q. Form of order of reference.
- R. Form of report of referee.

ARTICLE VIII.**Judgment.**

- A. Civil Practice Act, § 1082. Final judgment must direct sale.
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- C. Rules of Civil Practice, Rule 259. Contents of judgment of sale.
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- A. Civil Practice Act, § 1085. Effect of conveyance upon sale.
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- B. Mortgagor.
- C. Wife of mortgagor.
- D. Heirs or representatives of mortgagor.
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- K. No sale had.
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- C. Civil Practice Act, § 1086. Sale where mortgage debt is not all due.
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- A. Rules of Civil Practice, Rule 261. Disposition of surplus.
- B. Rules of Civil Practice, Rule 262. Application for surplus moneys; reference.
- C. Rules of Civil Practice, Rule 263. Proceedings before referee.
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- E. Right to surplus.
 - 1. In general.
 - 2. Mortgagor or owner of redemption.
 - 3. Dowress.
 - 4. Purchaser.
 - 5. Lienors and incumbrancers.
 - 6. Priority of liens.
 - 7. Marshalling assets.
 - 8. Liens not affected by foreclosure.
 - 9. Mechanics' liens.
 - 10. Partnership liens.
 - 11. Creditors not having liens.
 - 12. Guarantor.
 - 13. Creditors of deceased.
 - 14. Heirs or representatives of deceased.
 - 15. Contract vendee.
 - 16. Tenants.
 - 17. Easement.
 - 18. Assignor of mortgage.
 - 19. Assignee of surplus rights.
- F. Procedure.
 - 1. In general.
 - 2. Presentation of claims.
 - 3. Power of referee.
 - 4. Decision of referee.
 - 5. Confirmation of referee's report.
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 - 7. Costs.
 - 8. Appeal.
 - 9. Form of notice of claim to surplus.
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 - 11. Form of report of referee.
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Precedents for foreclosure of mortgage to secure corporate bonds.

- A. Complaint.
- B. Evidence before referee.
- C. Report of referee.
- D. Order appointing referee to sell.
- E. Order appointing referee to take proof of ownership of bonds.
- F. Notice to bondholders.
- G. Referee's report as to ownership of bonds.
- H. Order to pay dividend.
- I. Final report.

ARTICLE I.

NATURE OF ACTION AND JURISDICTION OF COURTS.

A. Nature of action.

Foreclosure of a mortgage is the process by which a mortgagee acquires or transfers to a purchaser an absolute title to the property on which he had previously had a mere lien by way of mortgage. The object of the action is to enable the mortgagee to have the mortgaged premises sold in order to obtain his money, interest, and expenses, and that the mortgagor and all persons claiming under him be barred of all equity of redemption in the mortgaged premises, the purchaser taking a clear title to the land sold.¹ Two objects are sought to be accomplished in foreclosures under the practice in this State, on the sale of the mortgaged property by decree, one to give perfect title and apply the moneys arising from the sale upon the mortgage debt, the other in case of deficiency to obtain a personal judgment against the parties liable therefor.²

The foreclosure of a mortgage is equitable in its nature, although based on legal rights, and it is the province of a court of equity to see to it that a party invoking its aid shall have dealt fairly before relief is given.³ A court of equity has the right to so control the proceedings as to produce a just result, and to protect the rights of all parties.⁴

1. Gerard's Titles to Real Estate (4th ed.), 671.

2. Wiltsie on Mortgage Foreclosure, 5.

3. Germania Life Ins. Co. v. Potter, 124 App. Div. 814, 109 N. Y. Supp. 435.

Proceeding in rem.—It is said in Selkirk v. Wood, 9 Civ. Pro. 141, that

an action of foreclosure is a proceeding in rem. See, also, Hulbert v. Clark, 57 Hun, 558, 11 N. Y. Supp. 417; aff'd, 128 N. Y. 295. The contrary is held in Osborne v. Randall, 7 Civ. Pro. 323.

4. The General Synod, etc. v. Lincoln, 6 St. Rep. 13.

B. Different methods of foreclosure.

There are three methods of foreclosure which are or have been recognized in this State:

First. Strict foreclosure or foreclosure without sale of the property, the purpose of which is to perfect in the mortgagee an absolute title instead of by resort to a sale. This procedure was originated in England, upon the theory that the mortgagee acquired title to property subject only to an equity of redemption, and the action was used simply to perfect that title in the mortgagee and deprive the owner of the equity of any right in the property.⁵

Second. Statutory foreclosure or foreclosure by advertisement, a remedy under which sale may be had by proceedings provided for by statute. This method is provided for under §§ 540 to 563 of the Real Property Law, and is treated in another place in this work. As the statutory proceeding must be strictly followed and the courts have insisted that the papers must show every matter connected with jurisdiction, it is not ordinarily used except in cases where the value of the property is comparatively small.⁶

Third. The action in equity recognized and to a very small extent regulated under the provisions of article 65 of the Civil Practice Act, §§ 1077-1088. The procedure is regulated by the rules applicable to courts of equity and was well defined by the chancery practice previous to the adoption of the Code, and those rules as enacted in the rules of the Supreme Court, continue to govern the method of carrying on the action.

The very general character of the Code regulations doubtless arises from the fact that the foreclosure of mortgages proceeded under the equity practice and was not a matter of statute except to a very limited extent. The codifiers seem to have been disposed to leave the practice unchanged, and made no attempt to interfere with it or further formulate it.

There formerly existed the method of foreclosure by entry and possession which is still common in New England States, but is not known in this State and will, therefore, not be considered.⁷

The mortgagee is prohibited by section 991 from maintaining an action of ejectment to recover possession of the premises.⁸

5. See, *infra*, the following subdivision.

6. See the chapter on Foreclosure by Advertisement.

7. Wiltsie on Mortgage Foreclosure, § 3.

8. See, *supra*, the chapter on Ejectment.

C. Strict foreclosure.

The language of section 1082 would seem to direct a sale of property absolutely and at all events, and thus entirely abolish the method of foreclosure known as "strict foreclosure." The language of the Revised Statutes with reference to the power of the court was "shall have power to decree," while that of section 1082, and its equivalent section, 1626, in the Code of Civil Procedure, it will be noted, is "final judgment *must* direct the sale of the property mortgaged;" but such foreclosure has been had since the Code apparently without the objection being raised.⁹ Strict foreclosure was allowable where foreclosure had once been had and the property sold, and some person not having been made a party had a right to redeem it, for the purpose of confirming a title otherwise defective.¹⁰ The effect of a strict foreclosure is to cut off and extinguish the equity in the mortgagor and leaves the title conveyed by the mortgagor absolute in the mortgagee.¹¹

The equitable remedy known as a strict foreclosure of a real property mortgage has never been recognized in this State save in a very limited class of cases. It had its root in the common-law doctrine that the mortgagee acquired a fee in the land, and upon a default of payment a right to the possession, and that the mortgagor had no estate or interest therein and no right of possession after a default had been made in the payment of the mortgage debt. The mortgagee's remedy was by ejectment, and in a court of law it was not an available defense for the mortgagor to plead that he was willing and ready to pay the debt if he had once suffered a default to occur. In order to mitigate

9. *House v. Lockwood*, 1 St. Rep. 196, 40 Hun, 532, where the lands were situated outside of the State. See, also, *Franklin v. Hayward*, 61 How. Pr. 43.

10. *Bolles v. Duff*, 43 N. Y. 469; *Kendall v. Treadwell*, 14 How. Pr. 165; *Benedict v. Gilman*, 4 Paige, 58; *Ross v. Boardman*, 22 Hun, 527; *Mills v. Dennis*, 3 Johns. Ch. 367.

11. *Packer v. Rochester, etc., R. R. Co.*, 17 N. Y. 283.

As a form of judgment.—It is said in *Green v. Mussey*, 38 Misc. 287, 77 N. Y. Supp. 851, that "it is sufficient to say that strict foreclosure is simply a form of judgment and may as

well be had in this action as in another, although it is not recognized by our system of practice under the Code. It has generally been regarded as a severe form of judgment against persons standing in such relation to the mortgaged premises as that occupied by the party here who is asking to have it applied." This opinion was given upon motion for an order permitting plaintiff to serve supplemental summons to bring in new party defendant. The order was reversed in 76 App. Div. 174, 78 N. Y. Supp. 434, upon other grounds. The right to strict foreclosure is not considered in the opinion in the Appellate Division.

the hardships of this rule, equity permitted a mortgagor and his privies to redeem by discharging the mortgaged debt and by restoring to him the possession of the land if the mortgagee had taken possession. Equity would entertain an action to compel the parties entitled to this right to exercise it by paying within a reasonable time the amount of the mortgage debt or be forever barred or foreclosed of the right of redemption and in case of redemption the decree provided that the mortgagee should reconvey the lands to the mortgagor or other party redeeming.¹² Strict foreclosure should be resorted to only in extreme cases; and it seems that it is not called for in favor of a prior mortgagee, in possession through an action foreclosing a prior mortgage, defendant in a subsequent action brought to foreclose a junior mortgage by a mortgagee who was not made a party to the prior action, instead of permitting the junior mortgagee to sell at his own expense, where the defendant prior mortgagee's possession is under liens in excess of the value of the mortgaged premises, and the junior mortgagee cannot sell except in subordination to all his rights.¹³

D. Jurisdiction of courts.

1. Supreme Court.

The Supreme Court has jurisdiction of mortgage foreclosures as the successor to the Court of Chancery.¹⁴ This jurisdiction extends to a mortgage on property, part of which is located in another State.

The Supreme Court has jurisdiction of an action to foreclose a mortgage upon a parcel of land located partly in this State and partly in another State, and may, when the mortgagors are residents of this State and have been personally served with process therein, provide in the decree that the referee shall sell all the mortgaged land, and that the mortgagors shall convey the foreign land to the purchaser.¹⁵

12. *Moulton v. Cornish*, 138 N. Y. 133, wherein it was said: "This proceeding has been termed a strict foreclosure, but it is apparent that it has no appropriate place in the system of laws and jurisprudence where it has been declared that the mortgage does not operate as a conveyance of the legal title, but is only a chose in action constituting a lien upon the land as security for the debt or other obligation of the mortgagor, and the

courts of this State have refused to adopt it as an authorized remedy in ordinary cases, and in this respect have followed the practice of the civil rather than of the common law."

13. *Denton v. Ontario Co. N. Bank*, 150 N. Y. 126.

14. Civil Practice Act, § 64.

15. *The Union Trust Co. v. Olmsted*, 102 N. Y. 729; *Mead v. Brockner*, 82 App. Div. 480, 81 N. Y. Supp. 594.

2. County Courts.

Under section 67 of Civil Practice Act, a county court has jurisdiction of the action where the real property to which the action relates is situated within the county. A county court is of limited jurisdiction and has, in an action to foreclose a mortgage, simply incidental equitable powers. It has no power to pass upon the validity of the assignment and set it aside.¹⁶

Where a suit of foreclosure is brought in a county court and an infant, made a party defendant, alleges her disaffirmance and asks that the complaint be dismissed and her deed and the mortgage be annulled and canceled, the court being of limited statutory jurisdiction has no power to adjudicate upon the infant's rights, for a determination thereof would involve an action to remove a cloud on title, or, if there had been no mortgage, an action of ejectment, and of these actions the court has no jurisdiction.¹⁷

The statutory power conferred upon county courts does not include as incidental thereto the power to reform a mortgage. A county court, therefore, has not jurisdiction of such an action although part of the relief asked is the foreclosure of the mortgage after it has been reformed; the remedies are independent and may be attained by separate actions open to separate and independent defenses.¹⁸ But it has been held that in an action to foreclose a mortgage, a county court has jurisdiction to reform the conditions of the bond in relation to the time for which interest is to be computed; as such relief is strictly incidental, secondary, and ancillary to the foreclosure proceedings.¹⁹

3. Surrogate Courts.

A Surrogate's Court has no jurisdiction of an action to foreclose a mortgage; but it has power in some cases to issue orders for the payment of the surplus to the persons entitled.²⁰

16. *Tonges v. Vanderveer Canarsie Improvement Syndicate*, 148 N. Y. Supp. 748.

17. *Oneida County Savings Bank v. Saunders*, 179 App. Div. 232, 166 N. Y. Supp. 280.

18. *Thomas v. Harmon*, 122 N. Y. 84.

19. *Mead v. Langford*, 30 St. Rep. 450, 9 N. Y. Supp. 586.

20. See, *infra*, this chapter, Art. XIII-F.-6.

ARTICLE II.

WHEN ACTION MAINTAINED.

A. In general.

Speaking in general terms, upon default by a mortgagor, the mortgagee is entitled to maintain an equitable action to foreclose the mortgage. He has the right to have the mortgaged premises sold by the court for the satisfaction of the indebtedness, and is under no obligation to take the mortgaged premises.²¹ In the absence of fraud or collusion on the part of the mortgagee and his attorney, preventing the mortgagor from paying the interest, their motives in foreclosing the mortgage are immaterial.²² A foreclosure may be had for interest,²³ although less than \$50 is due.²⁴ And, in foreclosure for the interest, if the principal becomes due during the pendency of the action, the pleadings may be amended to conform to the proof.²⁵

An action to foreclose for principal and interest is not barred by a prior foreclosure for interest only; and, where a deed has been given on the prior foreclosure to a purchaser subject to the mortgage, such purchaser cannot resist the subsequent foreclosure.²⁶

Where a suit of foreclosure has been prosecuted to judgment and sale, but there is some defect in the proceedings by reason of which existing liens or claims subordinate to the mortgage were not cut off, the purchaser will be treated as a mortgagee in possession and may again foreclose the mortgage as to such liens and claims.²⁷

As against the mortgagor, the motive which actuates the commencement of the foreclosure action is immaterial, but the situation may be different where the claims of creditors or other persons having legitimate claims against the property will be injuriously affected; and particularly is this true where one guilty of fraud will profit by the enforcement of the mortgage.²⁸ Thus, where it appears that so far as the beneficial owner of the property is concerned, the sole pur-

21. *Merritt v. Youmans*, 21 App. Div. 256, 47 N. Y. Supp. 664.

22. *Trenor v. Le Count*, 84 Hun, 426, 32 N. Y. Supp. 412, 65 St. Rep. 610.

23. *Long Island Loan & Trust Co. v. Long Island City & N. R. Co.*, 85 App. Div. 36, 82 N. Y. Supp. 644; *aff'd* without opinion, 178 N. Y. 588.

24. *House v. Eisenlord*, 17 Wkly.

Dig. 203.

25. *Sidenburg v. Ely*, 1 Month. Law Bull. 70.

26. *Pretzfeld v. Lawrence*, 34 Misc. 329, 69 N. Y. Supp. 807.

27. *Vought v. Levin*, 142 App. Div. 623, 127 N. Y. Supp. 479.

28. *Weis v. Levy*, 106 App. Div. 496, 94 N. Y. Supp. 857.

pose of enforcing the mortgage is to cut off whatever rights were acquired by the vendee in a contract for the sale thereof on breach of the contract by the beneficial owner, which the vendee was seeking to have specifically performed, equity will not lend its aid to enforce the mortgage, and thereby further the scheme to defraud.²⁹

B. Necessity of demand.

Ordinarily no demand is necessary before the commencement of proceedings to foreclose a mortgage.³⁰ Where interest is payable under the terms of the mortgage at the office of the mortgagor, the abandonment by the mortgagor of its office releases the holder of interest coupons from obligation to make demand for payment, even if such demand was necessary.³¹ But where an executor in order to continue an investment tells a mortgagor's agent, who offers to pay an installment of the mortgage debt at maturity, that he need not pay any principal until another year, neither the executor nor his assignee, with the notice of the extension, can foreclose the mortgage for non-payment without demand for payment of the past-due installments.³²

C. Acceleration of principal on default in partial payment.

Bonds and mortgages generally contain a clause that upon default in the payment of interest or an installment of the principal the entire principal shall become due at the option of the mortgagee.³³ It is clear that such a provision is valid and not unconscionable;³⁴ and it is to be distinguished from the clause allowing forfeiture for failure to pay taxes or assessments.³⁵ It is not a condition precedent to the mortgagee's right to use such an option that he notify the mortgagor of his election so to do.³⁶ The commencement of the

29. *Weis v. Levy*, 106 App. Div. 496, 94 N. Y. Supp. 857.

30. *Neal v. Brown*, 34 Misc. 759, 71 N. Y. Supp. 1143.

31. *Long Island Loan & Trust Co. v. Long Island City & N. R. Co.*, 85 App. Div. 36, 82 N. Y. Supp. 644; aff'd without opinion, 178 N. Y. 588.

32. *Goldman v. Ehrenreich*, 33 Misc. 433, 68 N. Y. Supp. 424.

33. See *Baker v. Consolidated Gas & Elec. Co.*, 42 Misc. 95, 85 N. Y. Supp. 1030.

Acceptance of the interest after de-

fault is a waiver of the interest clause. *Lawson v. Barron*, 18 Hun, 414.

34. *Trowbridge v. Malex Realty Corp.*, 111 Misc. 211, 183 N. Y. Supp. 53.

35. *Trowbridge v. Malex Realty Co.*, 111 Misc. 211, 183 N. Y. Supp. 53.

36. *Hothorn v. Louis*, 52 App. Div. 218, 65 N. Y. Supp. 155; aff'd without opinion, 170 N. Y. 576; *Trowbridge v. Malex Realty Co.*, 111 Misc. 211, 183 N. Y. Supp. 53.

action is sufficient notice of the election.³⁷ The court is generally without power to relieve the mortgagor from the effects of such an option,³⁸ especially, when nothing has been done by the mortgagee to render it unconscionable for him to avail himself of the forfeiture.³⁹

A court of equity will not deny foreclosure on such default when it was not induced by anything that the mortgagee did or refrained from doing, and there were no acts of the mortgagee upon which the mortgagor relied, and there was no fraud or mutual mistake. Cases where foreclosure may be denied in spite of the default of the mortgagor fall within two classes: First, where the default is in the payment of taxes or assessments, or sums for which the time of payment is not fixed by the instrument and can be known to the mortgagor only by investigation or information *dehors* the mortgage; second, where, by the course of dealing between the parties, the mortgagor has been induced by the mortgagee to suffer the default.⁴⁰ A decree of foreclosure will not be denied merely because the plaintiff began his action four days after his election to treat the mortgage due by reason of a default, unless it be shown that the plaintiff's course of dealing misled the defendant.⁴¹ And a mortgagee who has declared the entire sum due cannot be required to discontinue the foreclosure upon payment of the unpaid installment, interest and costs.⁴² Where ample notice has been given to the owner of the fee before the commencement of the action, that the mortgagees elected to foreclose if interest was not paid as provided in the interest clause, the action cannot be defeated by a tender of the interest due and costs subsequently made.⁴³ But equity will relieve a mortgagor from the operation of such a clause where the mortgagor's default

37. *Boigeol v. Eigabrodt*, 35 Misc. 606, 72 N. Y. Supp. 133.

38. *Pizer v. Herzig*, 120 App. Div. 102, 105 N. Y. Supp. 38; *Fay v. Picariello*, 109 Misc. 662, 180 N. Y. Supp. 621; *Noyes v. Clark*, 7 Paige, 179; *Ferris v. Ferris*, 28 Barb. 29; *Bennett v. Stevenson*, 53 N. Y. 508; *O'Connor v. Shipman*, 48 How. Pr. 126. See *Asendorf v. Meyer*, 8 Daly, 278; *Dwight v. Webster*, 32 Barb. 47; *Thurston v. Marsh*, 14 How. Pr. 572.

Prior mortgage.—Relief when second mortgage is sought to be accelerated on account of default in payment of interest on prior mortgage.

Trowbridge v. Malex Realty Co., 111 Misc. 211, 183 N. Y. Supp. 53.

39. *Cole v. Hinck*, 120 App. Div. 355, 105 N. Y. Supp. 407.

40. *Pizer v. Herzig*, 120 App. Div. 102, 105 N. Y. Supp. 38.

41. *Weinstein v. Sinel*, 133 App. Div. 441, 117 N. Y. Supp. 346.

42. *Rosche v. Kosmowski*, 61 App. Div. 23, 70 N. Y. Supp. 216; *Weyand v. Park Terrace Co.*, 135 App. Div. 821, 120 N. Y. Supp. 192; *rev'd on other grounds*, 202 N. Y. 231.

43. *Osborne v. Ketcham*, 76 Hun, 325, 27 N. Y. Supp. 694, 59 St. Rep. 83.

was occasioned by the appointment of temporary receivers of the mortgagor who were in possession of its assets at the time of default and during the thirty days thereafter.⁴⁴ And where it was expressly agreed by the mortgagor that a default of thirty days in payment of interest should cause the whole sum to become due at the option of the mortgagee, and a tender of the interest is made within the thirty days, followed by a continued readiness to pay the same, the mortgagee has no ground for exercising the option.⁴⁵

Where an action is brought to foreclose a mortgage upon the ground that the principal sum is due, according to the terms of the mortgage, the action cannot be sustained on the theory that the option provided in case of a default in payment of interest has been exercised.⁴⁶

D. Default in payment of taxes.

The failure of the mortgagor to pay taxes or assessments levied against the premises, according to the terms of many mortgages, is ground for foreclosure.⁴⁷ The failure to pay such taxes, however, has the effect of a penalty or forfeiture, and the courts find ground for relieving the mortgagor from his default. The court will not allow the action for foreclosure to be maintained, if the taxes were paid immediately upon the mortgagor's attention being called to the default, and before the suit is brought.⁴⁸ A court of equity should not entertain an action to foreclose a mortgage because of a technical default in the payment of taxes even though there was no offer to repay the taxes before action commenced, if the action was begun so quickly that there was no opportunity to do so, and the defendant upon learning that the plaintiff had taken advantage of the default tendered all taxes paid with interest and costs of action to date.⁴⁹

If a mortgagee pays an assessment at any time previous to the expiration of the time for redemption, he acquires a lien therefor, as against the mortgagor.⁵⁰ Money paid by the

44. *Smith v. Lamb*, 59 Misc. 568, 111 N. Y. Supp. 455.

45. *Schieck v. Donohue*, 77 App. Div. 321, 79 N. Y. Supp. 233; appeal dismissed, 173 N. Y. 638.

46. *Beach v. Shanley*, 35 App. Div. 566, 55 N. Y. Supp. 130.

47. *Germania Life Insurance Co. v. Potter*, 57 Misc. 204, 107 N. Y. Supp. 912; rev'd, 124 App. Div. 814, 109 N. Y. Supp. 435.

Waiver of default.— See *VerPlank v. Godfrey*, 42 App. Div. 16, 58 N. Y. Supp. 784.

48. *Ver Planck v. Godfrey*, 42 App. Div. 16, 58 N. Y. Supp. 784.

49. *Germania Life Ins. Co. v. Potter*, 124 App. Div. 814, 109 N. Y. Supp. 435.

50. *Brevoort v. Randolph*, 7 How. Pr. 398.

mortgagee to redeem the premises from a tax sale becomes part of the mortgage debt, which may be enforced by foreclosure.⁵¹ But where the bond and mortgage contain no covenant to pay taxes and assessments, the mortgagor cannot, on foreclosure, be held for a deficiency arising from non-payment of taxes and assessments accruing after a sale by him of the premises.⁵² Where the condition is that on failure of the mortgagor to pay the taxes the mortgagee may do so, the mortgagee must actually pay the taxes to give him the right to foreclose and collect them.⁵³ When, although, as between the life tenant and the remainderman it is the duty of the former to pay the taxes, still the equities between them cannot destroy the right of the mortgagee to pay taxes and add the amount to the mortgage.⁵⁴

Where a purchaser of realty subject to a mortgage assumes taxes, on condition that the mortgagee refrains from foreclosing, and the purchaser thereafter fails to pay taxes, the mortgagee is not put to his election to sue for a breach of such contract, or to treat the contract as rescinded and foreclose the mortgage, but is entitled to prosecute both remedies.⁵⁵

E. Failure to procure insurance.

An election by the mortgagee to demand the payment of the entire principal sum when there is a default in the insurance clause will not be enforced if unconscionable.⁵⁶ Where a mortgagor of real estate, after repeated demands, fails to have the buildings thereon insured and permits them to become vacant, making it impossible for the mortgagee to effect such insurance, he is, under the usual insurance clause of the mortgage giving him the option to declare the whole sum secured by the mortgage due and payable, authorized by section 254 (4) of the Real Property Law to bring an action to foreclose because of the mortgagor's breach of his covenant to insure.⁵⁷

Where a mortgage contains a covenant to insure and provides that upon default by the mortgagor the mortgagee may

51. *Kortright v. Cady*, 23 Barb. 490; *Brevoort v. Randolph*, 7 How. Pr. 358; *Burr v. Veeder*, 3 Wend. 412; *Eagle Fire Ins. Co. v. Pell*, 2 Edw. Ch. 631; *Sidenburgh v. Ely*, 90 N. Y. 257, below, 11 Abb. N. C. 354.

52. *Marshall v. Davis*, 16 Hun, 600, 78 N. Y. 414.

53. *Williams v. Townsend*, 31 N. Y. 411.

54. *Rapelye v. Prince*, 4 Hill, 119; *Silver Lake Bank v. North*, 4 Johns. Ch. 370; *Faure v. Winans*, 1 Hopk. 283.

55. *Cook v. Adams*, 32 App. Div. 385, 53 N. Y. Supp. 120.

56. *Bieber v. Goldberg*, 133 App. Div. 207, 117 N. Y. Supp. 211.

57. *Marlatt v. Holdridge*, 97 Misc. 456, 161 N. Y. Supp. 148.

insure and the premiums paid shall be added to the mortgage debt, an action is not maintainable upon an allegation that the defendant mortgagor has failed to keep the buildings insured and to assign the policy; and, in the absence of any allegation that plaintiff has procured insurance or that any demand was ever made upon the defendant for premium paid by the plaintiff for such insurance, the complaint does not state a cause of action. In such a case subdivision 4 of section 254 of the Real Property Law does not confer upon the mortgagee the right to elect that the whole mortgage shall be due and payable immediately.⁵⁸ The effect of section 254, subdivision 4, and section 257 of the Real Property Law is to include as parties in the covenant not only the mortgagor but also the representatives thereof, so that the covenant binds those who may thereafter assume its obligations. But where a grantee of real property on which there is an existing mortgage containing a covenant to insure for the benefit of the mortgagee takes title subject to the mortgage but does not assume the payment thereof, such grantee is not bound personally to insure the premises, but he is charged with liability to have added to the mortgage debt an amount sufficient to reimburse the mortgagee for any insurance premium which he might properly incur for his security. A covenant by a mortgagor to keep the mortgaged premises insured for the benefit of the mortgagee is entirely personal in its character and does not affect the land or run with it, and is collateral and incidental to the remaining covenants in the mortgage.⁵⁹ A mortgagee is not entitled to a lien upon the proceeds of insurance upon a building destroyed by fire where the insurance was taken out and paid for by the owner of the premises who purchased the same subject to, but who did not assume the obligations of, the mortgage which contained a clause for insurance in favor of the mortgagee.⁶⁰

F. Extension of payment.

A valid extension of time for the payment of the mortgage may bar a foreclosure thereof until the extended time has passed.⁶¹ To have this effect, however, there must be a legal consideration for the extension.⁶² Where the promise of the

58. *Bumpus v. Willett*, 55 Misc. 94, 106 N. Y. Supp. 366.

59. *Sheehan v. Spring Valley Wood Products Co.*, 194 App. Div. 119, 185 N. Y. Supp. 641.

60. *Sheehan v. Spring Valley Wood Products Co.*, 194 App. Div. 119, 185

N. Y. Supp. 641.

61. See *Rosche v. Kosmowski*, 61 App. Div. 23, 70 N. Y. Supp. 216.

62. *Carr v. Morris*, 191 App. Div. 671, 181 N. Y. Supp. 813; *Barden v. Sworts*, 112 Misc. 384, 183 N. Y. Supp. 184.

extension is without consideration, the fact that the mortgagee does not give the mortgagor notice of his intention to disregard it furnishes no ground for defense.⁶³

Where the owner of a leasehold, who has not assumed a prior mortgage thereon, pays interest to the mortgagee in consideration of his agreement to extend the mortgage to a specified date, there is a good consideration for the contract to extend. Hence, an answer setting out the facts aforesaid states a good defense to an action of foreclosure brought before the expiration of the extension, and it should not be stricken out as frivolous. This is so, although there be no allegation as to an extension of payment of the bond secured by the mortgage, as such is the reasonable intendment.⁶⁴

ARTICLE III.

PARTIES.

A. Plaintiff.⁶⁵

1. Assignee of mortgage.

There can be no doubt about the general proposition that the assignee of a mortgage can maintain an action for its foreclosure, upon default by the mortgagor.⁶⁶ The assignee of a mortgage is a "party in interest" within the meaning of section 210, Civil Practice Act, and entitled to sue for foreclosure, although the assignment was made to him merely for such purpose.⁶⁷ And parties who are entitled to the benefit of the mortgage security, although not named as mortgagees or holding an assignment, may foreclose as equitable assignees in some cases.⁶⁸

63. Carr v. Morris, 191 App. Div. 671, 181 N. Y. Supp. 813.

64. Krebs v. Carpenter, 124 App. Div. 755, 109 N. Y. Supp. 482.

65. Foreclosure of contract.—As to the proper parties plaintiff on foreclosure of a contract for sale of lands where the vendor has died, see *Champion v. Brown*, 6 Johns. Ch. 398; *Moors v. Burrows*, 34 Barb. 173; *Adams v. Green*, 34 Barb. 176; *Lewis v. Smith*, 9 N. Y. 502; *Thomson v. Smith*, 63 N. Y. 301; *Schroepel v. Hopper*, 40 Barb. 425.

66. *Whitney v. McKinney*, 7 Johns. Ch. 144; *Andrews v. Gillespie*, 47 N. Y. 487.

Fraudulent transfer.—It has been

said that a *bona fide* assignee for value of a mortgage originally given as a consideration for a fraudulent transfer of lands may foreclose, though the transfer has been adjudged fraudulent as to creditors. *Swart v. Bennett*, 4 Abb. Ct. App. Dec. 353.

67. *Morrison v. Schmeman*, 166 App. Div. 264, 151 N. Y. Supp. 607; *aff'd*, 222 N. Y. 569.

68. *Lawrence v. Lawrence*, 3 Barb. Ch. 71; *Ferguson v. Ferguson*, 2 N. Y. 360; *Hancock v. Hancock*, 22 N. Y. 568; *Stewart v. Hutchinson*, 29 How. Pr. 181; *Bolles v. Duff*, 43 N. Y. 469; *Robinson v. Ryan*, 25 N. Y. 320.

For the purpose of an action to foreclose a mortgage by an assignee, it is sufficient for the plaintiff to have title to the bond and mortgage, valid and legal on its face, such as will protect the mortgagor, upon payment, from any claim by the assignor.⁶⁹

An election to declare a mortgage due for failure to pay an installment of interest or taxes may be made by an assignee of the mortgagee.⁷⁰

It is said that a bond and mortgage may be assigned by delivery;⁷¹ but an assignment of the mortgage without bond, whether in writing or by parol, and as collateral or otherwise, is a nullity, and the assignee acquires no interest especially as against a subsequent assignee of both the bond and mortgage.⁷²

2. Pledgee of mortgage.

The holder of the mortgage to whom it has been assigned as collateral may maintain the action to foreclose, but he can only recover the amount due him, and the owner of the interest subject to the assignment must be made a party, either plaintiff or defendant.⁷³ But one who assigns a mortgage as collateral security for his own debt, and after default in his debt is made a defendant in an action to foreclose the mortgage, must set up his equity if he would preserve it. If he does not, the usual judgment of foreclosure bars him, and if the premises sell to plaintiff for less than enough to pay the debt as security for which the mortgage is held as collateral, the assignor cannot redeem.⁷⁴

Where the owner of a bond and mortgage has assigned them as security for a debt less than their full amount, and the assignee has foreclosed, claiming only the amount due him, and has obtained judgment of sale, and the owner subsequently has paid the amount due the assignee, the judgment is not a bar to an action of foreclosure by the owner. After

69. *American Guild of Richmond v. Damon*, 107 App. Div. 140, 94 N. Y. Supp. 985; rev'd on other grounds, 186 N. Y. 360.

70. *Corporate Investing Co. v. Gracehull Realty Co.*, 157 App. Div. 259, 142 N. Y. Supp. 131.

71. *Strause v. Josephthal*, 77 N. Y. 622.

72. *Merrill v. Bartholick*, 36 N. Y. 44.

73. *Whitney v. McKinney*, 7 Johns.

144; *Carpenter v. O'Dougherty*, 67 Barb. 397; *Bloomer v. Sturges*, 58 N. Y. 168; *Bard v. Poole*, 12 N. Y. 495; *Bush v. Lathrop*, 22 N. Y. 535; *Salmon v. Allen*, 11 Hun, 29; *Dalton v. Smith*, 86 N. Y. 176; *Union College v. Wheeler*, 61 N. Y. 88; *Slee v. Manhattan Co.*, 1 Paige, 48; *Western Res. Bank v. Potter*, *Clarke's Ch.* 432.

74. *Bloomer v. Sturges*, 58 N. Y. 168.

payment of the assignee's lien the mortgage is restored to the owner.⁷⁵ And the owner, where he has pledged the mortgage as collateral for a debt less than the face of the mortgage, has an interest in it which entitles him to bring an action to foreclose. In such action the pledgor is a necessary party, but it is immaterial, so far as the mortgagor is concerned, whether he is a party plaintiff or defendant.⁷⁶

Where plaintiff assigned a mortgage as security, and in an action by the pledgee it was adjudged a certain amount was due him, which was paid by the owner, it was held the action by the pledgee was not a bar to a foreclosure by the owner.⁷⁷

3. Joint owners of mortgage.

The joint holders of a mortgage should be co-plaintiffs, unless one of them refuses to join.⁷⁸ If the party bringing the foreclosure has not the entire interest, the interested parties should be plaintiffs with him unless they refuse, which should be alleged, and then they should be made defendants.⁷⁹

The omission to unite as a party in foreclosure one to whom the plaintiff has assigned a partial interest in the mortgage will not invalidate the decree of foreclosure or furnish a ground for collateral attack on the part of the purchaser, but the equity of redemption in such case will be effectually barred.⁸⁰

The power to foreclose may be exercised by one owning only a part of the mortgage debt, and if he claim too much, that does not render the sale void.⁸¹

Where by a participation mortgage agreement it clearly appears that it was the intention of the parties to give to the senior participant the entire right to manage, control and deal with the mortgage and simply to preserve to the junior participant the right to receive from the senior participant the principal of his junior participation, with interest, the junior participant is not entitled to maintain an action to foreclose the mortgage.⁸² The assignee of an interest in a

75. *O'Dougherty v. Remington Paper Co.*, 81 N. Y. 496.

76. *Simpson v. Satterlee*, 64 N. Y. 657.

77. *O'Dougherty v. Remington Paper Co.*, 81 N. Y. 496.

78. *Paton v. Murray*, 6 Paige, 474; see *Lawrence v. Lawrence*, 3 Barb. Ch. 71; *McGregor v. McGregor*, 35 N. Y. 218; *Carpenter v. O'Dougherty*, 2 T.

& C. 427; *aff'd*, 58 N. Y. 681.

79. *Lawrence v. Lawrence*, 3 Barb. Ch. 71; *Hancock v. Hancock*, 22 N. Y. 568.

80. *Batterman v. Albright*, 122 N. Y. 484, 34 St. Rep. 131.

81. *Batterman v. Albright*, 6 St. Rep. 334.

82. *Clare v. New York Life Ins. Co.*, 178 App. Div. 877, 166 N. Y. Supp. 95;

bond and mortgage may not alone elect to declare the entire sum due upon default in the payment of interest, as that option is to be exercised, if at all, by all of the joint owners.⁸³

4. Surety.

A surety who has been obliged to pay a mortgage debt may be subrogated to the rights of the mortgagee and may maintain foreclosure.⁸⁴

5. Infant.

Where a mortgage is given to the special guardian of an infant, the guardian is the proper person to file a bill for redemption and assignment of a second mortgage on the same premises.⁸⁵

6. Fiduciary.

One executor or trustee may foreclose against another.⁸⁶ Before the enactment in 1911 of section 1836a of the Code of Civil Procedure (now section 160 of the Decedent Estate Law) a foreign executor or administrator could not foreclose without taking out letters in this State.⁸⁷ But the foreign representative was allowed to assign the mortgage to a natural person who could thereupon bring an action of foreclosure.⁸⁸ The letters of administration granted in this State are conclusive as to the validity of the appointment.⁸⁹

Clare v. New York Life Ins. Co., 100 Misc. 308, 166 N. Y. Supp. 647.

83. Beach v. Tanguer Hotel Co., 110 Misc. 41, 179 N. Y. Supp. 657.

84. Halsey v. Reed, 9 Paige, 446; McLean v. Towle, 3 Sandf. Ch. 117; Marsh v. Pike, 10 Paige, 595; Brewer v. Staples, 3 Sandf. Ch. 579; Tice v. Annan, 2 Johns. Ch. 125; Johnson v. Zink, 52 Barb. 396; Cox v. Wheeler, 7 Paige, 248; Cherry v. Monroe, 2 Barb. Ch. 627; Ferris v. Crawford, 2 Den. 595; Patterson v. Birdsell, 64 N. Y. 294; Strause v. Josephthal, 77 N. Y. 622; Averill v. Taylor, 8 N. Y. 44; Calvo v. Davies, 73 N. Y. 211; Marshall v. Davies, 78 N. Y. 414; Ellsworth v. Lockwood, 42 N. Y. 89; Dings v. Parshall, 7 Hun, 522.

85. Pardee v. Van Aiken, 3 Barb. 534.

86. Paton v. Murray, 6 Paige, 474; Lawrence v. Lawrence, 3 Barb. Ch.

71; McGregor v. McGregor, 35 N. Y. 218. *Contra*, Vrooman v. Strimson, 7 Wkly. Dig. 468.

87. Morrell v. Dickey, 1 Johns. Ch. 153; Williams v. Storrs, 6 Johns. Ch. 353; Doolittle v. Lewis, 7 Johns. 45; Vroom v. Van Horne, 10 Paige, 549; Brown v. Brown, 1 Barb. Ch. 353; Smith v. Webb, 1 Barb. 232; Vermilyea v. Beatty, 6 Barb. 429; Lawrence v. Elmendorf, 5 Barb. 73; Parsons v. Lyman, 20 N. Y. 173; Peterson v. Chemical Bank, 32 N. Y. 21; Robbins v. Wells, 26 How. Pr. 15; Zabriskie v. Smith, 13 N. Y. 322; McBride v. Farmers' Bank, 26 N. Y. 457.

88. Smith v. Tiffany, 16 Hun, 552. Under the present statute the foreign representative is allowed to maintain the action. See chapter on Decedents' Estates, Art. 1-C.

89. Abbott v. Curran, 98 N. Y. 665.

A mortgage held by an administrator and assigned to him through a third party can be foreclosed by him though voidable as to next of kin of the testator.⁹⁰ A receiver or the successor of a receiver may foreclose a mortgage given to him in his official capacity.⁹¹

Where a mortgage is charged with an annuity and is devised to trustees for that purpose, the legatee has a vested interest which will enable her to maintain foreclosure without a demand on the trustee, where the latter refuses to bring the action or his acts are such as to indicate that he would refuse.⁹² Where a mortgage, given by an executor to his testator during his lifetime, is the only asset of the estate, and the executor refuses to bring an action, a judgment creditor of deceased may maintain an action to compel the sale of the mortgaged premises and the payment of his debt from the proceeds of the sale.⁹³

7. Trustee for bondholders.

A mortgage trustee is entitled to a judgment of foreclosure if it establishes that outstanding valid obligations were issued under the mortgage and that the mortgagor has made default in their payment, and it is immaterial who owns the obligations.⁹⁴

One of two trustees under a mortgage executed by a railroad company to secure its bonds may sue alone to foreclose the mortgage making his cotrustee a party defendant without alleging that he requested the cotrustee to join as plaintiff, where the complaint states that the cotrustee is a director of the defendant mortgagor, and, therefore, is not qualified to represent the bondholders in the suit.⁹⁵

Where a trust company, as trustee of bondholders, at their instance and under the terms of the mortgage securing the bonds, instituted an action to foreclose the mortgage for default in payment of interest the bondholders cannot on their own authority and without the sanction of the court take the control of the action and of the trust affairs out of the hands of the trustee.⁹⁶ Where an emergency occurs which

90. *Read v. Knell*, 143 N. Y. 484.

91. *Leavitt v. Pell*, 27 Barb. 322; *aff'd*, 25 N. Y. 474; *Attorney-General v. Guardian Mutual Life Ins. Co.*, 77 N. Y. 272.

92. *Mulvey v. Reilly*, 31 Misc. 10, 64 N. Y. Supp. 582.

93. *Raynor v. Gordon*, 16 Hun, 126.

94. *Knickerbocker Trust Co. v.*

Oneonta, etc., Ry. Co., 116 App. Div. 78, 101 N. Y. Supp. 241; *aff'd*, 188 N. Y. 38.

95. *Cumming v. Middletown, Unionville and Water Gap R. R. Co.*, 147 App. Div. 105, 131 N. Y. Supp. 710.

96. *Metropolitan Trust Co. v. Long Acre Electric Light and Power Co.*, 223 N. Y. 69.

renders futile a demand upon a trustee of a corporate mortgage to foreclose the same, such as his absence abroad or his insanity, a bondholder may maintain such an action. In such case, the appointment of a new trustee before bringing the action is not necessary.⁹⁷ A refusal by a trustee to allow a bondholder to foreclose by his own attorneys unless the trustee is indemnified for costs is not such a refusal as makes it proper for the bondholder to bring the action; nor does the failure of the trustee to bring suit for a long time after the default of itself give a bondholder such right, since foreclosure is usually a last resort in such case.⁹⁸ The holder of corporate bonds secured by a second trust mortgage, providing that it shall be due and payable upon default for sixty days in payment of interest on the first mortgage, may maintain an action for its foreclosure after such default, and after refusal of a substituted trustee to bring an action; and a receiver may be appointed in the action.⁹⁹

Where a bondholder brought a suit to foreclose a mortgage made by an incorporated club after the trustee named in the mortgage had refused to sue on due request to do so, and the trustee sought to defeat the foreclosure on the ground that the mortgage had not been authorized by the court as required by section 13 of the Membership Corporations Law, and the mortgage was thereafter confirmed by the court, and the trustee thereupon sues to foreclose without leave of court and with knowledge that the other suit is pending, the suit by the trustee is illegal and the bondholder will be allowed to continue her action by filing a supplemental complaint.¹

8. Joinder of mortgagees of contemporaneous mortgages.

Two mortgagees holding contemporaneous mortgages, being liens of the same date, may unite in a foreclosure.²

B. Defendants.

1. Civil Practice Act, § 1079. Parties.

Any person who is liable to the plaintiff for the payment of the debt secured by the mortgage may be made a defendant in the action. The people of the state of New York may be made a party defendant to an action for the

97. *Ettlinger v. Persian Rug & Carpet Co.*, 142 N. Y. 189, 58 St. Rep. 303.

98. *Beebe v. Richmond Light, Heat and Power Co.*, 13 Misc. 737, 69 St. Rep. 230, 35 N. Y. Supp. 1; *aff'd*, 3 App. Div. 334, 38 N. Y. Supp. 395.

99. *Baker v. Consolidated Gas &*

Electric Co., 42 Misc. 95, 85 N. Y. Supp. 1030.

1. *Smart v. East Side Club*, 190 App. Div. 818, 180 N. Y. Supp. 814.

2. *Potter v. Crandall*, *Clarke's Ch.* 119. See, also, *Decker v. Boice*, 83 N. Y. 215; *Granger v. Crouch*, 86 N. Y. 494; *Green v. Warnick*, 64 N. Y. 220.

foreclosure of a mortgage on real property, where the people of the state of New York have an interest in or a lien on the said real property subsequent to the lien of the mortgage sought to be foreclosed in said action, in the same manner as a private person. In an action to foreclose a mortgage upon any of the public utilities regulated by the public service commissions law, the public service commission having supervision thereof shall be made a party defendant. Service of summons upon any such commission shall be made by delivering a copy thereof within the state to a commissioner, a deputy commissioner or the secretary of the commission.

2. In general.

Generally speaking, no person should be made a party to a foreclosure action except those who have title to or lien upon the premises.³ The only proper parties are the mortgagor, the mortgagee, and those who have acquired rights under them, subject to the mortgage, and these parties only are affected by the judgment of foreclosure.⁴ But one who has or claims to have an interest in the premises subordinate to that of plaintiff is a proper defendant in foreclosure.⁵ Conditional vendees of personalty situated upon the mortgaged premises, claiming absolute ownership thereof, are not proper parties to foreclosure proceedings.⁶

Where defendant was inadvertently made a party to an action of foreclosure and appeared, but not until after a motion had been made to strike out his name as a party, but he received no notice of the motion, it was held that his appearance was regular and he was entitled to notice.⁷ But where a party acquired title after a decree of foreclosure and was not a party to the suit, he was held not to be entitled to notice of motions made therein.⁸

A defendant, permitted to intervene in foreclosure in setting up an issue which either wholly or partially defeats the mortgage, occupies the same position as though he had originally interposed an answer, and has a right to a trial and determination of the issues so raised.⁹

Where a defendant in foreclosure claimed an interest in mortgaged premises, but did not serve his answer on his co-defendants, owners of the equity, it was held that they should not be deprived of their right to appeal from a judg-

3. *Gardner v. Lansing*, 28 Hun, 413.

4. *Emigrant Savings Bank v. Goldman*, 75 N. Y. 127; *Kent v. Popham*, 6 Civ. Pro. 336.

5. *Mutual Life Ins. Co. v. Hoyt*, 15 Wkly. Dig. 489.

6. *Condit v. Goodwin*, 44 Misc. 312, 89 N. Y. Supp. 827; *aff'd*, 107 App.

Div. 616, 95 N. Y. Supp. 1122.

7. *Stephens v. Hall*, 32 St. Rep. 453, 10 N. Y. Supp. 753.

8. *Wing v. De La Rionda*, 25 St. Rep. 1005, 5 N. Y. Supp. 550.

9. *Farmers' Loan & Trust Co. v. Hoffman House*, 96 App. Div. 301, 89 N. Y. Supp. 281.

ment which contained a provision in his favor to their detriment.¹⁰

3. Mortgagor.

The mortgagor, if he has not parted with his title, is a necessary defendant.¹¹ And the rule is the same, if he has conveyed by an unrecorded conveyance,¹² or if a receiver has been appointed for him.¹³ But he is not a necessary party, if he has parted with his title by a recorded conveyance.¹⁴ But, although he has parted with his equity by a recorded conveyance, he is a proper party defendant. And, where the bond is executed by the mortgagors and another, it is proper to make all parties and demand judgment against all.¹⁵

Although where the mortgagor has conveyed his interest he is not a necessary party, yet if he is not made a party, it is necessary to make one deriving title or interest from him subsequent to the mortgage a party in order to bar his right of redemption. For the purpose of charging subsequent grantees or incumbrancers not made parties, the fact that the mortgagor has conveyed the property does not obviate the necessity of serving summons and complaint on him and charging him by the decree.¹⁶

One may not be made a party on motion of a defendant, unless he has some pecuniary interest in the subject of the action and the moving party will be prejudiced by a denial of the motion. Where no deficiency judgment is asked for, a nonresident mortgagor or the representatives of one who is dead, or his wife, whose whereabouts are unknown, or the grantee, who has assumed and agreed to pay the mortgage but whose grantor has not so agreed, are not necessary or proper parties defendant.¹⁷

10. *Clark v. Strong*, 105 App. Div. 179, 93 N. Y. Supp. 514.

11. *Reed v. Marble*, 10 Paige, 409; *Griswold v. Fowler*, 6 Abb. 113; *Kay v. Whittaker*, 44 N. Y. 565; *Raynor v. Selmes*, 52 N. Y. 579; *Watson v. Spence*, 20 Wend. 260; *Hall v. Nelson*, 14 How. Pr. 32.

12. *Ostrom v. McCann*, 21 How. Pr. 431; *Kipp v. Brandt*, 49 How. Pr. 358; *Hall v. Nelson*, 14 How. Pr. 32.

13. *Brandow v. Vroman*, 29 App. Div. 597, 51 N. Y. Supp. 943.

14. *Trustees v. Yates*, 1 Hoff. Ch.

142; *Griswold v. Fowler*, 6 Abb. 133; *Whitney v. McKinney*, 7 Johns. Ch. 144; *Bigelow v. Bush*, 6 Paige, 343; *Van Nest v. Latson*, 19 Barb. 604. See *Root v. Wright*, 21 Hun, 344; rev'd on another point, *Walton v. James*, 11 Wkly. Dig. 508.

15. *Thorne v. Newby*, 59 How. Pr. 120.

16. *Kursheedt v. Union Dime Savings Institution*, 118 N. Y. 358.

17. *Gano v. Potter*, 105 Misc. 482, 173 N. Y. Supp. 528.

4. Owner of equity of redemption.

The holder of the equity of redemption is a necessary defendant.¹⁸ A mortgagee, by a sale in foreclosure action, parts with all his interest in the mortgage and rights in the land, the purchaser at the sale acquiring them, so that the owner of the equity of redemption, not having been made a party, a subsequent foreclosure action against him must be by the purchaser.¹⁹ A married woman taking a conveyance and assuming a mortgage is liable as if she were sole.²⁰ Where a grantee covenants to pay the mortgage he becomes the principal debtor, and is liable for deficiency.²¹

A person to whom a conveyance is to be made, but is not yet delivered, is not a necessary party.²² Nor is a subsequent grantee under an unrecorded deed a necessary party.²³ Grantees of the mortgaged premises whose deed, though executed, is unrecorded, are not necessary parties, but they are bound by the judgment.²⁴ But, if the grantee has actual possession, he should be a party, though his conveyance is not recorded.²⁵ The possession of the grantee under an unrecorded deed is not notice which will require him to be made a party to the action, unless such possession is actual, open, and visible, and not equivocal or consistent with the title of the apparent owner by the record.²⁶ But the real owner of mortgaged premises does not forfeit his right to be made a party to an action to foreclose the mortgage by omission to record his deed; and provided he make applica-

18. *Kursheedt v. Union Dime Savings Institution*, 118 N. Y. 358; *Hall v. Nelson*, 14 How. Pr. 32; *Miner v. Beekman*, 50 N. Y. 337; *Raynor v. Selmes*, 52 N. Y. 579; *Winslow v. Clark*, 47 N. Y. 261; *Robinson v. Ryan*, 25 N. Y. 320; *Landon v. Townshend*, 16 Civ. Pro. 161.

Unincorporated association.—When the equity of redemption is vested in a labor union, it is not necessary to make the individual members parties to the action. *Schein v. Erasmus Realty Co.*, 107 Misc. 27, 176 N. Y. Supp. 648.

19. *Green v. Mussey*, 76 App. Div. 174, 78 N. Y. Supp. 434.

20. *Cashman v. Henry*, 75 N. Y. 103.

21. *Fleischauer v. Giggenheimer*, 15 Wkly. Dig. 164.

22. *Hatfield v. Malcolm*, 71 Hun,

51, 24 N. Y. Supp. 596.

23. *Powell v. Jenkins*, 14 Misc. 83, 35 N. Y. Supp. 265, 69 St. Rep. 582.

Deed to another.—A grantee of lands whose deed was not recorded until after a deed of the same premises given by his grantor to another, and then only in the book of mortgages, is not a necessary party to an action to foreclose a mortgage given by his grantor to which a subsequent grantee was made a party. *Abraham v. Mayer*, 7 Misc. 250, 27 N. Y. Supp. 264, 58 St. Rep. 29.

24. *Kindbery v. Freeman*, 39 Hun, 466; *aff'd*, 109 N. Y. 653.

25. *Bassett v. Wood*, 29 St. Rep. 901, 9 N. Y. Supp. 79; *Phelan v. Brady*, 119 N. Y. 587.

26. *Powell v. Jenkins*, 14 Misc. 83, 35 N. Y. Supp. 265, 69 St. Rep. 582.

tion in due time, it is the duty of the court to direct him to be brought in.²⁷

5. Former owner.

An immediate owner of the premises between the original mortgagor and the present holder of the equity of redemption is not a necessary party.²⁸ If, however, he assumed the payment of the mortgage, he is a proper party and may be joined so as to be held liable for a deficiency judgment. Persons who have absolutely conveyed all their interests in the equity, and who, as between parties, bear only the relation of sureties as to the personal obligation of one party to pay the bond, are not necessary parties, though they may be proper.²⁹ Purchasers of mortgaged property who do not assume the mortgage debt, but afterwards execute a bond to the mortgagee as collateral security for the debt, are not necessary parties to a foreclosure suit.³⁰

6. Dowress.

To divest the wife of the holder of the equity of redemption of her inchoate dower right, it is necessary that she be a party to the foreclosure suit.³¹ The wife is a necessary party if married after the giving of the mortgage.³² And, if the mortgage is given to secure the purchase money, the wife's dower is subject to the mortgage and is barred if she is made a party.³³ But the husband of the owner of the equity of redemption is not a necessary party.³⁴

On the foreclosure of a mortgage given by husband and wife, although there were no allegations that the wife was living or that she had not released her dower, the complaint was held defective for not making her defendant by reason of the presumption of life and the continuance of an inchoate right of dower. The rule is that the defendant claiming an

27. *Johnson v. Donovan*, 106 N. Y. 269.

28. *Crowe v. Malba Land Co.*, 76 Misc. 676, 135 N. Y. Supp. 454; *Connecticut Mutual Life Ins. Co. v. Cornwall*, 72 Hun, 199, 25 N. Y. Supp. 348; *Lockwood v. Benedict*, 3 Edw. Ch. 472.

29. *Root v. Wright*, 21 Hun, 34; rev'd on another point, 84 N. Y. 72.

30. *Baker v. Potts*, 73 App. Div. 29, 76 N. Y. Supp. 406.

31. *Kay v. Whittaker*, 44 N. Y. 265;

Wheeler v. Morris, 2 Bosw. 524; *Denton v. Nanny*, 8 Barb. 618; *Vartie v. Underwood*, 18 Barb. 561; *Mills v. Van Voorhis*, 20 N. Y. 412; *Bell v. Mayor*, 10 Paige, 49; *Merchants' Bank v. Thompson*, 55 N. Y. 7. See, also, *Mills v. Van Voorhees*, 20 N. Y. 412; *Breckett v. Baum*, 50 N. Y. 8.

32. *Smith v. Gardner*, 42 Barb. 356.

33. *Breckett v. Baum*, 50 N. Y. 278.

34. *Mapes v. Brown*, 14 Abb. N. C. 94; *Trustees, etc. v. Roth*, 14 Wkly. Dig. 450.

interest subordinate to the incumbrance is entitled to object on the ground that one whose presence was necessary to enable a purchaser to obtain a good title is not a party to the action.³⁵

A person claiming dower, by a title paramount to the mortgagee, cannot be brought into court in a foreclosure suit to set up the validity of her dower after judgment. Her right is the same as if she had not been made a party.³⁶

Where the complaint in a foreclosure action alleges that the defendants, other than the mortgagor, have or claim to have some interest in or lien upon the said mortgaged premises "subject or subordinate to the lien" of the mortgage in suit, and the only answering defendant sets up a claim for dower which arose prior to the execution of the mortgage, such claim for dower constitutes neither a defense nor a counterclaim and will be dismissed and judgment rendered for the plaintiff.³⁷

7. Personal representative of mortgagor.

Where a mortgagor, who was personally liable for any deficiency, is dead, his representatives may be made parties, and a decree rendered that the deficiency be paid out of the estate in their hands in due course of administration.³⁸ The plaintiff is entitled to have the deficiency paid from the mortgagor's personal estate after his death, and so much as is caused by the mortgagor's omission to pay taxes is a preferred debt.³⁹ But, where the will directs the executors to sell the real estate, divide the proceeds among the residuary legatees, and the legatees elect to take the land, the executors are not necessary parties.⁴⁰

8. Heirs and devisees.

In case of the death of the owner of the equity of redemption, his heirs or devisees are necessary parties to the action.⁴¹ If the fee of the property vests in the heirs or

35. *Franklin v. Beegle*, 102 App. Div. 412, 92 N. Y. Supp. 449.

36. *Lewis v. Smith*, 9 N. Y. 502; *Merchants' Bank v. Thompson*, 55 N. Y. 7.

37. *Hildenbrand v. Ruckert*, 111 Misc. 237, 182 N. Y. Supp. 747.

38. *Glaciuss v. Fogel*, 88 N. Y. 439; *Heidgerd v. Reis*, 135 App. Div. 414, 119 N. Y. Supp. 921; *Shaw v. McNish*, 1 Barb. Ch. 328. See, also, *Leonard v. Morris*, 9 Paige, 90.

39. *Mitchell v. Bowne*, 63 How. Pr. 1.

40. *Prentice v. Jansen*, 7 Wkly. Dig. 318.

41. *Gruner v. Ruffner*, 134 App. Div. 837, 119 N. Y. Supp. 942; *Heidgerd v. Reis*, 135 App. Div. 414, 119 N. Y. Supp. 921; *Steinhardt v. Baker*, 20 Misc. 470, 46 N. Y. Supp. 707; *aff'd*, 25 App. Div. 197, 49 N. Y. Supp. 357; *aff'd*, 163 N. Y. 410; *Noonan v. Brennemann*, 8 St. Rep. 91; *Wood v. More-*

devisees, it is not enough to join the personal representative of the deceased.⁴² And persons having liens on the mortgaged premises as legatees are necessary parties.⁴³ And it has been held that legatees, devisees, heirs or next of kin of one who was personally liable for the payment of a mortgage may be joined as defendants to charge them with statutory liability for deficiency to the extent of the assets received by them.⁴⁴ But, where, by reason of the scheme of a will, there was an imperative power of sale to carry out its provisions, amounting to an equitable conversion of the real estate into personalty, the residuary legatees and devisees were not necessary parties defendant to a suit to foreclose a mortgage on property belonging to the estate.⁴⁵

9. Creditors of deceased mortgagor.

Although the estate of a deceased mortgagor is insufficient to pay his debts, general creditors have no such lien upon lands as to make them necessary parties to foreclosure.⁴⁶ Contract creditors of a decedent cannot be allowed to defend

house, 1 Lans. 405; *Dodd v. Neilson*, 90 N. Y. 243.

Ejectment by heir.—Where an heir was not made a party to an action to foreclose, and the purchaser at the sale went into possession, the heir is not entitled to maintain ejectment without tendering the amount due on the mortgage. *Lunny v. McClellan*, 116 App. Div. 473, 101 N. Y. Supp. 812.

Fatal defect.—On foreclosure of a mortgage given by one to whom a testamentary trustee had conveyed property, without consideration, under an agreement for an immediate reconveyance, neither the beneficiaries under the will nor the heirs-at-law of the testator were made parties, which fact was not known to the purchaser at the time of the sale, it was held to be a fatal defect in the title. *Phillips v. Wilcox*, 12 Misc. 382, 33 N. Y. Supp. 561.

42. *Noonan v. Brennemann*, 8 St. Rep. 91.

43. *McGown v. Yerks*, 6 Johns. Ch. 450; *Hebron Society v. Schoen*, 60 How. Pr. 185.

44. *Collins' Petition*, 6 Abb. N. C. 27.

45. *Boehmcke v. McKeon*, 119 App. Div. 30, 103 N. Y. Supp. 930.

Purchase by executors having power of sale.—Where a testator owning lands incumbered by a first and second mortgage devises the lands to children living at his death, in equal proportions, giving to his executors a power of sale, and after his death, in a proceeding to foreclose the second mortgage by advertisement, all the devisees are made parties and there is no question as to the regularity of the foreclosure, the executors, who bought in the lands on the foreclosure sale, hold the same as personalty and the title of the devisees is completely divested. Hence, on a subsequent foreclosure of the first mortgage, it is immaterial that all of the devisees were not made parties defendant, as their interest had been already extinguished. *McCarty v. Downes*, 161 App. Div. 667, 146 N. Y. Supp. 973.

46. *Heidgerd v. Reis*, 135 App. Div. 414, 119 N. Y. Supp. 921.

against a foreclosure on real estate owned by him in his lifetime.⁴⁷

10. Beneficiaries of trust.

Beneficiaries of a trust may be necessary parties.⁴⁸ If the equity of redemption is vested in a trustee, both the trustee and *cestui que trust* should be made parties.⁴⁹ But ordinarily a *cestui que trust* is a proper but not a necessary party.⁵⁰ In case of a trustee for creditors, the creditors are not necessary parties.⁵¹ Where the rents and profits derived from real property are directed to be invested and the income to be divided, the parties for whose benefit the provision is made are not necessary parties to the foreclosure.⁵²

11. Remaindermen.

Vested remaindermen under a will are necessary parties to an action to foreclose a mortgage given by a testator.⁵³ While reversioners and remaindermen are necessary parties, not every person having a contingent interest need be joined.⁵⁴ It is generally sufficient to have as parties the first person in being who has a vested estate of inheritance, together with those claiming prior interests, and in such suit those who may have a claim in remainder or in reversion after such vested estate of inheritance are not necessary parties.⁵⁵

47. *Gardner v. Lansing*, 28 Hun, 413.

48. *Hodges v. Walker*, 76 App. Div. 305, 78 N. Y. Supp. 447; *Lockman v. Reilly*, 95 N. Y. 64.

49. *Williamson v. Field*, 2 Sandf. Ch. 533; *Case v. Price*, 9 Abb. 111; *Grant v. Duane*, 9 Johns. 591; *Paton v. Murray*, 6 Paige, 474; *Nodine v. Greenfield*, 7 Paige, 547; *Leggett v. Mutual Ins. Co.*, 64 Barb. 36; *Ransom v. Lampman*, 5 Barb. 456; *Eagle Fire Ins. Co. v. Cammet*, 2 Edw. Ch. 127; *Rathbone v. Hooney*, 58 N. Y. 463; *King v. McVickers*, 3 Sandf. Ch. 192; *Toole v. McKiernan*, 48 Super. Ct. 163; *Dodd v. Neilson*, 90 N. Y. 243. See *Van Vechten v. Terry*, 2 Johns. Ch. 197; *Christie v. Herrick*, 1 Barb. Ch. 254.

50. *Harlem, etc., Association v. Quinn*, 32 St. Rep. 909, 10 N. Y. Supp. 682.

51. *Grant v. Duane*, 9 Johns. 591.

52. *Mutual Life Ins. Co. v. Woods*, 21 St. Rep. 341, 4 N. Y. Supp. 133.

53. *Scholle v. Scholle*, 113 N. Y. 261; *Hodges v. Walker*, 76 App. Div. 305, 78 N. Y. Supp. 447; *Levy v. Levy*, 79 Hun, 290, 60 St. Rep. 561, 29 N. Y. Supp. 384, 31 Abb. N. C. 468.

54. *United States Trust Co. v. Roches*, 116 N. Y. 120; *Eagle Ins. Co. v. Cammet*, 2 Edw. Ch. 127; *Nodine v. Greenfield*, 7 Paige, 547; *Leggett v. Mutual Life Ins. Co.*, 64 Barb. 36; *Rathbone v. Hooney*, 58 N. Y. 463; *Brevoort v. Brevoort*, 70 N. Y. 136; *Lockwood v. Reilly*, 10 Abb. N. C. 351.

55. *N. Y. Security and T. Co. v. Schoenberg*, 87 App. Div. 262, 84 N. Y. Supp. 359, aff'd on opinion below, 177 N. Y. 556.

In an action to foreclose a mortgage on a leasehold estate, the landlord is not a necessary party, but the circumstances may be such that he can properly be brought in.⁵⁶

12. Equitable interests.

A vendee in possession under contract of sale has an equitable title, rendering him a necessary party to a foreclosure of previous mortgage on the property.⁵⁷ One who has an interest in the land, the deed of the whole of which was made to another, may be made a party if he desire.⁵⁸ But where a person furnishes the purchase price of property and causes the deed to be taken in the name of another, without any agreement in relation thereto, he has no interest in the property under section 94 of the Real Property Law, and is not a necessary party in an action for the foreclosure of a mortgage thereon, although he is actually in possession.⁵⁹

13. Occupant.

A party in possession at the time of the commencement of an action of foreclosure is a proper party defendant in the absence of any allegation or evidence that such party was in possession under some right or title superior to the mortgagor.⁶⁰ Tenants under a lease subsequent to the mortgage and actual occupants of the mortgaged premises may be necessary parties.⁶¹ But the fact that lessees under a lease given subsequent to the mortgage were not made parties under foreclosure does not entitle them to recover from the purchaser in possession under the foreclosure the value of the unexpired term of the lease.⁶²

In an action to foreclose a mortgage securing rent and part of the purchase price of the assignment of the lease, a creditor of a defendant in possession of the premises is not entitled to intervene.⁶³ As a general rule a tenant is liable

56. *Meyers v. Knights of Pythias*, --- 194 App. Div. 405, 185 N. Y. Supp. 436. See also, *Meyers v. Knights of Pythias*, 192 App. Div. 460, 183 N. Y. Supp. 393.

57. *Titcomb v. Fonda, J. & G. R. R. Co.*, 38 Misc. 630, 78 N. Y. Supp. 226.

58. *Johnston v. Donovan*, 106 N. Y. 269.

59. *Douglas v. Kohart*, 196 App. Div. 84, 187 N. Y. Supp. 102.

60. *Ruyter v. Reid*, 31 St. Rep. 387, 121 N. Y. 498.

61. *Davidson v. Weed*, 21 App. Div. 579, 48 N. Y. Supp. 368; *Hirsch v. Livingston*, 3 Hun, 9; *Whalen v. White*, 25 N. Y. 462; *Clarkson v. Skidmore*, 47 N. Y. 297; *Globe Marble Mills v. Quinn*, 76 N. Y. 23.

62. *Sprague National Bank v. Erie R. R. Co.*, 22 App. Div. 526, 48 N. Y. Supp. 65.

63. *Bouden v. Long Acre Square Building Co.*, 92 App. Div. 325, 86 N. Y. Supp. 1080.

under his contract of lease until he is evicted. Neither the beginning of an action to foreclose a mortgage superior to his lease in which he is made a defendant, nor the entry of a judgment of foreclosure and sale constitute such an eviction. Until the sale actually takes place he remains liable to his landlord on his contract. If, on the contrary, he is not a party to the action his rights are not affected. There is never an eviction. Until the sale he must pay his landlord. Afterwards, the purchaser.⁶⁴

14. Receiver.

Where a judgment debtor has conveyed his property to his receiver, such receiver is a necessary party to an action to foreclose a mortgage made by him.⁶⁵

15. Trustee in bankruptcy.

A trustee in bankruptcy, whose title to the real estate of the bankrupt is subject to a mortgage, is a necessary party to an action for its foreclosure,⁶⁶ unless he is appointed after the suit is brought.⁶⁷

16. General assignee.

A general assignee is a necessary defendant.⁶⁸ But the failure to make a general assignee a party is cured after the lapse of twenty-five years.⁶⁹

17. Subsequent lienors.

All persons having a lien on the mortgaged premises which is subsequent to the mortgage sought to be foreclosed, as a general rule, are necessary parties. Subsequent incumbrancers who are made parties under the usual allegations must assert their claims or be foreclosed.⁷⁰ Thus, subsequent

64. *Metropolitan L. Ins. Co. v. Childs Co.*, 230 N. Y. 285. See also, *Four Hundred Sixty-One Eighth Avenue Co. v. Childs Co.*, 181 App. Div. 742, 168 N. Y. Supp. 948.

65. *Graham v. Lawyers' Title Insurance Co.*, 20 App. Div. 440, 46 N. Y. Supp. 1055.

Receiver of railroad.—See *Herring v. N. Y., etc., R. Co.*, 105 N. Y. 340.

66. *Landon v. Townsend*, 112 N. Y.

93; *Ostrander v. Hart*, 30 St. Rep. 170, 8 N. Y. Supp. 809; *Townsend v. Thompson*, 46 St. Rep. 847, 18 N. Y. Supp. 870; *Cleveland v. Boerum*, 24 N. Y. 617.

67. *Lenihan v. Hamann*, 55 N. Y. 652; *Wagner v. Hodge*, 34 Hun. 524.

68. *Bard v. Pool*, 12 N. Y. 475.

69. *Kip v. Hirsch*, 103 N. Y. 565.

70. *Benjamin v. Elmira, etc., R. R. Co.*, 49 Barb. 441.

mortgagees,⁷¹ or judgment creditors,⁷² or holders of subse-

71. *McGuckin v. Milbank*, 83 Hun, 473, 31 N. Y. Supp. 1049, 65 St. Rep. 79, aff'd, 152 N. Y. 297; *Arnot v. Post*, 6 Hill, 65; *Franklyn v. Hayward*, 61 How. Pr. 43; *Benedict v. Gilman*, 4 Paige, 58; *Vroom v. Ditmas*, 4 Paige, 526; *Vandercamp v. Shelton*, 11 Paige, 28; *Brainard v. Cooper*, 10 N. Y. 356; *Gage v. Brewster*, 31 N. Y. 218; *Peabody v. Roberts*, 47 Barb. 91; *Benjamin v. Elmira*, etc., R. R. Co., 54 N. Y. 675.

Mortgage not indexed.—One whose mortgage is recorded but not indexed is a necessary party to the foreclosure of a prior mortgage, and, if not joined, the foreclosure is void as to him. *Mutual Life Ins. Co. v. Dake*, 1 Abb. N. C. 381, aff'd, 87 N. Y. 257.

Subrogation.—Where a defendant as part owner and holder of a subsequent mortgage made by another part owner after entry of judgment moved for leave to pay off the mortgage in suit and compel an assignment of it to him, it was held that he was entitled to subrogation as against other part owners and creditors of a part owner who sought subrogation in order to effect an immediate sale. *De Forrest v. Peck*, 84 Hun, 299, 65 St. Rep. 611, 32 N. Y. Supp. 413.

Sale by second mortgagee.—A mortgage was foreclosed, after which a second mortgagee not a party to the first action brought suit to foreclose his mortgage; the prior mortgagee went into possession in good faith without actual knowledge of the second mortgage, although the second mortgage was on record; the second mortgagee had no knowledge of the first action; held that the second mortgagee had the right of sale subject to prior liens, and was not bound to redeem under penalty of dismissal of complaint on failure so to do as against the first mortgagee. *Denton v. Ontario County National Bank*, 150 N. Y. 126.

A judgment of foreclosure and sale in an action to foreclose a first mortgage is not before sale a bar to an

action to foreclose a junior mortgage, although the junior mortgagee was made a party to the first action, where a sale has not been had under the prior judgment. *Bache v. Purcell*, 6 Hun, 518. See *Salmon v. Allen*, 11 Hun, 29, appeal dismissed, 75 N. Y. 479.

Receiver of mortgagee.—Where, in an action for the foreclosure of a mortgage on real property, a junior mortgage is held by a foreign corporation for which permanent receivers have been appointed in the State where the corporation was organized, such permanent receivers are necessary parties defendant. *Ely v. Mathews*, 58 Misc. 365, 110 N. Y. Supp. 1102.

72. *Morris v. Wheeler*, 45 N. Y. 708; *Martin Realty Co. v. Bay View Heights Land Co.*, 107 Misc. 140, 177 N. Y. Supp. 158; *Niagara Bank v. Roosevelt*, 9 Cow. 409; *People's Bank v. Hamilton Manuf. Co.*, 10 Paige, 481; *Morris v. Wheeler*, 45 N. Y. 708; *Verdin v. Slocum*, 71 N. Y. 345; *Hubbell v. Sibley*, 5 Lans. 51; *Weinbreuer v. Johnson*, 7 Abb. (N. S.) 202; *Root v. Wheeler*, 12 Abb. 294; *Groff v. Morehouse*, 51 N. Y. 503; *Lyon v. Lyon*, 67 N. Y. 250.

An assignee of a judgment who took it only to collect for the assignor, and has sold the land and received a sheriff's deed is not a necessary party; only the assignor need be made a party. *McKee v. Murphy*, 34 Super. Ct. 261.

Intervention.—Where a subsequent judgment creditor of a mortgagor, entitled to any surplus, applied to be made a party to foreclosure proceedings after sale, and alleged that a relative of the mortgagor had purchased at the sale, had not completed in time, had been granted several months additional time, and that the proceeds of the sale were inadequate, he is entitled to be made a party defendant. *Bowers v. Denton*, 41 Misc. 133, 83 N. Y. Supp. 942. Upon an application of a judgment creditor, who obtained judgment after commencement of fore-

quent mechanic's liens,⁷³ must be joined, or their liens will not be divested by the proceedings. But judgment creditors who are not lienors are not necessary parties.⁷⁴ Nor is the holder of mortgage recorded after devolution of title unto a *bona fide* purchaser for value a necessary party.⁷⁵ The personal representatives and not the heirs of a deceased subsequent mortgagee are necessary and proper parties.⁷⁶

A junior mortgagee, who is a party to a foreclosure, may, on motion before judgment, and on tender of payment, have on order for assignment to him of the senior mortgage, which is being foreclosed.⁷⁷ Where the holder of a junior incumbrance tenders the amount of a prior incumbrance and demands transfer, it does not release the lien of the prior incumbrance, but merely puts the holder in a position to compel a transfer.⁷⁸

The court has no power to enter a judgment dismissing the statutory lien of a judgment creditor who has not answered, and divide the surplus among others, especially when in the complaint no such relief was demanded.⁷⁹

18. Prior owners or lienors.

Prior incumbrancers are neither necessary nor proper parties to an ordinary action for foreclosure.⁸⁰ Thus, prior mortgagees are not necessary parties.⁸¹ A judgment creditor of the mortgagor's grantor cannot be made a party for the purpose of having his judgment declared subsequent and

closure suit, showing irregularities in the sale had therein, he being entitled to any surplus moneys, it was held that he should be permitted to become a party to the foreclosure suit. *Bowers v. Denton*, 41 Misc. 133, 83 N. Y. Supp. 942.

73. *Payne v. Wilson*, 74 N. Y. 348; *Emigrant Savings Bank v. Goldman*, 75 N. Y. 127.

74. *Spring v. Short*, 90 N. Y. 538.

75. *Abraham v. Mayer*, 7 Misc. 250, 27 N. Y. Supp. 264.

76. *German Savings Bank v. Muller*, 10 Wkly. Dig. 67.

77. *Twombly v. Cassidy*, 82 N. Y. 155.

78. *Frost v. Yonkers Savings Bank*, 70 N. Y. 553. See *Dry v. Strong*, 17 Wkly. Dig. 328; *Bloomingtondale v. Barnard*, 7 Hun, 459; *McLean v. Thomp-*

son, 18 Abb. 24.

79. *Rogers v. Ivers*, 23 Hun, 424, citing *Chautauqua Bank v. Risley*, 19 N. Y. 375.

80. *Goebel v. Iffla*, 111 N. Y. 170; *Sumner v. Skinner*, 80 Hun, 201, 61 St. Rep. 797, 30 N. Y. Supp. 4, aff'd, 149 N. Y. 597.

81. *Fink v. Allen*, 36 Super. Ct. 350; *Ferris v. Hard*, 17 St. Rep. 364, 15 Civ. Pro. 171.

Mortgage to secure part of prior mortgage.—The holder of a prior mortgage is a necessary party to an action to foreclose a second mortgage given by a grantee of the land for the security of the payment of such portion of the prior mortgage he had assumed to pay. *Wait v. Getmon*, 32 App. Div. 168, 52 N. Y. Supp. 965, 28 Civ. Pro. 49.

subordinate to the mortgage.⁸² Nor should any person claiming under a title paramount to the mortgage be made a party.⁸³

One who claims adversely to the mortgagor and mortgagee, and whose claim arose prior to the mortgage, cannot properly be made a party defendant for the purpose of trying the validity of such adverse title.⁸⁴ Only such persons are required to be parties to a foreclosure as have acquired rights or interests, or claim so to have done so subsequent to the mortgage. Any interest acquired prior thereto cannot be considered or determined in such an action.⁸⁵ Where the rights of a defendant are paramount and adverse to the claim of the plaintiff under the mortgage, they should not be adjudicated in the action without the consent of such defendant.⁸⁶ But prior lienors may be made parties for the purpose of ascertaining amount of their claims.⁸⁷ Thus, where in a suit to foreclose a third mortgage it appears that the amount due on a first mortgage is in dispute, a defendant, who is a receiver and trustee in bankruptcy and owner of a fifth mortgage given to the bankrupt, is entitled to have the holder of the first mortgage made a party in order that he may ascertain just how much there is due upon such mortgage, and be in a position to bid intelligently at the sale, to the end that the whole controversy respecting the liens upon the land in question may be settled.⁸⁸

Although the holder of a prior mortgage is not a proper party and his interest will not be cut off under a complaint containing the usual allegation that defendant's interest is subordinate to that of plaintiff, yet where the complaint alleges the prior incumbrance and prays that the amount due thereon be ascertained and first paid out of the proceeds of

82. *Kent v. Popham*, 6 Civ. Pro. 336.

83. *Helck v. Reinheimer*, 105 N. Y. 470; *Ruyter v. Reid*, 121 N. Y. 498; *Fifth Avenue Bk. of Brooklyn v. Cudlipp*, 1 App. Div. 524, 37 N. Y. Supp. 248, 72 St. Rep. 528.

84. *Dumond v. Church*, 4 App. Div. 194, 38 N. Y. Supp. 557; *Lewis v. Smith*, 9 N. Y. 502; *Meigs v. Willis*, 5 Civ. Pro. 106; *Corning v. Smith*, 6 N. Y. 82; *Helck v. Reinheimer*, 23 Wkly. Dig. 473; *Brundage v. Domestic, etc., Society*, 60 Barb. 204; *Kent v. Popham*, 6 Civ. Pro. 366; *Bram v. Bram*, 34 Hun, 487; *Mercan-*

tile Trust Co. v. Rochester, etc., Ry., 22 Wkly. Dig. 65; *Rathbone v. Hooney*, 58 N. Y. 463; *Keeler v. McNeirney*, 6 Civ. Pro. 363; *Merchants' Bank v. Thompson*, 55 N. Y. 7; *Emigrant Bank v. Goldman*, 75 N. Y. 127; *Smith v. Davis*, 4 Civ. Pro. 158.

85. *Bram v. Bram*, 34 Hun, 487.

86. *Cromwell v. MacLean*, 123 N. Y. 474.

87. *Smith v. Roberts*, 91 N. Y. 470; *Metropolitan Trust Co. v. T. V. & C. R. R. Co.*, 43 Hun, 521.

88. *Quinlan v. Olson Construction Co.*, 153 App. Div. 140, 138 N. Y. Supp. 216.

the sale, and the defendant suffers default, he is concluded thereby and the judgment operates as a bar to a subsequent action to foreclose his mortgage; he should appear and raise the objection that his rights cannot be adjudicated.⁸⁹

Where a prior mortgagee is made a party and interposed an answer setting up the superiority of his lien and died pending the action, and the plaintiff filed a stipulation waiving all claim to priority over such defendant's mortgage and asking that he be allowed to proceed to judgment, it was held that such application should be granted, upon the ground that where an action is brought against several defendants and one of them was not properly a party, plaintiff may proceed against the other defendants.⁹⁰

19. Purchaser at tax sale.

Persons in possession of land under a tax title superior to the lien of the mortgage are not proper parties defendant in an action of foreclosure.⁹¹ A title arising upon sale of land for taxes regularly conducted is paramount to the lien of a prior mortgage, and those in possession under such title are not proper parties to the foreclosure since they cannot be required to defend their title in an equitable action, but are entitled to have their rights passed upon by a jury in a court of law. Such person, however, when made party defendant, may consent that the question as to the validity of his title be adjudicated therein and in which case the court has the right to pass upon the question. And where a defendant incorporated in her pleading a positive request that such question be passed upon, the judgment in the action is binding upon all parties.⁹²

20. Unsecured creditors.

Unsecured general creditors of the mortgagor are not proper or necessary parties.⁹³ One who has a claim against a corporation for damages for personal injuries, upon which

89. *Jacobie v. Mickle*, 144 N. Y. 237, 63 St. Rep. 102; *Fletcher v. Barber*, 82 Hun, 405, 63 St. Rep. 568, 31 N. Y. Supp. 239.

90. *Ferris v. Hard*, 15 Civ. Pro. 171.

91. *Erie County Savings Bank v. Shuster*, 107 App. Div. 46, 94 N. Y. Supp. 737, aff'd, 187 N. Y. 111. Compare, *Ruyter v. Wickes*, 22 St. Rep. 200, 4 N. Y. Supp. 743; *Becker v.*

Howard, 4 Hun, 359; s. c., 69 N. Y. 5; *Roosevelt Hospital v. Dowley*, 57 How. Pr. 489.

92. *Cromwell v. MacLean*, 123 N. Y. 474.

93. *Herring v. New York, etc., R. Co.*, 105 N. Y. 340; *Gardner v. Lansing*, 28 Hun, 413; *People v. Erie Railway Co.*, 56 How. Pr. 122.

she has once recovered a judgment that was afterwards reversed upon appeal, has no interest in the corporate property which entitles her to be made a defendant in an action brought for the foreclosure of a mortgage thereon given to secure the payment of corporate bonds.⁹⁴ The holder of a certificate of indebtedness issued by a rural cemetery association is not a necessary party to an action to foreclose a purchase-money mortgage, covering land conveyed to a cemetery association for cemetery purposes.⁹⁵

21. Assignor of mortgage.

Generally the assignor of the mortgage is not a proper party to suit for its foreclosure.⁹⁶ But if he has guaranteed the collection thereof, he may be joined.⁹⁷ The assignor of a mortgage where it has been assigned as security should be made a party.⁹⁸ Where, after the assignment of a mortgage, the mortgagor pays interest to the assignor without notice or knowledge of the assignment, the assignee may make his assignor a party defendant to a suit of foreclosure for the purpose of recovering the payments received by him. As such suit is in equity, an assignor who receives the payments after the assignment is a proper, although not necessary, party defendant.⁹⁹

Where, in an action to foreclose second mortgage, it appears that after the mortgage was given the mortgagor conveyed separate parcels of the property to grantees who assumed proportionate amounts of both the first and second mortgagees taken together, the liability of these grantees should not be determined without bringing in the first mortgagee as party.¹

94. *Clinton v. South Shore Natural Gas & Fuel Co.*, 61 Misc. 339, 113 N. Y. Supp. 289.

95. *Ross v. Glenwood Cemetery Ass'n*, 81 App. Div. 357, 81 N. Y. Supp. 779.

96. *Correction of mortgage*.—After a purchase-money mortgage was assigned by the mortgagee, it was discovered that the premises were wrongfully described, the mortgagee and wife then executed and delivered a new deed and an agreement was made correcting the mortgage; and it was held that the

mortgagee had no further interest in the enforcement of the mortgage and was not a necessary or proper party to an action to foreclose the same. *Haaren v. Lyons*, 30 St. Rep. 416, 9 N. Y. Supp. 211.

97. *Robert v. Kidansky*, 111 App. Div. 475, 97 N. Y. Supp. 913, *aff'd* on opinion below, 188 N. Y. 638.

98. *Matter of Gilbert*, 104 N. Y. 200.

99. *People's Trust Co. v. Gomolka*, 129 App. Div. 12, 113 N. Y. Supp. 49.

1. *Rudolph v. Burton*, 85 App. Div. 312, 82 N. Y. Supp. 592.

22. Surety or guarantor.

Persons who have guaranteed the payment of a mortgage debt are proper parties defendant in an action of foreclosure, as they may be held for a deficiency.² In a foreclosure action, the maker of a bond, given as collateral security, should be made a party defendant in order to avoid a multiplicity of suits.³

Where, as additional security for the payment of a loan secured by a bond and mortgage, a third party guarantees, by a separate instrument, the payment of such bond and mortgage, the mortgagees have three remedies: First, they may proceed upon the bond and guaranty alone against the guarantor or the bondsmen and guarantor, and, if the judgment obtained in that action be unsatisfied, foreclose the mortgage for the purpose of having the real estate sold and applied to the satisfaction of the deficiency; second, they may bring an action of foreclosure making both the mortgagor and the guarantor parties, and by asking such relief in the complaint obtain a judgment for any deficiency remaining after the foreclosure sale; or, third, they may foreclose the mortgage as against those in possession of the property, and then, with leave of the court, obtained pursuant to section 1078 of the Civil Practice Act, bring an action upon the guaranty to recover any deficiency resulting from the foreclosure sale.⁴

23. Persons estopped.

Persons against whom an estoppel is claimed may be necessary parties.⁵

24. Claimants of mortgage.

Where the ownership of the mortgage is disputed, the various claimants may be made parties.⁶

25. Incompetent parties.

Persons not judicially declared to be of unsound mind may be made parties with the same force and effect as if sane.⁷ The committee of the incompetent defendant who executed

2. *Vanderbilt v. Schryer*, 91 N. Y. 392; *Morrison v. Slater*, 128 App. Div. 467, 112 N. Y. Supp. 855; *Weinstein v. Sinel*, 133 App. Div. 441, 117 N. Y. Supp. 346.

3. *Hochstein v. Schlanger*, 150 App. Div. 124, 134 N. Y. Supp. 704, *aff'd*, 208 N. Y. 513.

4. *Shipman v. Niles*, 75 App. Div. 451, 78 N. Y. Supp. 440; *aff'd* without opinion, 177 N. Y. 527.

5. *Lyon v. Morgan*, 143 N. Y. 505.

6. *Kortright v. Smith*, 3 Edw. Ch. 402.

7. *Prentice v. Cornell*, 31 Hun, 167.

the mortgage is not a necessary party; nor is it necessary in such a case to allege and prove that the court has granted leave to maintain the action against the committee.⁸ It is error for the court to refuse to find that an infant holding a prior mortgage satisfied the same during her infancy in consideration for a conveyance of other lands, as otherwise it is impossible to make an equitable disposition of the rights of the parties, for the infant still retains her right to disaffirm at majority.⁹

26. Unknown parties.

Section 215 of the Civil Practice Act provides for unknown parties. It applies to all actions in which service of summons may be made by publication.¹⁰ Service by publication upon unknown parties will not be held to include trustees not named, where it is not claimed that the names of such trustees were unknown to the plaintiff, and it does not appear that the plaintiff intended to make them parties to the action.¹¹ In an affidavit to obtain service by publication on unknown heirs, made by an attorney, it is not enough to show that the names or residences of the parties in interest were unknown to the affiant, but it should show they were unknown to the plaintiff.¹²

Where a mortgage was executed in 1853, and the mortgagor shortly afterward left the State, he being a sailor, and has never since been heard from, on foreclosure the mortgagor was made defendant and also all unknown owners, such owners being therein described as the wife, widow, heirs-at-law, devisees, grantees, assignees, or next of kin, if any, of said defendant, and their respective husbands and wives, if any, all of whose names were unknown; it was held that the unknown parties were properly designated; that judgment could be entered against them without evidence that they were, in fact, unknown or absentees, or that the mortgagor died without heirs-at-law or next of kin, and that a sale on the foreclosure conveyed a good title.¹³

27. Municipal corporations.

A city need not be made a party where it has taken a portion of the property for public use.¹⁴

8. *Heburn v. Reynolds*, 73 Misc. 73, 73 N. Y. Supp. 364.
132 N. Y. Supp. 460.

9. *Foy v. Salzano*, 152 App. Div. 47, 136 N. Y. Supp. 699.

10. *Bergen v. Wyckoff*, 84 N. Y. 659.

11. *Moir v. Flood*, 66 App. Div. 544,

12. *Piser v. Lockwood*, 30 Hun, 6.
13. *Moran v. Conomo*, 36 St. Rep. 680, 13 N. Y. Supp. 625.

14. *Hooker v. Martin*, 10 Hun, 302.

ARTICLE IV.

COMPLAINT AND NOTICE OF PENDENCY OF ACTION.

A. Rules of Civil Practice, Rule 255. Complaint to state whether action for mortgage debt has been brought.

The complaint in an action to foreclose a mortgage upon real property must state whether any other action has been brought to recover any part of the mortgage debt, and, if so, whether any part thereof has been collected.

B. Capacity of plaintiffs.

Where the complaint in an action of foreclosure brought by executors alleges the date and place of testatrix's death, the admission of her will to probate and its record, and that plaintiffs were by such will duly appointed sole executors, and qualified as such, it sufficiently appears that the plaintiffs had legal capacity to sue.¹⁵ Where plaintiff brought the action individually, and as administratrix, to foreclose a mortgage given by a person of whom she was also administratrix, and made herself a party defendant in that capacity, it was held that the fact that she was named as defendant did not prejudice the other defendants and was not a valid ground of demurrer.¹⁶

C. Description of bond and mortgage.

It is not necessary to allege in the complaint the indebtedness for which the bond and mortgage were given, and, if alleged, it need not be proved.¹⁷ The bond and mortgage should be correctly described though a mere technical variance will be disregarded.¹⁸ A complaint alleging the making and delivery of the mortgage, the correctness of the description and that part of the debt had become due and unpaid together with the other formal allegations required for the purpose of foreclosure, is sufficient to present a cause of action.¹⁹

D. Assignments of mortgage.

The several assignments of the mortgage should be set out in full,²⁰ but it is not necessary to allege the recording of an assignment.²¹ Where the complaint alleges that the mort-

15. *Brenner v. McMahon*, 20 App. Div. 3, 46 N. Y. Supp. 643.

16. *Burtis v. Burtis*, 39 St. Rep. 637, 15 N. Y. Supp. 412.

17. *Day v. Perkins*, 2 Sandf. Ch. 359.

18. *Hadley v. Chapin*, 11 Paige, 245.

19. *Haaren v. Lyons*, 9 N. Y. Supp. 211, 30 St. Rep. 416.

20. *Thorn v. Desmond*, 12 How. Pr. 321; *Rose v. Myer*, 7 Civ. Pro. 219.

21. *Fryer v. Rockerfeller*, 63 N. Y. 268.

gage was assigned to plaintiff, but does not allege that the bond was so assigned, it is insufficient.²² The allegation "that the plaintiffs now are and have been since the date of said assignment, the true and lawful owners of said bond and mortgage," is sufficient to cure the defect.²³

A complaint will be sustained where in substance it alleges that the bond and mortgage were given by the defendant to the plaintiff's assignor to secure the payment of certain notes which in their turn were given to secure the payment of certain judgments recovered by the assignor against the defendant, and that the agreement, notes, bond and mortgage, together with the moneys due or to grow due thereon or thereunder, were assigned to the plaintiff.²⁴

A complaint which alleges that the mortgagee died at a specified date leaving one H. her only heir-at-law and next of kin, who became the owner of said mortgage "by inheritance," and that the said H. died leaving a will duly admitted to probate, by which he bequeathed said mortgage to a person named as executrix, who assigned the same to the plaintiff, sufficiently states the plaintiff's title although the use of the word "inheritance" is not to be recommended.²⁵

E. Default of mortgagor.

The complaint must allege default in payment, and where neither a default nor any facts from which it can be inferred to exist are alleged or set forth in the complaint, it is insufficient.²⁶ A demand of payment need not be averred where no place of payment is specified in the bond or mortgage, although it is payable on demand.²⁷ Where the complaint alleged that the mortgage had been given to secure a bond, and that the mortgage had fallen due and not been paid, but it was not alleged that there was any default in the payment of the bond, the complaint was held insufficient.²⁸ A complaint which states that payments were to be made in weekly installments; that none of the payments had been made since a certain date, and that there is justly due a

22. *Manne v. Carlson*, 49 App. Div. 276, 63 N. Y. Supp. 162; *Smith v. Thompson*, 118 App. Div. 6, 103 N. Y. Supp. 336. Compare *Preston v. Loughran*, 34 St. Rep. 391, 12 N. Y. Supp. 313.

23. *Schade v. McGoven*, 2 Bradb. 143.

24. *Williams v. Cornell*, 137 App. Div. 795, 122 N. Y. Supp. 670.

25. *Ward v. Bronson*, 126 App. Div. 508, 110 N. Y. Supp. 335.

26. *Coulter v. Bower*, 64 How. Pr. 132; *Davis v. New York Concert Co.*, 5 St. Rep. 21.

27. *Harris v. Muloch*, 9 How. Pr. 402; *Field v. Hawxhurst*, 9 How. Pr. 75; *Gillett v. Balcom*, 6 Barb. 370.

28. *Harvey v. Truby*, 62 App. Div. 503, 71 N. Y. Supp. 86.

specified sum, states a cause of action.²⁹ Where the complaint set out the indebtedness of the mortgagors upon notes indorsed by them and discounted by plaintiff, and alleged that the mortgage was given to secure the payment of a bond, by which the time of payment of such indebtedness was extended, and that the obligors had failed to comply with the conditions of the bond, it was held that the facts constituted a cause of action.³⁰

F. Interest of defendants.

The body of the complaint should connect the defendants with the cause of action in some manner. It is improper to adjudicate the right of a defaulting defendant where the complaint does not state the nature of the defendant's interest in the premises, or demand any relief against him.³¹ A complaint in an action to foreclose an unrecorded mortgage, in which the holder of a prior mortgage is joined as defendant, may allege generally that the latter has, or claims to have, an interest in or upon the mortgaged premises, or some part thereof, which, if any, is subsequent to the lien of plaintiff's mortgage; no special allegations are necessary.³² The allegation that the defendants named have, or claim to have, some interest in or lien upon the premises which, if any, is subsequent to plaintiff's mortgage, is a sufficient statement of a cause of action against such defendants.³³

Where a bond and mortgage is executed by an executor or trustee and purports to have been executed in such capacity, it is not necessary to allege that the mortgagor was, in fact, such executor or trustee and the fact as to his appointment; otherwise where the action is brought to recover a debt due from a testator.³⁴

An allegation in a complaint following a description of the premises "that this mortgage is given to secure a portion of the purchase money of the above-described premises," when taken in connection with the allegation that defendants have, or claim, an interest accruing subsequent to the lien of the mortgage, is not sufficient to raise an issue of the right of dower of the wife of the mortgagor, who had not joined in the mortgage.³⁵

29. *Sun, etc., Fund Ass'n v. Buck*, 36 App. Div. 637, 55 N. Y. Supp. 262.

30. *Troy City Bank v. Bowman*, 43 Barb. 639.

31. *Shneider v. Mahl*, 84 App. Div. 1, 82 N. Y. Supp. 27.

32. *Constant v. American Benevo-*

lent, etc., Society, 53 Super. Ct. 170.

33. *Drury v. Clark*, 16 How. Pr. 424; *Frost v. Coon*, 30 N. Y. 428.

34. *Skelton v. Scott*, 18 Hun, 375.

35. *Fern v. Osterhout*, 11 App. Div. 319, 42 N. Y. Supp. 450.

G. Liability for deficiency.

An omission to ask for judgment for deficiency does not convert the action into a strict foreclosure.³⁶ A personal judgment cannot be had against a party not appearing, unless asked for in the complaint.³⁷ The provisions of the statute requiring an heir or devisee taking real estate subject to a mortgage, to pay the mortgage, does not require any additional allegations in a complaint which seeks to charge the personal representatives with a deficiency.³⁸

An allegation in a complaint that a grantee of the premises from the mortgagor orally agreed to secure the payment of the mortgage "and thereby and otherwise become legally and equitably bound to the grantors and to the mortgagee to pay the same" is sufficient to allow proof on the subject, and, in the absence of any application to make more definite, will justify proof of collateral given by the grantee to guarantee payment of any deficiency after remedy against the land is exhausted.³⁹

H. Payment of recording tax.

In the complaint in an action for the foreclosure of a mortgage upon real property, it is not necessary to allege that the recording tax upon the mortgage has been paid.⁴⁰

I. Statement of no other action.

Pursuant to the requirements of Rule 255, the complaint should state whether any other action has been brought to recover any part of the mortgage debt, and, if so, whether any part thereof has been collected.⁴¹ If the complaint shows that the plaintiff has obtained a judgment for the debt, but does not show that he has exhausted his remedy upon it, the defendant may move to dismiss complaint; or, if the fact does not appear upon the face of the complaint, he may raise his objection by answer.⁴² It is not necessary that the complaint follow the exact language of the Rule.⁴³ A complaint which alleges "that no other action had been had for the recovery of the said sum secured by the said bond and

36. *Equitable Life Ins. Co. v. Stevens*, 63 N. Y. 341.

37. *French v. New*, 20 Barb. 484; *Bullwinker v. Ryker*, 12 Abb. 311; *Simonson v. Blake*, 20 How. Pr. 484.

38. *Glacius v. Fogel*, 88 N. Y. 439.

39. *Wager v. Link*, 150 N. Y. 549.

40. *Moore v. Lindsay*, 61 Misc. 176, 114 N. Y. Supp. 684.

41. *Lovett v. German Reformed*

Church, 12 Barb. 63; *Patterson v. Powers*, 4 Paige, 549. And see, *infra*, Art. VI-Q, Foreclosure suit after action on debt.

42. *North River Bank v. Rogers*, 8 Paige, 648; *Shufelt v. Shufelt*, 9 Paige, 137; *Lovett v. German Reformed Church*, 12 Barb. 67.

43. *Bottom v. Chamberlain*, 21 Misc. 556, 47 N. Y. Sunn. 733.

mortgage " is sufficient.⁴⁴ A criticism that the complaint did not contain such an allegation, not having been raised in the trial court, where an amendment might have been permitted, is unavailing on appeal.⁴⁵

Where the complaint contained the proper allegation and the answer denied any knowledge or information sufficient to form a belief as to such allegation, and the defendant withdrew from the trial of the cause and an inquest was had, it was held not to be incumbent on the plaintiff to prove such allegation.⁴⁶

When the complaint alleged that no proceeding had been taken at law, it was held that a plea that the plaintiff recovered a judgment at law for the same debt was valid, although containing no averment that an execution had issued on such judgment and been returned unsatisfied.⁴⁷

Where the evidence showed the amount specified in the bond had been paid to the mortgagor, that plaintiff had received from the mortgagor payment of a sum of money, part of which was applicable to the payment of the principal of the bond; and that after deducting such amount from the principal, the remainder was due and payable; it was held that such evidence warranted a finding that no other proceeding had been instituted to collect the amount due on the bond and mortgage, from which anything had been received that could be credited thereon.⁴⁸

J. Joinder of causes of action.

Two causes of action to foreclose two mortgages upon the same real estate, both of which are held by one party and past due, but which were not given at the same time, nor by the same parties, and which were accompanied by bonds executed by different persons, may properly be joined in one complaint, where it is alleged that all the defendants have, or claim to have, some interest in or lien upon the mortgaged premises subsequent to the lien of the mortgages therein described, and that notwithstanding that the persons against whom a deficiency judgment was sought on different causes of action were not the same.⁴⁹ And it has been said that

44. *Schieck v. Donohue*, 77 App. Div. 321, 79 N. Y. Supp. 233, appeal dismissed, 173 N. Y. 638.

45. *Szemko v. Weiner*, 176 App. Div. 620, 163 N. Y. Supp. 382.

46. *Riesgo v. Glengariffe Realty Co.*, 116 App. Div. 414, 101 N. Y. Supp. 832, aff'd, 194 N. Y. 600.

47. *North River Bank v. Rogers*, 8 Paige, 648.

48. *Riesgo v. Glengariffe Realty Co.*, 116 App. Div. 414, 101 N. Y. Supp. 832, aff'd, 194 N. Y. 600.

49. *Morrissey v. Leddy*, 11 Civ. Pro. 438.

the same person cannot, at the same time, foreclose two mortgages on the same property by separate actions.⁵⁰

K. Amendment.

Where the name of a defendant appears in the title of the complaint but not in the body of it, and there is nothing to show his connection with the property or cause of action, the court has power on the trial to direct an amendment by inserting an allegation as to his interest.⁵¹ In foreclosure for interest, if the principal becomes due during the pendency of the action, the pleadings may be amended to conform to the proof.⁵² Where it appears that a prior mortgage has been foreclosed in a suit to which the present plaintiff was not a party, all the necessary parties being before the court and the pleadings being sufficient, the action can be turned into one for redemption.⁵³

An order of the Appellate Division reversing an order allowing an amendment to the complaint after trial, by setting up an omission from the mortgage by mistake of land intended to be covered by it, is discretionary and not reviewable in the Court of Appeals.⁵⁴

L. Supplemental complaint.

Where the complaint shows a right to some relief, a supplemental complaint is proper for the purpose of setting out subsequent facts.⁵⁵ Where a complaint in foreclosure sets forth a default in the payment of taxes on the mortgaged property and alleges that pursuant to the terms of the mortgage the plaintiff elects to consider the principal immediately due and payable, he will be granted leave to serve a supplemental complaint pleading a subsequent default in the payment of interest which also gives him the right to declare the principal due.⁵⁶

50. *Roosevelt v. Ellithorp*, 10 Paige, 415.

51. *Schoonmaker v. Blass*, 88 Hun, 179, 34 N. Y. Supp. 424, 68 St. Rep. 382.

52. *Sidenburg v. Ely*, 1 Month. Law Bull. 70.

53. *Denton v. Ontario Co. National Bank*, 44 St. Rep. 33, 18 N. Y. Supp. 38.

54. *Sprague v. Cochran*, 144 N. Y. 104.

55. *Hasbrouck v. Shuster*, 4 Barb. 285; *Candler v. Pettit*, 1 Paige, 168; *Bostwick v. Menck*, 8 Abb. (N. S.) 169; *Stilwell v. Van Epps*, 1 Paige, 615; *Malcolm v. Allen*, 49 N. Y. 448.

56. *Dunn v. O'Connor*, 104 Misc. 426, 172 N. Y. Supp. 336.

M. Notice of pendency of action.

The plaintiff, at least twenty days before a final judgment directing a sale is rendered, must file in the clerk's office of each county where the mortgaged property is situated a notice of the pendency of the action, which must specify, in addition to other particulars required by law, the date of the mortgage, the parties thereto and the time and place of recording it.⁵⁷ Matters relating to *lis pendens* are discussed in another chapter of this work.⁵⁸

N. Form of complaint.

(Title.)

The plaintiff in the above-entitled action alleges and shows as follows:

1. That on or about the day of, 19..., the defendant C. D., for the purpose of securing to the plaintiff A. B., the payment of dollars, with interest thereon, executed and delivered to the said A. B., a bond, dated on that day and sealed with his seal, whereby he bound himself, his heirs, executors and administrators in the sum of dollars, upon the condition that the same should be void if the said C. D., or his heirs, executors or administrators should pay to the said A. B. or his heirs, executors, administrators or assigns, the said sum of dollars, with interest thereon at the rate of .. % per annum, as follows: (Insert terms of payment.)

2. That as collateral security for the payment of the indebtedness above recited, the said C. D., on or about the said day of, 19..., duly executed and delivered to the said A. B. a certain indenture of mortgage, bearing date on that day, whereby he granted and released unto the said A. B., his heirs, or assigns forever, the following described premises: (Insert description.)

3. That the said mortgage contained a proviso in substance the same as the conditions of said bond and also contained an express covenant that the mortgagee, in case of default of payment of the said indebtedness or interest that might accrue thereon, or any part thereof, should have the power to sell said mortgaged premises, and that said mortgage was duly recorded in the office of the clerk of the county of, in liber No. of mortgages, at page, on the day of, 19... (If mortgage has been assigned, state facts as to assignment thereof, with the time and place of recording assignment in the county clerk's office.)

4. That in and by the above-described bond and mortgage it was covenanted and agreed, among other things, that the whole principal sum should become due at the option of the mortgagee after default in payment of interest for thirty days.

5. That the defendants have failed to comply with the conditions of said bond and mortgage by omitting to pay the installment of interest which became due on the day of, 19... That no

57. Civil Practice Act, § 1080.

58. See the chapter, Real Property, Provisions Relating Thereto.

part thereof has been paid and the plaintiff, pursuant to the provisions of said bond and mortgage, has elected and does elect, that the whole principal sum thereby secured be immediately due and payable, and that there is now justly due and payable to the plaintiff upon said mortgage the sum of dollars, with interest thereof at the rate of .. per cent per annum from the day of, 19...

6. That no action has been brought at law or otherwise to recover the said mortgage debt, secured by the said bond and mortgage, or any part thereof. (If action has been brought, the complaint should state whether any part thereof has been collected.)

7. That the defendant, has, or claims to have dower, right of dower or inchoate right of dower, in such mortgaged premises, or some part thereof, which said dower, right of dower or inchoate right of dower, if any, has accrued subsequent to the lien of said mortgage and is inferior thereto.

8. That the defendant has, or claims to have, some interest or lien upon said mortgaged premises or some part thereof, which interest or lien, if any, accrued subsequent to the lien of said mortgage and is subordinate thereto. (If the foreclosure is based upon failure to comply with the insurance clause, or other special clause in the mortgage, the facts in reference thereto must be alleged, together with the default in performance, and if any party is sought to be made especially liable, as, for example, a guarantor of the mortgage debt, the facts in relation thereto must be specially alleged and conveyances made by the mortgagor should be alleged, together with the record of recording the same.)

WHEREFORE, The plaintiff demands a judgment that the defendants and all persons claiming under them, subsequent to the filing of the notice of the pendency of this action, may be barred and forever foreclosed of and from all right, title, interest, claim, lien and equity of redemption in and to said mortgaged premises; or so much thereof as may be sufficient to raise the amount due to the plaintiff for principal, interest and costs, and which may be sold in parcels, without material injury to the interests of the parties, may be decreed to be sold according to law and that the moneys arising from the sale may be brought into court and that the plaintiff may be paid the amount due on said bond and mortgage, with interest to the time of such payment, and the costs and expenses in this action so far as the amount of such moneys properly applicable thereto will pay the same; and that the defendants C. D. and may be adjudged to pay any deficiency which may remain after applying all of said moneys so applicable thereto; and that the plaintiff have such other and further relief, or both, in the premises as may be just and equitable.

.....

Attorney for Plaintiff,
Office and P. O. Address,

....., N. Y.

(Verification.)

O. Form of notice of pendency.

(Title.)

Notice is hereby given that an action has been commenced and is pending in this court upon the complaint of the above-named plaintiff against the above-named defendants for the foreclosure of a mortgage executed by the defendant C. D. to the plaintiff A. B., dated the day of, 19.., and recorded in the office of the clerk of county, N. Y., on the day of, 19.., in liber No. of mortgages at page, at o'clock in the noon. (If the mortgage has been assigned, make statement as to assignment.)

That the mortgaged premises affected by this action of foreclosure were, at the time of the commencement of this action, and at the time of the filing of this notice are, situated in the town of, county of, N. Y., and that they are described in such mortgage as follows: (Insert description.)

Dated the day of, 19...

.....
Attorney for Plaintiff,
Office and P. O. Address,
, N. Y.

To the clerk of the county of

You will please index the foregoing notice of pendency of action against the defendants C. D. and

.....
Plaintiff's Attorney,
Office and P. O. Address,
, N. Y.

ARTICLE V.

ANSWER AND DEFENSES.

A. Denials.

An answer which, upon information and belief, denies the allegations of the complaint puts in issue the execution and delivery of the mortgage sought to be foreclosed.⁵⁹ And a denial of any knowledge or information sufficient to form a belief as to the allegations of execution, delivery and failure to comply with the conditions of the bond raises a general issue.⁶⁰ So, too, a denial of knowledge or information sufficient to form a belief as to the plaintiff's allegation that he has paid moneys for taxes on the lands and interest

⁵⁹. *Bidwell v. Sullivan*, 10 App. Div. 174, 72 N. Y. Supp. 640. See also, *Gimmel v. Stayner*, 71 App. Div. 135, 41 N. Y. Supp. 770.

⁶⁰. *Alexander v. Aronson*, 65 App. Div. 540, 75 N. Y. Supp. 887.

upon the prior mortgage in order to protect his lien raises an issue of fact so that the plaintiff is not entitled to judgment on the pleadings.⁶¹ But a defendant, who in a written agreement with the plaintiff has admitted that the latter holds a certain recorded bond and mortgage which is the subject of the foreclosure, cannot allege that he has no knowledge or information sufficient to form a belief as to the truth of allegations of the complaint alleging the execution and delivery of the mortgage and its assignment to the plaintiff.⁶²

In an action to foreclose a mortgage given by defendant, an answer which after a denial upon information and belief of each and every allegation of the complaint alleges upon information and belief that on a certain date he by his agent, naming him, offered and duly tendered to the attorney and agent of plaintiff, naming him, the full amount due on the alleged bond and mortgage together with interest to date is frivolous on its face, and plaintiff's motion for an order overruling the answer as frivolous and for judgment on the pleadings will be granted.⁶³

Where a complaint sets forth the execution of a bond, and avers the execution of a mortgage, with the same condition as the bond, an answer which merely repeats the words of the condition, as stated in the complaint, and avers that it is not contained in the mortgage, is not a denial that such was, in substance, the condition of the mortgage.⁶⁴

An answer in an action to foreclose a mortgage on real estate which denies, in the words of the complaint, that defendant had failed to comply with the conditions of the mortgage by omitting to pay the principal sum, or that the sum claimed, or any sum whatever, remains due and unpaid, may not be stricken out as sham on the ground that it involves a negative pregnant. Where a separate defense, in pleading an agreement for the extension of the mortgage debt, clearly sets up facts which cannot be determined on affidavits, a motion to strike out the answer as sham will be denied, as whether there was an extension of the mortgage is a question of fact.⁶⁵

Where a complaint alleges that the premises were conveyed to the defendant, who covenanted to assume the pay-

61. *Godwin v. Liberty-Nassau Building Co.*, 144 App. Div. 164, 128 N. Y. Supp. 791.

62. *Preston v. Cuneo*, 140 App. Div. 144, 124 N. Y. Supp. 1031.

63. *Cook v. Broughton*, 102 Misc. 260, 168 N. Y. Supp. 818.

64. *Dimon v. Dann*, 15 N. Y. 498.

65. *Carlton v. Lawrence*, 77 Misc. 573, 137 N. Y. Supp. 200.

ment of the mortgage, and the answer denies the allegation and sets up as a defense that at the time of the transfer it was expressly understood that defendant should not assume the payment of the mortgage, a motion to strike out the answer as sham and frivolous should be denied.⁶⁶

B. Admissions.

An answer which admits the taking of the mortgage as security for the debt admits the cause of action, and a denial of the remaining allegations may be considered as a mere legal conclusion, and puts nothing in issue.⁶⁷ An admission of a bond and mortgage, as alleged in the complaint, is not an admission of the payment of insurance premiums by plaintiff as therein alleged.⁶⁸ Where the due acknowledgment of a mortgage is admitted by the answer, the defendant cannot show that the mortgagor, a married woman, was not examined apart from her husband, as required under the statute then in force.⁶⁹

C. Conclusions.

An answer that the mortgage is not binding and no lien on the premises is a statement of a conclusion unsupported by facts, and unavailing.⁷⁰ And an answer which merely denies the allegation of the complaint that defendants were in default of a sum alleged to have been due at a certain date as interest states a conclusion of law merely, and is frivolous.⁷¹

D. Inconsistent defenses.

A denial by defendants that they have or claim to have an interest in the premises which accrued subsequent to the lien of the mortgage is not inconsistent with the further defense of payment; both defenses may stand.⁷²

E. Claim of paramount title.

An answer setting up title in a third person named is not frivolous, but shows a good defense.⁷³ And where a defendant sets a claim paramount to the mortgage under fore-

66. *Blum v. Bruggemann*, 58 App. Div. 377, 68 N. Y. Supp. 1965.

67. *Kay v. Churchill*, 10 Abb. N. C. 83.

68. *Fellows v. Muller*, 38 Super. Ct. 137.

69. *Meeker v. Wright*, 76 N. Y. 262.

70. *Caryl v. Williams*, 7 Lans. 416.

71. *Excelsior Savings Bank v. Campbell*, 4 T. & C. 549, aff'd, 62 N. Y. 637.

72. *Moody v. Belden*, 38 St. Rep. 722, 15 N. Y. Supp. 119.

73. *Fougera v. Moissen*, 16 Hun, 237.

closure, he is not required to litigate his claim in the foreclosure action; but he is entitled to have the complaint dismissed as against his claim or to have his interest excepted from the operation of the judgment.⁷⁴

Where a person claiming a lien prior to plaintiff is made a party, it is not necessary for him to set up his rights by answer.⁷⁵ But a prior mortgagee who is a defendant, and holding a junior lien, may answer in the action, and ask to have the prior mortgage paid out of the proceeds of the sale, before applying any portion of the proceeds to the payment of plaintiff's mortgage.⁷⁶

Although a wife who has not joined in her husband's mortgage is made a party defendant on foreclosure, it is not necessary for her to set up her dower rights by answer.

74. *Lanier v. Smith*, 37 Hun, 529; *Meigs v. Willis*, 66 How. Pr. 466.

Recording Acts.—As to the effect of the Recording Acts on the priority of mortgages, see *Douglas v. Miller*, 102 App. Div. 94, 92 N. Y. Supp. 514; *Kirchoff v. Gerli*, 171 App. Div. 160, 156 N. Y. Supp. 770; *Ebling Brewing Co. v. Gennaro*, 189 App. Div. 782, 179 N. Y. Supp. 384. See also, *Keeler v. McNeirney*, 6 Civ. Proc. 363.

Validity of lease.—In an action brought by the lender to foreclose a mortgage, the validity of a lease in which the tenant recognized the title of the persons whom the plaintiff claims as owner, may be properly tried. *Larremore v. Squires*, 30 Misc. 62, 62 N. Y. Supp. 885.

Easement.—Where if any easement existed in mortgaged property it arose under deeds executed long prior to the execution of the mortgage, the right of the alleged holder of the easement cannot be determined in an action to foreclose the mortgage. *Mayer v. Margolies*, 47 Misc. 24, 95 N. Y. Supp. 204.

75. *Payne v. Brant*, 23 Hun, 134; *Frost v. Koon*, 30 N. Y. 428; *Rathbone v. Hooney*, 58 N. Y. 463; *Lewis v. Smith*, 9 N. Y. 502; *Merchants' Bank v. Thompson*, 55 N. Y. 7; *Emigrant Savings Bank, etc., v. Goldman*, 75 N. Y. 127.

76. *Metropolitan Trust Co. v. Tona-wanda, etc.*, R. R. Co., 43 Hun, 521,

aff'd, 106 N. Y. 673; *Doctor v. Smith*, 16 Hun, 245.

Answer not frivolous.—A defendant was made such upon the allegation that he claimed some interest in the mortgaged premises, which interest, if any, was subsequent to that of the mortgagee. He answered denying the allegation that his interest was subsequent to the lien of the mortgage, and alleging that he had an equitable lien, prior and superior to that of the mortgage, which had been fraudulently discharged, and that the plaintiff knew that the discharge was fraudulent; held, that this defense was not frivolous; that since the plaintiff had made the defendant a party, such defendant was entitled to answer and to demand that the court in rendering its judgment determine his title to the property. *Older v. Russell*, 8 App. Div. 518, 40 N. Y. Supp. 892.

Answers as proof.—Where the plaintiff made a prior lienor a party seeking relief against the prior lien and a sale was ordered subject to the lien; it was held that allegations in the answers of other defendants unsupported by evidence could not be accepted as proof, especially where the answers were not put in evidence, and the plaintiff not appealing, that the prior lienor had no ground for appeal. *Quinlan v. Strattan*, 128 N. Y. 659.

Such answer is frivolous and will be stricken out. The inchoate dower of a wife who did not join in a mortgage is not affected by the foreclosure.⁷⁷

A defendant who sets up an equitable title against a mortgagee without actual notice, in order to affect the latter with constructive notice by his possession at the date of the mortgage, should allege that he was then in possession claiming the land as his own. It is not enough to allege that he was in possession at and long before the execution of the mortgage.⁷⁸

A holder of a tax deed cannot as a defendant defeat plaintiff's title by simply asserting in her answer that she has or claims to have a title paramount and superior to him, without showing what that title is and how derived.⁷⁹

Although in an action for the foreclosure of a mortgage it is not competent for the court to try an adverse claim of title arising *prior* to the execution of the mortgage, it is competent for the court to try and decide an issue of estoppel with respect to such title.⁸⁰

F. Subsequent lienors.

A subsequent incumbrancer cannot set up that the conditions of the bond are not in the mortgage.⁸¹ It is not necessary for junior incumbrancers, where their rights are correctly stated in the complaint, to appear and answer in order to save their rights.⁸² But the defendants may set out their respective rights so as to enable the court to make a proper decree as to sale in parcels, and any claim they have to the equity of redemption.⁸³

An answer setting up a junior mortgage is no evidence of the existence of such a mortgage against a defendant, who suffered the bill to be taken as confessed; or incumbrancers not made parties.⁸⁴

Where the complaint alleges that the lien of the defendant's mortgage is subsequent to that of the plaintiff's and this allegation is denied in the answer, evidence necessary to determine which mortgage is the first lien is admissible.⁸⁵

77. *Anderson v. McNeely*, 120 App. Div. 676, 105 N. Y. Supp. 278.

78. *N. Y. Life Ins. Co. v. Cutler*, 3 Sandf. Ch. 177.

79. *Ruyter v. Reid*, 33 St. Rep. 590.

80. *United States Trust Co. of New York v. Pleasant Ave. Realty Co.*, 167 App. Div. 762, 153 N. Y. Supp. 65.

81. *Kay v. Whittaker*, 44 N. Y. 565.

82. *Merchants' Ins. Co. v. Marvin*, 1 Paige, 567.

83. *Tower v. White*, 10 Paige, 395.

84. *Beekman v. Gibbs*, 8 Paige, 511.

85. *Citizens' Permanent Savings & Loan Association v. Raupe*, 116 N. Y. Supp. 597, aff'd, 139 App. Div. 927, 123 N. Y. Supp. 1110.

If objection is taken, a defendant in foreclosure who holds a junior mortgage cannot delay the enforcement of plaintiff's claim to await a settlement of the dispute over his rights under his mortgage.⁸⁶

An answer, in an action to foreclose a mortgage on real property, setting up that the defendant is the owner of a subsequent mortgage upon the premises and setting up another action pending which is based entirely upon such junior lien, constitutes no defense to the plaintiff's action.⁸⁷

It has been held that a defendant lienor under a mechanic's lien, subject to a mortgage, cannot avail himself of the failure of the mortgagee to advance a portion of the moneys given to secure the mortgage.⁸⁸

G. Equities between mortgagor and assignor of mortgage.

A mortgage is not negotiable and is subject to defenses existing between the original parties; an assignee takes subject to the equities between the parties.⁸⁹ A mortgagor may assert equities existing between him and the mortgagee at the time of the assignment of the mortgage to the plaintiff, though the assignee had no actual notice thereof when he took the assignment.⁹⁰ But, while an assignee for value of a mortgage takes it subject to the equities existing between the original parties, they must be established by common-law evidence, and declarations of the assignor made prior to the assignment are inadmissible against the assignee to establish a defense to an action brought by him to foreclose the mortgage.⁹¹

H. Want of consideration.

The mortgagor can defend the foreclosure action on the ground that there was no consideration for the mortgage,⁹²

86. *Syracuse Savings Bank v. Merrick*, 182 N. Y. 387.

87. *White v. Gibson*, 61 Misc. 436, 113 N. Y. Supp. 983.

88. *Price v. Alyea*, 13 App. Div. 184, 43 N. Y. Supp. 355.

89. *Ingraham v. Disborough*, 47 N. Y. 421; *Schafer v. Reilly*, 50 N. Y. 61; *Andrews v. Gillespie*, 47 N. Y. 487; *Union College v. Wheeler*, 61 N. Y. 88; *Davis v. Bechstein*, 69 N. Y. 440.

90. *Cassel v. Regierer*, 114 N. Y. Supp. 601.

91. *Merkle v. Beidleman*, 165 N. Y. 21.

92. *Diversion of proceeds.*—Where the defense in an action for the foreclosure of a mortgage on real property is want of consideration, and it appears that the plaintiff intrusted the amount expressed as the consideration of the mortgage to his attorney and agent, who converted it to his own use, and there is no evidence sufficient to warrant the inference that the said attorney acted as the agent of the owner of the property, the signature to the mortgage, in the absence of any consideration or benefit moving to the mortgagor or to her estate, has no

even though the action is brought by an assignee of the mortgage who is a *bona fide* purchaser thereof.⁹³ A defendant in foreclosure who has guaranteed, in an assignment of a bond and mortgage, its payment by due foreclosure and sale, may set forth as a defense that the guaranty was without consideration, though there was consideration for the assignment.⁹⁴ But a purchaser who takes a deed to the premises subject to the mortgage cannot defend on the ground that there was no consideration for the mortgage.⁹⁵

Where the maker of a note executes a mortgage to an indorser to secure him on account of said indorsement, and he has never been charged with liability thereon, the mortgage is not enforceable by the indorser or by an assignee.⁹⁶

Where an answer alleged "that there never was any valuable or other legal consideration" for the mortgage, it is equivalent to an allegation that there was no consideration therefor, and such allegation is one of fact and does not state a conclusion of law.⁹⁷

Where a deed recites an adequate consideration and there is nothing on its face to excite inquiry as to whether the consideration was paid, the rights of the mortgagee who holds a mortgage on the same property are not affected by the fact that the consideration was never paid.⁹⁸

It is not necessary for plaintiff to allege or prove in the first instance that his mortgage was given for value, although it may be his duty to do so after proof of a prior agreement; still where no objection has been taken of the failure of such proof, it will not be considered on appeal.⁹⁹ Where the mortgagor alleges that the same was executed without consideration, the burden is on him to overcome the presumption of consideration raised by the seal on the mortgage.¹ The seal upon a mortgage is only presumptive evidence of

legal significance, and the complaint is properly dismissed under the rule that where one of two innocent persons must suffer from the wrong or fraud of a third party, he must bear the loss whose action enabled such party to perpetrate the wrong or fraud. *Yeoman v. McClenahan*, 190 N. Y. 121.

^{93.} *Briggs v. Langford*, 107 N. Y. 680; *Hill v. Hoole*, 116 N. Y. 299.

^{94.} *Vanderbilt v. Schryver*, 91 N. Y. 392.

^{95.} *McConihe v. Fales*, 107 N. Y. 404.

^{96.} *First National Bank of Binghamton v. Baker*, 163 App. Div. 72, 148 N. Y. Supp. 372.

^{97.} *First National Bank of Tonawanda v. Robinson*, 105 App. Div. 193, 94 N. Y. Supp. 767, *aff'd*, 188 N. Y. 45.

^{98.} *Albany Exchange Savings Bank v. Brass*, 59 App. Div. 370, 69 N. Y. Supp. 391, *aff'd*, 171 N. Y. 693.

^{99.} *Oliphant v. Burns*, 146 N. Y. 218.

^{1.} *Quackenbush v. Mapes*, 54 Misc. 124, 105 N. Y. Supp. 654, modified, 123 App. Div. 242, 107 N. Y. Supp. 1047.

a sufficient consideration which may be rebutted, and, therefore, evidence of declarations at and before the execution of the mortgage are admissible to show want of consideration and the purpose for which it was given. As against the personal representative of deceased mortgagee the declarations of the testator made while he was the owner and holder of the mortgage are competent in an action to foreclose.² Where the judgment creditor of the mortgagor sets up a defense that the mortgage was made without consideration and to defraud creditors, evidence offered by such creditor to establish want of consideration, does not shift the burden of proof to the mortgagee. The burden of proof remains throughout the whole case upon the party having the affirmative of the issue.³

I. Fraud.

Fraud is a good defense when it is shown that it was practiced by the mortgagee, or his agents, upon the mortgagor, or when the mortgagee, or his assignee, at the time of taking the mortgage, was aware of the fraud.⁴ Where a purchaser of property takes it subject to a mortgage, the fact that his immediate grantor falsely represented the value of the property and the mortgagee was not a party to such fraudulent representations, is no defense to an action to foreclose the mortgage.⁵ It is no defense for the wife who executes a mortgage on her property to enable her husband to obtain money to run his business, that the husband, instead of procuring moneys thereon, delivered the mortgage to his creditors in settlement of his debt to them.⁶ Nor is it a defense to a wife who executes a mortgage without specifying the purpose for which it is to be used, and allows her husband to use it, to claim, upon his using it as collateral security for the debt due from his firm, that the mortgage was diverted from the purpose for which it was made.⁷

A deficiency in the quantity of land purchased is no defense to a purchase-money mortgage if there was no

2. *Baird v. Baird*, 81 Hun, 300, 30 N. Y. Supp. 785, aff'd, 145 N. Y. 659.

3. *Alcock v. Davitt*, 179 N. Y. 9.

4. *Aiken v. Morris*, 2 Barb. Ch. 140; *Reed v. Latson*, 15 Barb. 9; *Champlin v. Laytin*, 6 Paige, 189; *Abbott v. Allen*, 2 Johns. Ch. 519; *Knickerbocker Life Ins. Co. v. Nelson*, 13 Hun,

5. *Commercial Bank v. Catto*, 20 App. Div. 236, 46 N. Y. Supp. 983, aff'd without opinion, 163 N. Y. 569.

6. *Laidlaw v. Slaybeck*, 23 Wkly. Dig. 259.

7. *McLaren v. Percival*, 102 N. Y. 675.

fraud.⁸ Misrepresentation of the grantor as to capacity of the water power on the demised premises furnished no defense to an action to foreclose a purchase-money mortgage where the deed contained no covenants in relation thereto, and no fraud was alleged or proved and the grantee had been in possession for four months and had an opportunity to ascertain its capacity.⁹ An allegation of a conspiracy to prevent defendant from raising money to pay the mortgage, and that the assignment to plaintiff was made from malicious motives, is frivolous.¹⁰

Where it is shown at the time of the execution of a mortgage the mortgagor was insane, the burden rests on the persons claiming under the mortgagee to show that the latter acted in good faith and was ignorant of such insanity.¹¹

J. Champerty.

No suit to foreclose a mortgage which was executed by the mortgagor at a time when the lands were in the actual possession of another person claiming under an adverse title can be maintained until such time as the mortgagor has actually recovered possession. Until the mortgagor has obtained possession the remedy of the mortgagee is limited to an action upon the bond.¹²

K. Alteration of mortgage.

Where the proof showed that alleged alterations were made prior to delivery and by the draughtsman who stood in the relation of stranger to the parties, a defense that a mortgage had been altered by changing the dates was held insufficient.¹³

L. Usury.

In an action to foreclose a mortgage usury may be pleaded either as a defense or as a counterclaim, or both, and that the matter is alleged both as "a defense and a counterclaim" does not make it any less a counterclaim.¹⁴ One who has purchased land subject to a mortgage, the amount of which is made part of the consideration of the purchase, cannot

8. *Northrup v. Sumney*, 27 Barb. 196.

9. *DeMilt v. Hill*, 89 Hun, 56, 34 N. Y. Supp. 1060, 69 St. Rep. 4.

10. *Morris v. Tuthill*, 72 N. Y. 575.

11. *Merritt v. Merritt*, 43 App. Div. 68, 59 N. Y. Supp. 357.

12. *Hopkins v. Baker*, 140 App. Div. 460, 125 N. Y. Supp. 417.

13. *Fanning v. Vrooman*, 12 St. Rep. 393.

14. *Charlton v. Ward*, 102 Misc. 238, 168 N. Y. Supp. 876.

set up usury whether he assumed payment of the mortgage or not.¹⁵

A judgment declaring a mortgage valid, rendered in an action brought by the mortgagor to set it aside on other grounds, is a bar to a defense of usury in an action to foreclose such mortgage.¹⁶

A defendant setting up that the mortgage is void for usury cannot, between plaintiff and a co-defendant, compel an amendment of the complaint for the purpose of setting forth the transaction, but may be protected by litigating with his co-defendant.¹⁷

M. Illegal assignment.

Where the plaintiff claims under an assignment, which has been made as security for an illegal transaction, the illegality is a valid defense.¹⁸ And the defendant may plead that plaintiff procured an assignment of the mortgage by fraud, and that the debt has been paid to the mortgagee and a release given.¹⁹ But in a suit by an assignee, the defendants may not avail themselves of any fraud as against creditors which may have infected the assignment to the plaintiff.²⁰

In an action by the assignee, an answer of a defendant claiming under a prior assignment, alleging that at the time the plaintiff took his assignment he had knowledge of the prior assignment, states a good defense. But a separate defense alleging that the consideration for the plaintiff's

15. *Hartley v. Harrison*, 24 N. Y. 170; *Sands v. Church*, 6 N. Y. 347; *Hardin v. Hyde*, 40 Barb. 435; *Morris v. Floyd*, 5 Barb. 130; *Freeman v. Auld*, 44 N. Y. 50; *Merchants' Exchange Bank v. Commercial, etc., Co.*, 49 N. Y. 635; *Golden v. Wooster*, 10 St. Rep. 435.

As to who may set up the defense of usury.—See *Fanning v. Dunham*, 5 Johns. Ch. 122; *Wheaton v. Voorhis*, 53 How. Pr. 3-19; *Bard v. Fort*, 3 Johns. Ch. 632; *Post v. Dart*, 8 Paige, 639; *Books v. Avery*, 4 N. Y. 225; *Thompson v. Van Vechten*, 27 N. Y. 568.

16. *Davidson v. Weed*, 20 Misc. 147, 45 N. Y. Supp. 718.

17. *Neiman v. Dickson*, 1 Abb. N. C. 307.

18. *Dewitt v. Brisbane*, 16 N. Y. 508.

19. *Hall v. Erwin*, 57 N. Y. 643.

Gift.—Where defendants denied that plaintiff was the owner of the mortgage, and alleged payment, and plaintiff made proof of the facts entitling him to relief, and defendant introduced evidence of a gift to him by the mortgagee, although such gift was not pleaded in the answer, plaintiff was properly permitted to show that such alleged gift was void, fraudulent, and of no effect. *Livingston v. Eaton*, 90 App. Div. 251, 85 N. Y. Supp. 540, aff'd without opinion, 184 N. Y. 610.

20. *American Guild of Richmond v. Damon*, 107 App. Div. 140, 94 N. Y. Supp. 985, reversed, 186 N. Y. 360.

assignment failed, unaccompanied by any allegation showing that the defendant had any interest in that question, is insufficient. Nor is it a defense to allege that the mortgage has been assigned to the plaintiff as security for a usurious loan when there is no allegation showing any interest of the defendant therein, for a stranger cannot attack a transaction for usury.²¹

Where the complaint alleged the assignment of the bond and mortgage, an answer, not taking issue on this allegation, but averring that the plaintiff was not the real party in interest, and that the bond and mortgage were still owned by an intermediate assignee, admits the sufficiency of the assignment, and does not avail to allow the defendant to rely on the objection that the *mesne* assignment proved did not purport to assign the bond.²²

A title derived from a foreclosure sale is not defective for failure to record an assignment of the mortgage to the party who foreclosed, for an assignment may be made by delivery only, and the judgment of the court is conclusive that there was such delivery.²³

N. Tender.

The tender of the amount due upon a mortgage discharges the lien,²⁴ although the tender is made after the moneys became due,²⁵ and although the tender is not kept

21. Biedler v. Malcolm, 121 App. Div. 145, 105 N. Y. Supp. 642.

22. Siver v. Wheeler, 3 Wkly. Dig. 482.

23. Fryer v. Rockefeller, 63 N. Y. 268.

24. Kortright v. Cady, 21 N. Y. 343.

25. Kortright v. Cady, 21 N. Y. 343.

Costs.—The answer in foreclosure, alleging the tender of the amount due, before the commencement of the action should not be stricken out, as such tender has a bearing on the right of the plaintiff to maintain the action, and also on the question of costs. Warner v. Billings, 33 App. Div. 641, 53 N. Y. Supp. 805.

Sufficiency of tender.—In *Rosevelt v. Bull's Head Bank*, 45 Barb. 583, it is said that the plaintiff on tender was not bound to sign a satisfaction piece; that the money should be tendered irrespective of any other act. In *Tuthill v. Morris*, 81 N. Y. 94, it is said, "in

view of the serious consequences resulting from the refusal of such tender, the proof should be very clear that it was fairly made and delivered and intentionally refused by the mortgagee or some one duly authorized by him, and that sufficient opportunity was given to ascertain the amount due; at all events, it should appear that a sum was absolutely and unconditionally tendered sufficient to cover the whole amount due. The burden of that proof is on the party alleging the tender." To the same effect, *Day v. Strong*, 29 Hun, 505, and in *Harris v. Jex*, 66 Barb. 232, it was held that the right to tender the money due so as to discharge the lien was personal to the mortgagor, and that an assignee of the mortgage was not in a position to avail himself of the rights given him in *Kortright v. Cady*, *supra*. On the appeal, 55 N. Y. 421, Judge Andrews, in the opinion of the court, said: "We

good.²⁶ If a mortgagor before suit has tendered the full amount then due and brought the same into court, the lien of the mortgage is extinguished to that extent, and an action for foreclosure cannot be maintained by reason of an installment subsequently falling due.²⁷ But where affirmative relief is asked by a defendant, such as the cancellation of the mortgage, or the execution of a discharge thereof, the tender must be kept good as in other actions.²⁸ And, unless the tender is kept good by the payment of the money into court, the covenant to pay the debt is not discharged.²⁹

When, in an action for foreclosure, the defendant, after tendering before suit installments due on the mortgage, pays the same into court to perfect the defense of tender, the money belongs to the plaintiff in any event, and he is entitled to withdraw it from the custody of the court.³⁰

The filing of a *lis pendens* and the service of a summons and complaint in an action of foreclosure upon a tenant of the property constitutes a commencement of the action, and a subsequent tender of payment by the mortgagor, even if made before service was made upon her, is insufficient to relieve her from liability for costs.³¹ Although the tender of taxes and costs was made in the form of a certified check the plaintiff cannot take advantage of the fact that money was

deem it unnecessary to consider whether there is such a distinction between the facts in this case and those which appear in Kortright v. Cady, as to call for the application of a different rule in respect to the legal effect of the tender made by the defendant there, that applied in that case." Harris v. Jex, 66 Barb. 232, is cited with approval in Noyes v. Wyckoff, 30 Hun, 466, which was aff'd 114 N. Y. 204, without reference to this point. See, however, upon this point, Frost v. Yonkers Savings Bank, 70 N. Y. 553, which was assumed to intimate a different view from that held in Harris v. Jex.

26. Kortright v. Cady, 21 N. Y. 343; Nelson v. Loder, 132 N. Y. 288; Cresco Realty Co. v. Clark, 128 App. Div. 144, 112 N. Y. Supp. 550.

27. Green v. Fry, 93 N. Y. 353.

28. Halpin v. Phenix Ins. Co., 118 N. Y. 165; Tuthill v. Morris, 81 N. Y. 94; Breunich v. Weselman, 100 N. Y. 609; Werner v. Tuch, 23 St. Rep. 683,

52 Hun, 269, 5 N. Y. Supp. 219, aff'd, 127 N. Y. 217; Nelson v. Loder, 28 St. Rep. 635, 7 N. Y. Supp. 849; Bond & Mortgage Guarantee Co. v. White, 81 Misc. 8, 142 N. Y. Supp. 1038.

Insufficient tender.—An offer by the owner of mortgaged premises to pay the amount claimed to be due on a mortgage, under an order permitting it to be paid without prejudice to any of the mortgagee's rights and without in any manner attempting to adjudicate upon the question of the sufficiency of the tender, where the amount offered was not paid into court until more than three weeks after the trial, is an insufficient tender to support an action for the cancellation of the mortgage. Weil v. Lippman, 55 Misc. 443, 105 N. Y. Supp. 516.

29. Nelson v. Loder, 132 N. Y. 288.

30. Bieber v. Goldberg, 120 App. Div. 457, 104 N. Y. Supp. 1080.

31. Harvey v. Mooney, 168 App. Div. 169, 153 N. Y. Supp. 268.

not tendered if he did not refuse the tender upon that ground.³²

A subsequent lienor's right to redeem a prior security is derived from the owner of the mortgaged premises, and he is in this respect in no better position than the owner, and his tender, if he wishes to stop interest or compel an assignment of the prior lien, must be as absolute and specific as that which the owner is required to make as a ground for affirmative relief or to stop the running of the interest.³³

A defendant in a suit to foreclose a mortgage upon lands who is not the principal debtor, on tendering to plaintiff moneys sufficient to satisfy the mortgage, with costs, is entitled to an order requiring the plaintiff to assign the bond and mortgage to the person from whom the defendant obtained the moneys with which to make the payment.³⁴ Although a junior mortgagee who tenders to the holder of a senior mortgage then under foreclosure the amount due thereon, with costs of action, is entitled to an assignment of the prior lien in order to protect his own, he is not entitled to bind the senior mortgagee as to the amount due, and must accept an assignment without recourse to him and without covenants express or implied.³⁵

An election to declare a mortgage due for failure to pay interest must be seasonably made, and where one to whom such mortgage has been assigned as security for a loan has not so elected, and the mortgagor tenders the interest to the assignee prior to an action of foreclosure by the mortgagee, the action is barred. Such a tender of interest need not be kept good by payment into court in order to be available as a defense to the foreclosure.³⁶

If the holder of a mortgage has refused to receive interest, except upon condition that taxes that he had paid be reimbursed, and if the effect of so doing was to waive the tender of the money due on the mortgage, the defendants in foreclosure must set up these facts in their answer, and allege the tender.³⁷

32. *Germania Life Ins. Co. v. Potter*, 124 App. Div. 814, 109 N. Y. Supp. 435.

33. *Nelson v. Loder*, 132 N. Y. 288.

34. *Manilla Anchor Brewing Co. v. Raw Silk Trading Co.*, 163 App. Div.

30, 148 N. Y. Supp. 119.

35. *Boocock v. Wood*, 128 App. Div. 645, 113 N. Y. Supp. 46.

36. *Cresco Realty Co. v. Clark*, 128 App. Div. 144, 112 N. Y. Supp. 550.

37. *Sidenberg v. Ely*, 90 N. Y. 257.

O. Payment.

Payment is an affirmative defense, and the burden of pleading and proving the payment of a mortgage is upon the defendants.³⁸ In foreclosure for non-payment of interest, whereby the principal becomes due, it is not a defense that the defendant was unable to find the plaintiff to make the payment, no trick or fraud being imputed to the plaintiff.³⁹ In an action to foreclose for the whole principal sum by reason of failure to pay an installment, an answer denying the non-payment of such installment is not frivolous.⁴⁰ Where a defendant in foreclosure pays the amount of the mortgage, but not the costs, and sets up such payment by answer, the answer cannot be stricken out as a sham.⁴¹ Proof of the surrender of a bond and mortgage by the widow of the mortgagee, upon the representation that they were paid, is not a good defense to an action upon the bond and mortgage.⁴²

It cannot be held, before an accounting, that the use and occupation of mortgaged premises by the mortgagee is payment of the interest on the mortgage, and an application to modify the judgment in foreclosure by striking out the provision thereof for the payment of interest must be denied.⁴³

Where a mortgagor, who had conveyed property and guaranteed the payment of the bond and mortgage thereon,

38. *Redmond v. Hughes*, 151 App. Div. 99, 135 N. Y. Supp. 843; *Gamble v. Lewis*, 88 Misc. 139, 151 N. Y. Supp. 778.

Proof of payment on appeal.—Where upon the trial of an action to foreclose a trust mortgage for default in payment of interest, the mortgagor tendered the full amount of interest due to the day of trial, which was refused and the money was paid into court, whereupon the trial justice dismissed the complaint, and the trustee appealed from the judgment of dismissal to the Appellate Division, and thereafter, but while the appeal was pending, the Appellate Division, upon the mortgagor's motion and affidavits showing the payment of all interest coupons on all outstanding bonds to the date of the motion, dismissed the appeal, its decision, where it appears that the coupons were not presented by the trustee, and that it knows nothing about the payment of the in-

terest, is erroneous and the judgment entered upon the order dismissing the appeal must be reversed and the case be sent back to the Appellate Division to consider the questions raised upon the appeal from the judgment of the trial court. *Metropolitan Trust Co. v. Long Acre Electric Light and Power Co.*, 223 N. Y. 69.

39. *Dwight v. Webster*, 19 How. Pr. 349.

40. *Gruenstein v. Jablonsky*, 1 App. Div. 580, 37 N. Y. Supp. 538, 73 St. Rep. 154.

41. *Wetmore v. Gale*, 2 Wkly. Dig. 408.

42. *Fitzmahoney v. Caulfield*, 25 App. Div. 119, 49 N. Y. Supp. 196.

43. *Buffalo Savings Bank v. Polish Catholic Church of Holy Mother of the Rosary of Buffalo*, 87 Misc. 343, 150 N. Y. Supp. 726; modified, 166 App. Div. 960, 151 N. Y. Supp. 1107; aff'd, 215 N. Y. 723.

in order to prevent a threatened foreclosure, delivered to an assignee of the bond and mortgage his check and promissory note for the balance due and received a receipt stating that the check and note had been received "as additional security," and that when collected the proceeds should be held as such, and that if the balance due on the bond should be collected from any other person liable thereon it should be paid over to the mortgagor, a subsequent payment of the check and note did not operate as a payment in full satisfaction of the bond and mortgage so as to constitute a defense in a suit for foreclosure by a subsequent holder.⁴⁴

P. Extension of payment.

An agreement, based upon a sufficient consideration extending the time of the payment of a mortgage, is a valid defense to an action of foreclosure commenced before the time to which the payment of the mortgage debt has been extended.⁴⁵ Hence, an answer which admits the allegations of the complaint, accompanied by a denial that the principal is due, and an allegation that an extension was granted, is not frivolous.⁴⁶ But a promise to forbear, or extend the time of payment of a debt actually due, based upon a promise of the debtor to pay the sum with interest on a later date, does not constitute a defense in law to the foreclosure of a mortgage securing such debt.⁴⁷ And an agreement to extend the time of payment, in consideration of preventing the foreclosure of another mortgage, which is in fact foreclosed, does not constitute a defense.⁴⁸

The receipt of interest upon a mortgage indebtedness in advance of the time that the same became due is *prima facie* evidence of an agreement on the part of the mortgagee to extend the time of payment until the expiration of the period for which the interest was received, which, however, may be rebutted by proof of facts and circumstances showing that such agreement was not made.⁴⁹

44. *Morrison v. Schmeman*, 166 App. Div. 264, 151 N. Y. Supp. 607, *aff'd*, 222 N. Y. 569.

45. *Krebs v. Carpenter*, 124 App. Div. 755, 109 N. Y. Supp. 482; *Macauley v. Hayden*, 48 Misc. 21, 96 N. Y. Supp. 64. See also, *Briggs v. Weeks*, 98 App. Div. 487, 90 N. Y. Supp. 853.

46. *Beach v. Shanley*, 35 App. Div.

566, 55 N. Y. Supp. 130.

47. *Repelow v. Walsh*, 98 App. Div. 320, 90 N. Y. Supp. 651.

48. *Priest v. Gumprecht*, 81 App. Div. 631, 80 N. Y. Supp. 759, *aff'd* without opinion, 178 N. Y. 595.

49. *Germania Life Insurance Co. v. Casey*, 98 App. Div. 88, 90 N. Y. Supp. 418, *aff'd*, 184 N. Y. 554.

Q. Statute of limitations.

An action to foreclose for simple contract debt which a mortgage was given to secure is not barred in six years, but no judgment can be had for deficiency after such time.⁵⁰ When a vendee in an unsealed instrument for the sale of real estate continues in possession, claiming under an executory contract, an action to foreclose the contract is not barred by the lapse of six years between the last payment and the commencement of the action.⁵¹

An action to foreclose a mortgage may be barred, although an action can be maintained on the bond to which it is collateral.⁵² The time during which a mortgagor, who continues to own the property, is absent from the State, is not a part of the time limited for the commencement of an action of foreclosure.⁵³

When the statute is pleaded, the burden is on the plaintiff to show that the last payment of interest was made within twenty years.⁵⁴

A payment of interest or part of the principal renews a mortgage so that an action may be brought to enforce it within twenty years after such last payment, and where there are several persons interested in the equity of redemption, a payment by one of them keeps alive the right of entry not only against him, but also against all other owners of the equity.⁵⁵

R. Defective title conveyed to mortgagor.

The fact that the mortgagor of a purchase money mortgage received a defective title from the mortgagee, as a general rule, affords no defense to the foreclosure of the mortgage.⁵⁶ If the mortgagor has remained in undisturbed

50. *Huribut v. Clark*, 57 Hun, 558, 33 St. Rep. 354, 11 N. Y. Supp. 417, aff'd, 128 N. Y. 295.

Land in another State.—Where residents of New York executed a bond to resident of New Jersey, secured by mortgage on property in the latter State, and the mortgage was foreclosed in that State, the rights of the party under the contract are governed by the laws of New Jersey, requiring action for deficiency to be brought within six months after foreclosure sale. *Stumpf v. Hollahan*, 101 App. Div. 383, 91 N. Y. Supp. 1062, aff'd without opinion, 185 N. Y. 550.

51. *Plett v. Willson*, 23 St. Rep. 879, 4 N. Y. Supp. 507.

52. *Fowler v. Wood*, 78 Hun, 304, 60 St. Rep. 176, 28 N. Y. Supp. 976; aff'd, 150 N. Y. 584.

53. *Simonson v. Nafis*, 36 App. Div. 473, 55 N. Y. Supp. 449.

54. *United States Trust Co. v. Stanton*, 76 Hun, 32, 27 N. Y. Supp. 614, 59 St. Rep. 601; aff'd, 145 N. Y. 620.

55. *Clute v. Clute*, 197 N. Y. 439.

56. *National Fire Ins. Co. v. McKay*, 21 N. Y. 191; *Sanford v. Travers*, 40 N. Y. 140; *Merchants' National Bank v. Snyder*, 52 App. Div. 606, 65 N. Y. Supp. 994; aff'd, without opin-

possession of the property, the defect in the title is generally immaterial.⁵⁷ The grantee's remedy, if any, is an action upon the covenants of his deed.⁵⁸

It is not a defense to the foreclosure of a purchase-money mortgage that the original mortgagee failed to carry out an agreement made at the time to satisfy a judgment which was an apparent lien upon the premises where no steps have been taken to enforce such judgment and the defendants have suffered no injury thereby.⁵⁹ A breach by the mortgagee of a covenant to free the property from liens is not a defense though it may be a counterclaim in an action to foreclose a mortgage.⁶⁰ It does not affect the situation that the owner of a title paramount to the mortgagee has commenced an action for the possession of the premises.⁶¹ A defense of defect of title, which does not aver eviction, may be said to be frivolous.⁶² The mortgagor, however, may defend if he has been kept out of possession, or if he surrenders to a paramount title or after a judgment of eviction.⁶³

Where the grantor has taken a mortgage for deferred payments and delivered a deed to the grantee, containing a covenant for quiet enjoyment, the act of the grantor in breaking into and entering the premises, and depriving the grantee of the enjoyment thereof, it being a breach of the covenant for quiet and peaceful possession, constitutes a defense to an action to foreclose the mortgage, and entitles the grantee in an action for foreclosure to recover on his counterclaim the amount paid by him to the grantor under the contract.⁶⁴

ion, 170 N. Y. 565; *Parkinson v. Jacobson*, 13 Hun, 317; *aff'd*, 74 N. Y. 88; *Dime Savings Bank v. Crook*, 29 Hun, 671; *Farnam v. Hotchkiss*, 2 Keyes, 9; *Curtis v. Bush*, 39 Barb. 661.

57. *McConihe v. Fales*, 107 N. Y. 404; *Peabody v. Kent*, 213 N. Y. 154; *Shire v. Plimpton*, 50 App. Div. 117, 63 N. Y. Supp. 568; *Meserole v. Williams*, 153 App. Div. 306, 137 N. Y. Supp. 1046; *Edwards v. Bodine*, 26 Wend. 109; *Tallmadge v. Wallis*, 25 Wend. 107; *Banks v. Walker*, 3 Barb. Ch. 438; *Burke v. Nichols*, 2 Keyes, 670; *Parkinson v. Sherman*, 74 N. Y. 88; *Ryerson v. Willis*, 81 N. Y. 277.

58. *Merchants' Nat. Bank v. Snyder*, 52 App. Div. 606, 65 N. Y. Supp. 994; *aff'd*, without opinion, 170 N. Y. 565.

59. *Soule v. Dixon*, 17 St. Rep. 360, 1 N. Y. Supp. 697.

60. *McCrea v. Connor*, 30 App. Div. 598, 52 N. Y. Supp. 231.

61. *Platt v. Gilchrist*, 3 Sandf. 118.

62. *Parkinson v. Jacobson*, 13 Hun, 317; *aff'd*, 74 N. Y. 88.

63. *Withers v. Powers*, 2 Sandf. Ch. 350; *York v. Allen*, 30 N. Y. 104; *Coudry v. Coit*, 44 N. Y. 382; *Simers v. Saltus*, 3 Den. 214; *Dyett v. Pendleton*, 8 Cow. 727.

64. *Cassada v. Stabel*, 98 App. Div. 600, 90 N. Y. Supp. 533.

S. Condemnation.

An action to foreclose a mortgage on premises in the city of New York is not maintainable after the title had passed to the city under a condemnation of the mortgaged premises.⁶⁵ But proof of the mortgage in condemnation proceedings does not in all cases bar its foreclosure.⁶⁶

T. Estoppel to assert defense.

A grantee assuming a mortgage is estopped from denying its existence and validity.⁶⁷ For example, he cannot set up usury in the original transaction.⁶⁸ A purchaser of mortgaged premises who takes the deed subject to the mortgage is estopped from contesting the consideration or validity of the mortgage.⁶⁹

The mortgagee may be estopped by his declarations from setting up an otherwise valid defense.⁷⁰ A mortgagee who upon assignment covenanted that a certain sum was due, the payment of which was guaranteed, is estopped from setting up that the mortgage debt had been repaid to him prior to the assignment.⁷¹ But a mortgagee is not estopped to enforce his mortgage, as against a party acquiring the interest of the mortgagor, by reason of the fact that the latter believed that the effect of a prior decision, in an action to foreclose the mortgage, was that the mortgage was not a lien on the land.⁷²

The mortgagor or mortgagee or those claiming under him may be estopped by a certificate that there is no defense to a mortgage.⁷³ The declarations of a deceased mortgagor, while he was in possession of the premises, as to the validity of the mortgage are admissible against him and those succeeding to his interest.⁷⁴

Where a party attempted to have a sale of land set aside for fraud, and the contract was held to be free from fraud,

65. *Hill v. Wine*, 35 App. Div. 520, 54 N. Y. Supp. 892; *Bryan v. Altieri*, 36 App. Div. 623, 55 N. Y. Supp. 152.

66. *Weeks v. McCormick*, 16 App. Div. 432, 45 N. Y. Supp. 30.

67. *Parkinson v. Jacobson*, 13 Hun, 317; *aff'd*, 74 N. Y. 88; *Haile v. Nichols*, 16 Hun, 37.

68. See, *supra*, Art. VI-L, Usury.

69. *McConihe v. Fales*, 107 N. Y. 404.

70. *Hoeffler v. Westcott*, 15 Hun,

243; *Johnson v. Parmely*, 14 Hun, 398; *Norris v. Wood*, 14 Hun, 196.

71. *Gans v. McGowan*, 41 App. Div. 461, 58 N. Y. Supp. 951.

72. *Staley v. Nellis*, 188 App. Div. 325, 177 N. Y. Supp. 112.

73. *Real Estate Trust Co. v. Rader*, 53 How. Pr. 231; *Smyth v. Lombardo*, 15 Hun, 415; *Smyth v. Munro*, 84 N. Y. 354; *Weyh v. Boylan*, 23 Alb. L. Jour. 513.

74. *Staley v. Nellis*, 188 App. Div. 325, 177 N. Y. Supp. 112.

it was held that the party was not, by such an action, estopped from enforcing a mortgage given in pursuance of the contract.⁷⁵

U. Supplemental answer.

Upon a trial in foreclosure a defendant may be permitted to serve a supplemental answer in a proper case.⁷⁶

V. Cross-answers between defendants.

An answer tendered by a defendant in foreclosure can only be the basis of the determination of the rights of the defendants between themselves, in a case where they have appeared and answered, in reference to a claim made against them by plaintiff, and as part of the adjustment of that claim, and where an issue is formed upon the facts involved in and brought out on the litigation and investigation of that claim.⁷⁷ They cannot answer litigating claims, as among themselves, to a surplus which may arise on the sale, unless, for some reason, it is necessary to obtain a determination of their respective rights before the sale.⁷⁸ Defendants who do not set up any equities against the plaintiff should not be allowed to litigate between themselves, before judgment, the question of their priorities of right in the fund, or their equities, but plaintiff should have the usual judgment.⁷⁹

If an issue is raised by one defendant against any other defendant, the answer must be duly served on the co-defendant to be available.⁸⁰

The relief which defendants may have against each other in foreclosure must be based upon the facts involved in the allegations of plaintiff's claim and as part of its adjustment, and within those limits such relief, if demanded in the answers, may be granted.⁸¹

A defendant, on a foreclosure of real property, will be compelled to account and reconvey under an agreement that, when it gets its money out of the property, the balance shall belong to the mortgagor, where it appears that it has received more than the amount of its claims, with interest, costs, and

75. *Koke v. Balken*, 15 App. Div. 415, 44 N. Y. Supp. 426.

76. *Knickerbocker Life Ins. Co. v. Nelson*, 78 N. Y. 137.

77. *Lansing v. Hadsall*, 26 Hun, 619.

78. *Union Ins. Co. v. Van Rensselaer*, 4 Paige, 85; *Field v. Maghee*, 5 Paige, 539.

79. *Swart v. Bement*, 4 Abb. Ct.

App. Dec. 253; *Meaman v. Dickson*, 1 Abb. N. C. 307; *Miller v. Case*, Clarke's Ch. 395.

80. *Meigs v. Willis*, 66 How. Pr. 466.

81. *Binghamton Savings Bank v. Binghamton Trust Co.*, 85 Hun, 75, 66 St. Rep. 40, 32 N. Y. Supp. 657.

expenses from a private sale or exchange of a part of the mortgaged premises.⁸²

W. Counterclaim.

A set-off or counterclaim may be allowed in an action to foreclose a mortgage;⁸³ but it must be of a debt due and payable at the commencement of the action.⁸⁴ Demands purchased after the commencement of the suit cannot be set off.⁸⁵

A defendant who is personally liable for the debt, or whose land is bound by the lien, may plead a counterclaim.⁸⁶ A guarantor of the bond may counterclaim a debt due to the mortgagor or principal debtor.⁸⁷

A counterclaim in favor of a deceased mortgagor may properly be interposed in foreclosure brought against his administrator and purchasers, who did not assume the mortgage, although no judgment for deficiency is demanded, as the personal estate of the mortgagor is liable for any deficiency, and to the purchasers whose title would be defeated by the foreclosure sale.⁸⁸ If the mortgagee is guilty of a fraud on the mortgagor, the latter may counterclaim his damages resulting therefrom.⁸⁹ Damages sustained by the mortgagor by reason of the breach by the mortgagee of covenants in the conveyance to the mortgagor, are a proper counterclaim.⁹⁰

82. *Easling v. Independent Brewing Co.*, 160 N. Y. Supp. 529.

83. *Hutzler v. Richter*, 13 App. Div. 592, 43 N. Y. Supp. 679; *Thornton v. Moore*, 26 Misc. 120, 56 N. Y. Supp. 1100; *aff'd*, without opinion, 41 App. Div. 617, 58 N. Y. Supp. 1150.

84. *Richards v. La Tourette*, 119 N. Y. 54; *Holden v. Gilbert*, 7 Paige, 208.

Deceased mortgagee.—On foreclosure of a mortgage executed by defendant to plaintiff's testator to secure a payment agreed to be made in a specified time after such testator's death, a debt due defendant from the testator, in his lifetime, cannot be set off, but the funeral expenses paid by defendant can be. *Patterson v. Patterson*, 59 N. Y. 574.

85. *Knapp v. Burnham*, 11 Paige, 330.

86. *Lathrop v. Godfrey*, 3 Hun, 739.

87. *Artcher v. Douglass*, 5 Den. 509;

Bray v. Ransom, 12 N. Y. 466; *Bathgate v. Haskin*, 59 N. Y. 533.

88. *Thornton v. Moore*, 26 Misc. 120, 56 N. Y. Supp. 1100; *aff'd*, without opinion, 41 App. Div. 617, 58 N. Y. Supp. 1150.

89. *Abbott v. Allen*, 2 Johns. Ch. 519; *Greene v. Tallman*, 20 N. Y. 191; *Ludington v. Slauson*, 38 Super. Ct. 81. See, also, *Sherwood v. Fincke Co.*, 196 App. Div. 97, 187 N. Y. Supp. 755.

Bonus on loan.—Where it appears on foreclosure that the loan was obtained by an agent who charged the borrower an exorbitant bonus without the knowledge of his principal, the amount of such bonus will be credited to the borrower in the foreclosure proceedings. *Bliss v. Sherrill*, 42 N. Y. Supp. 432.

90. *Sanford v. Travers*, 40 N. Y. 140; *Simon v. Neef*, 160 App. Div. 46, 144 N. Y. Supp. 753; *Merritt v. Gou-*

Where the mortgagee is in possession, it is proper in an action for foreclosure to charge him with the rents and profits of the land which he has received, and if he has collected rents and profits sufficient to pay the mortgage in full, the complaint should be dismissed without costs.⁹¹

The transfer by a mortgagee of a note of the mortgagor which, when paid, was to be applied on the mortgage, operates as a payment so long as it remains in the hands of the transferee and cannot be produced by the mortgagee or the assignee of the mortgage, and the amount thereof should be deducted on foreclosure from the amount otherwise due on the mortgage.⁹² In a foreclosure against the devisees of a deceased mortgagor, moneys misappropriated by the mortgagee as trustee of the estate and guardian of the defendants should be deducted from the amount of the mortgage and an accounting may be ordered for that purpose.⁹³

ley, 35 St. Rep. 277, 12 N. Y. Supp. 132; aff'd, 106 N. Y. 673.

No eviction.—Where in an action to foreclose a purchase-money mortgage brought by an assignee, the grantee of the owner of the equity sets up as a counterclaim certain alleged breaches of a covenant against incumbrances contained in the deed from the mortgagee, but it appears that the grantee is in undisturbed possession; that no action is pending for possession by an adverse claimant, and that the alleged defects in title do not amount to a total failure of consideration, and there is no allegation in the answer of fraud in the sale of the premises; that the owner had lost the land in whole or in part, or that he had suffered any damage by breach of the covenant, the grantee is not entitled to a trial upon the counterclaim. A judgment on the pleadings in favor of plaintiff will be affirmed. *Kouwenhoven v. Gifford*, 144 App. Div. 355, 128 N. Y. Supp. 1129.

Action at law pending.—Where a grantor of land sues to foreclose a purchase-money mortgage executed by the grantee, the latter, holding under a full covenant deed, cannot counterclaim damages sustained because of an alleged breach of covenant where there is pending and undetermined a

legal action brought by the grantee against the grantor to recover damages for said breach of covenant if defendant neither asks nor offers to discontinue the prior action. Under the circumstances the defendant will be held to have elected to pursue his remedy in the prior action and thus to have waived his counterclaim in the suit of foreclosure. *Bailey v. Fear*, 182 App. Div. 331, 169 N. Y. Supp. 581.

Improvements.—When an action to foreclose a purchase-money mortgage is defended upon the ground that the grantors possessed no valid power to convey, which fact was apparent to the grantee when he took the conveyance and gave the mortgage, and there is no claim of eviction by paramount title or an unconditional offer of surrender of the mortgaged premises, there is no equitable basis for imposing the expense of improvements on the mortgagee. *Peabody v. Kent*, 213 N. Y. 154.

91. *Smith v. Cross*, 85 Hun, 58, 32 N. Y. Supp. 677, 66 St. Rep. 61.

92. *Fitch v. McDowell*, 145 N. Y. 498, 65 St. Rep. 369, 40 N. E. Rep. 205.

93. *Ingalsbe v. Murphy*, 84 Hun, 181, 32 N. Y. Supp. 569, 65 St. Rep. 792.

Where a prior mortgage was made to a defendant in the foreclosure, his claim to foreclose his mortgage is available as a counterclaim.⁹⁴ A defendant whose liability is not in question and who disclaims all interest in the mortgaged premises cannot demand a judgment against plaintiff on a contract.⁹⁵ An allegation in an answer of usury and a demand for the cancellation of the bond and mortgage does not constitute a counterclaim.⁹⁶ And an allegation that a mortgage is invalid for any reason does not call for a reply.⁹⁷

Allegations in an answer in foreclosure of facts not constituting a defense, coupled with a demand for a money judgment against plaintiff, do not constitute a counterclaim, where the complaint does not demand a personal judgment against the answering defendant.⁹⁸

X. Relief granted defendants.

No question of title adverse to the mortgagor can be litigated in an action to foreclose, and the only effect of a judgment therein is to vest in the purchaser the title of the mortgagor at the time of making the mortgage.⁹⁹ But, if one holding a subsequent mortgage is made a defendant, he may answer and claim to have prior mortgages held by him paid from the proceeds of the sale before paying plaintiff's mortgage.¹

A subsequent lienor who is made a party defendant has no right to require a determination of the amount of his claim where he has not served his answer upon the other defendants, but is relegated to the usual proceeding for the distribution of surplus moneys, if any there be.²

94. *Metropolitan Trust Co. v. Tona-wanda, etc.*, R. R. Co., 43 Hun, 521, 7 St. Rep. 90, 18 Abb. N. C. 368.

95. *National Fire Ins. Co. v. McKay*, 21 N. Y. 191.

96. *Barthet v. Elias*, 2 Abb. N. C. 364; *Equitable Life Ins. Co. v. Cuyler*, 12 Hun, 247; *aff'd*, 75 N. Y. 511.

97. *Agate v. King*, 17 Abb. 159; *Caryl v. Williams*, 7 Lans. 416; *Bates v. Rosekrans*, 37 N. Y. 409; *Vassar v. Livingston*, 13 N. Y. 249.

98. *Merchants' National Bank v. Snyder*, 52 App. Div. 606, 65 N. Y. Supp. 994; *aff'd without opinion*, 170 N. Y. 565.

99. *Bowery Savings Bank v. Foster*, 11 Wkly. Dig. 493; *Dime Savings Bank*

Hooney, 58 N. Y. 463; *Merchants Bank v. Thompson*, 55 N. Y. 7; *Meigs v. Willis*, 66 How. Pr. 466; *Emigrant, etc., Bank v. Goldman*, 75 N. Y. 127; *Emigrant, etc., Bank v. Clute*, 33 Hun, 82; *Corning v. Smith*, 6 N. Y. 82; *Lewis v. Smith*, 9 N. Y. 502; *Baker v. Burton*, 67 Barb. 458; *Lee v. Parker*, 43 Barb. 611.

The validity of a trust deed executed prior to the execution of the mortgage cannot be tried in foreclosure. *Helck v. Reinheimer*, 23 Wkly. Dig. 473.

1. *Doctor v. Smith*, 16 Hun, 245. See, also, *Lala v. Oldacre*, 160 N. Y. Supp. 435.

2. *Clement v. Congress Hall*, 72

A mistake occurring by accident, fraud, or otherwise, may be corrected in the action, on satisfactory proof being made.³

Thus, a defendant may have a covenant struck out of a deed binding him personally for the debt.⁴ Or, in a proper case, a clause whereby a grantee assumes the mortgage may be cancelled as inserted by mistake.⁵

It is proper to determine a controversy between plaintiff and the grantee of the mortgagor, as to the right of the latter to remove an erection from the land, and if the right is established, the court may protect it in the judgment by ordering the sale subject to the right of removal before the sale.⁶

The owner of the equity in property subject to a mortgage may, where foreclosure is brought, pay the amount due and require an assignment of the mortgage to him, instead of being obliged to pay the mortgage debt and take satisfaction thereof.⁷

Where a person residing on the premises, although not occupying position of a surety, is entitled upon payment of the amount due to an assignment of a bond and mortgage in process of foreclosure, and may thus avoid paying and satisfying the mortgage, he must present legal and equitable grounds for such relief.⁸ Where the answer sets up that the plaintiff has other security for the debt, and prays that defendant may be subrogated to plaintiff's rights therefor, the question of subrogation is properly raised.⁹

3. Gillespie v. Moon, 2 Johns. Ch. 585; Andrews v. Gillespie, 47 N. Y. 487.

4. Albany City Bank v. Burdick, 87 N. Y. 48.

5. Arnstein v. Bernstein, 127 App. Div. 550, 111 N. Y. Supp. 987.

Parol evidence.—Where a grantee of mortgaged premises alleges as a defense to an action to foreclose a mortgage that the assumption clause was fraudulently inserted in the deed without his knowledge or consent, parol evidence as to what was said between the parties to the deed prior to its

execution, intending to show the actual agreement, is admissible. Van Alstyne v. Smith, 82 Hun, 382, 63 St. Rep. 595, 31 N. Y. Supp. 277.

6. Brown v. Keeney Settlement Cheese Association, 59 N. Y. 242.

7. Stewart v. Smith, 29 Misc. 235, 60 N. Y. Supp. 329, distinguishing Twombly v. Cassidy, 82 N. Y. 155.

8. Hover v. Hover, 21 App. Div. 565, 48 N. Y. Supp. 395; *aff'd* on opinion below, 155 N. Y. 666.

9. Sternbach v. Friedman, 34 App. Div. 534, 54 N. Y. Supp. 608.

ARTICLE VI.

MISCELLANEOUS MATTERS OF PRACTICE.

A. Service of process.

A foreclosure suit may be commenced by service on defendants in any county in the State, or by publication against non-residents.¹⁰ The court obtains no jurisdiction of a non-resident defendant in a suit to foreclose a mortgage unless he is served by publication, or voluntarily appears in person or by attorney.¹¹ But a service by publication in due form bars the defendants, even if they are infants.¹² If affidavits upon which an order for service is sought state facts tending to show that the defendant had become and is a non-resident, the judge has jurisdiction to grant or refuse to make an order, and his determination that the defendant is a non-resident is conclusive.¹³

Where the service was by publication, a failure to file the order for publication, and the papers upon which it was made, is not a jurisdictional defect and is cured by an order permitting the filing *nunc pro tunc*.¹⁴ But a jurisdictional

10. *Bates v. Reynolds*, 7 Bosw. 685; *Spyer v. Fisher*, 5 J. & S. 93; *Porter v. Lord*, 13 How. Pr. 254.

11. *Hope v. Shevill*, 137 App. Div. 86, 122 N. Y. Supp. 127; *aff'd*, 204 N. Y. 563.

Partners.—Where extrinsic proof is necessary to show parties as partners, it is proper to serve one absent from the State by publication, and the expense is properly allowable. *Cheevers v. Damon*, 37 St. Rep. 904, 13 N. Y. Supp. 452.

12. *Wheeler v. Scully*, 50 N. Y. 667.

13. *Wichman v. Aschpurwis*, 14 Civ. Pro. 88.

14. *Fink v. Wallack*, 109 App. Div. 718, 96 N. Y. Supp. 543.

Set aside order for publication.—In an action to foreclose a prior mortgage, the holders of the subsequent mortgage have a standing to move to set aside the order granted for service by publication, for irregularity. *Brandow v. Vroman*, 29 App. Div. 597, 51 N. Y. Supp. 943.

order directing the service of a summons by publication upon a non-resident defendant, without the State, conformed to the statute (Code Civ. Pro., § 440) in every respect except that, by mistake and clerical error, the words "notice of object of action hereto annexed" were used in the place of the words "complaint hereto annexed," required by the statute, and the summons was duly published, together with the notice required by the statute, and the summons, complaint, notice of object of action, order of publication and affidavits upon which it was granted were duly served upon such defendant by mail, the defendant was thereby fully and fairly apprised that she was a party to the action and that her interest in the property would be cut off by the judgment to be obtained in the action and sale thereunder; the Supreme Court had power, therefore, after judgment of foreclosure, upon the papers in the action and proof of the facts stated, to amend the order of publication *nunc pro tunc*

defect cannot be cured by the entry of an order *nunc pro tunc*.¹⁵ Section 217 of the Civil Practice Act, allowing a defendant to defend upon a subsequent appearance, applies to an action of foreclosure, and pursuant to such section the subsequent appearance does not affect the title of a purchaser in good faith.¹⁶

Under the old chancery practice, where the wife had only an inchoate right of dower, service of summons on the husband was good for both husband and wife.¹⁷ That rule has been abolished and where the wife is not personally served, a judgment recovered in the action is void as to her, and where a mortgage given by a man and wife is foreclosed, and the wife is not served with the process in the foreclosure action, she may, after a sale of the mortgaged premises and during the lifetime of the husband, maintain, because of her inchoate dower interest, an action to redeem the mortgaged premises.¹⁸

B. Notice of no personal claim.

Under the provisions of section 1478 of the Civil Practice Act, where no personal claim is made against any defendant, a notice, setting forth the object of the action, a description of the property affected by it and that no personal claim is made against him, subscribed by the plaintiff's attorney, may be served with the summons. If the person so served unreasonably defends the action, costs may be awarded against him. If, after being served with notice of no personal claim in foreclosure and stipulation that nothing in the judgment shall affect her claim to dower, she answers, neither party will be entitled to costs as against the other.¹⁹

"complaint annexed hereto" in place of the words "notice of object of action hereto annexed," since the order was not void, by reason of such error, but irregular, and the court has ample power, either before or after judgment in furtherance of justice, to amend, or cure, any irregularity in process, pleading or proceeding. *Mishkind-Feinberg Realty Company v. Sidersky*, 189 N. Y. 402.

15. *Barleycorn v. Woolley*, 109 Misc.

224, 179 N. Y. Supp. 518.

16. *Zarkowski v. Schroeder*, 71 App. Div. 526, 75 N. Y. Supp. 1021.

17. *Feitner v. Lewis*, 119 N. Y. 131; *Ferguson v. Smith*, 2 Johns. Ch. 139; *Leavitt v. Cruger*, 1 Paige, 421.

18. *Taggart v. Rogers*, 49 Hun, 265, 1 N. Y. Supp. 900; *Campbell v. Ellwanger*, 81 Hun, 259, 30 N. Y. Supp. 792.

19. *Barker v. Burton*, 67 Barb. 459,

* **C. Form of notice of no personal claim.**

(Title.)

(Summons in usual form.)

To the above named defendants.....:

Take notice that the summons herewith served upon you in this action is issued upon a complaint for the foreclosure of a mortgage executed by to, dated the day of, 19.., and recorded in the office of the clerk of the county of, in liber of mortgages at page, on the day of, 19.., to secure the payment of the sum of, with interest from the day of, 19.., upon the following described premises (insert description) and a personal claim is not made against you or any of the defendants to the above-entitled action except

.....

Attorney for Plaintiff.

D. Guardian ad litem.

Sections 201-208 of the Civil Practice Act and sections 40-44 of the Rules of Civil Practice provide for guardians *ad litem* of infants and incompetent persons.²⁰ An infant must be served with process according to the provisions of the Civil Practice Act;²¹ but, if he is so served but no guardian appointed, the judgment is voidable though not absolutely void.²² In such case, where judgment is obtained by fraud or collusion, an action may be maintained on the part of the infant to set it aside.²³ Where a guardian *ad litem* had no notice of his appointment until after final judgment, he may then have leave to come in and answer; but not in case the plaintiff consents to strike out the name of the infant as a defendant.²⁴ An appearance by one appointed guardian *ad litem* for an infant defendant, who has not been served with process, is not a voluntary appearance, which is equivalent to the personal service of a summons.²⁵

The neglect of a guardian *ad litem* to interpose a formal answer in an action to foreclose is a mere irregularity which

20. Guardian for adult.—A sale in foreclosure is not rendered defective because the plaintiff procured the appointment of a guardian *ad litem*, who appeared in the action, even though such defendant was an adult. *Union Trust Co. v. Driggs*, 62 App. Div. 213, 70 N. Y. Supp. 947.

21. *Ingersoll v. Mangam*, 84 N. Y. 622.

22. *Croghan v. Livingston*, 17 N. Y.

218; *Bloom v. Burdick*, 1 Hill, 130; *Wright v. Miller*, 8 N. Y. 9; *McMurray v. McMurray*, 66 N. Y. 175; *Feitner v. Hoeger*, 15 St. Rep. 376.

23. *McMurray v. McMurray*, 66 N. Y. 175.

24. *Farmers' Loan and Trust Co. v. Erie Railway Co.*, 9 Abb. N. C. 264.

25. *Ingersoll v. Mangam*, 84 N. Y. 622.

the court may cure at any time by permitting an answer to be filed *nunc pro tunc*, and its absence does not invalidate the judgment.²⁶

Although section 206 of the Civil Practice Act empowers the court to designate a person to act as guardian *ad litem* for a non-resident infant defendant under certain circumstances, such order can be granted only where the infant has already been made defendant, and is residing out of the State, or is temporarily absent therefrom.²⁷

E. Form of general answer of infant defendant.

(Title.)

The defendant,, by, his guardian *ad litem*, answering the complaint of the plaintiff above named, says that he is a stranger to all and singular the matters and things in said complaint set forth, and that he is an infant under the age of twenty-one years, and claims such interest in the premises as he is entitled to; and he submits his rights and interests in the matters in question to the protection of the court.

Dated, the day of, 19...

.

Guardian Ad Litem for

F. Abatement and revival.

Where any of the parties die before judgment, the action should be revived, and continued in the names of their personal representatives.²⁸ But the death of any of the defendants subsequent to judgment will not affect the action.²⁹ Where the mortgagor or other party against whom no judgment for deficiency is demanded dies after the entry of judgment of sale, the final judgment should be entered in the names of the original parties.³⁰ An order may be made after entry of a decree of foreclosure providing for carry-

26. *Hopkins v. Frey*, 64 Hun, 213, 46 St. Rep. 133, 18 N. Y. Supp. 903.

27. *Gruner v. Rufner*, 134 App. Div. 837, 119 N. Y. Supp. 942.

Designation of person to receive summons.—Where an order appointing a guardian *ad litem* for an infant defendant under the age of fourteen years failed to designate the person to receive service of the summons on behalf of the infant, as required by section 426 of the Code of Civil Procedure, the court was without jurisdiction to render a judgment which will bar the infant from all interest in the property. Section 206 of the Civil

Practice Act seems to make such order discretionary instead of mandatory. *Pines v. Sullivan*, 103 Misc. 443, 170 N. Y. Supp. 252.

28. *Gerry v. Post*, 13 How. Pr. 118. See, also, *Grant v. Griswold*, 21 Hun, 509; dismissed, 82 N. Y. 569.

29. *Harrison v. Simonds*, 3 Edw. Ch. 394; *Lynde v. O'Donnell*, 21 How. Pr. 34; *Hayes v. Thomas*, 56 N. Y. 521.

30. *Wasson v. Hoff*, 27 Misc. 55, 57 N. Y. Supp. 953; *Hays v. Thomas*, 50 N. Y. 521; *Lynde v. O'Donnell*, 12 Abb. 286; *Harrison v. Simons*, 3 Edw. 394.

ing out the same after the death of the defendant mortgagor, without reviving an action against his heirs or representatives.³¹

Where a mortgagor, who is personally liable for a deficiency, dies, his executor may be made party to a suit for a foreclosure, and a decree may be made that the deficiency be paid out of the assets in his hands in due course of administration.³² Nor does the death of the plaintiff after judgment and before sale make it necessary to stay proceedings or revive,³³ but it is otherwise, when the plaintiff dies before judgment.³⁴ Where the sole plaintiff dies after the report of the referee as to amount due, the entry of judgment thereafter in the name of the original plaintiff, and a sale without revivor by the personal representatives, are mere irregularities which will not defeat the title of the purchaser.³⁵

G. Substitution of parties.

There need be no amendment on account of an assignment of the decree.³⁶ On a substitution of plaintiffs, notice should be given to all the defendants, whether they have appeared or not.³⁷ A trustee appointed pending an action of foreclosure, in place of the trustee holding the equity of redemption, who had resigned, cannot be added as a new party, but should be substituted in place of the former trustee.³⁸

H. Appearance of defendant.

A defendant may serve notice of appearance after judgment, and will then be entitled to notice of all subsequent proceedings.³⁹ An attorney for a party has a right to act for him until final judgment and payments made to him upon an interlocutory judgment in foreclosure are binding on his client.⁴⁰

I. Consolidation.

It is said foreclosure suits may be consolidated, but the motion therefor must be made before the causes are brought to trial.⁴¹ But when the foreclosures are against different

31. *Wing v. De La Rionda*, 125 N. Y. 678.

32. *Glacius v. Fogel*, 88 N. Y. 434.

33. *Lynde v. O'Donnell*, 12 Abb. Pr. 286.

34. *Gerry v. Post*, 13 How. Pr. 118.

35. *Smith v. Joyce*, 11 Civ. Pro. 257.

36. *Laing v. Titus*, 18 Abb. 388.

37. *McLean v. Tompkins*, 18 Abb.

38. *Griswold v. Caldwell*, 14 Misc. 299, 25 Civ. Pro. 122, 70 St. Rep. 682.

35 N. Y. Supp. 1057.

39. *Martine v. Lowenstein*, 6 Hun, 225; appeal dismissed, 68 N. Y. 456.

40. *Mills v. Stewart*, 88 Hun, 503, 34 N. Y. Supp. 786, 68 St. Rep. 584.

41. *Eleventh Ward Savings Bank v. Hay*, 55 How. Pr. 438. *Contra*, *Beach v. Ruggles*, 6 Abb. N. C. 69; *Selkirk*

premises, although against the same parties, consolidation will be refused.⁴²

J. Compelling plaintiff to proceed.

An application to compel the plaintiff to proceed with a number of foreclosure suits, the conduct of which is subject to special agreement, requires notice to all of the parties.⁴³ Where a judgment for foreclosure and sale has been entered, but the owner of the judgment refuses to sell, and the mortgagor has conveyed the premises to a grantee, who has covenanted to pay the mortgage, the right of such mortgagor to an assignment of such decree and mortgage on payment of the amount due may properly be determined on motion in the action.⁴⁴

K. Discontinuance.

A motion to discontinue an action cannot be resisted by a judgment creditor defendant, whose lien upon the mortgaged premises, which was alive at the commencement of the action, has ceased because of the lapse of ten years.⁴⁵

L. Provisional remedies.

An attachment does not issue where a money judgment can be obtained only after the granting of other relief, and hence is an improper remedy in a foreclosure action.⁴⁶ An injunction cannot be issued under section 878 of the Civil Practice Act to restrain the mortgagor from selling his personal property pending the procurement of a deficiency judgment which would be a lien on such personalty.⁴⁷

M. Jury trial.

The parties to a foreclosure suit are not entitled as a matter of right to a trial by jury; it is in the discretion of the court whether issues of fact shall be passed on by a jury to inform the conscience of the court.⁴⁸ A defendant who sets

42. *Kipp v. Delamater*, 58 How. Pr. 183.

43. *Wandell v. Romeyn*, 36 App. Div. 623, 54 N. Y. Supp. 1065.

44. *Howard v. Robbins*, 67 App. Div. 245, 73 N. Y. Supp. 172; *aff'd*, 170 N. Y. 498.

45. *Sherwood v. Ellenstein*, 27 Misc. 30, 57 N. Y. Supp. 99.

46. *Smith v. Mayer*, 105 Misc. 391, 174 N. Y. Supp. 197.

47. *Broadfoot v. Miller*, 106 Misc. 455, 174 N. Y. Supp. 497.

48. *Barker v. Burton*, 67 Barb. 458; *Losee v. Ellis*, 13 Hun, 655; *Knickerbocker Life Ins. Co. v. Nelson*, 8 Hun, 21; *Carroll v. Deimel*, 95 N. Y. 252; *French v. Row*, 77 Hun, 380, 28 N. Y. Supp. 849, 60 St. Rep. 396.

A counterclaim in an equitable action was unknown at common law, and, therefore, the issues raised there-

up the defense of champerty, fraud, intimidation, false representation and maintenance, is not thereby entitled as matter of right to trial by jury.⁴⁹ Where the answers in an action by a trustee set up both legal and equitable defenses, the defendants are not entitled to a trial by jury.⁵⁰

N. Place of trial.

By virtue of section 183 of the Civil Practice Act, an action to foreclose a mortgage must be tried in the county where the property, or some part thereof, is situated.⁵¹ This is the rule, although the money may have been loaned and the mortgage executed in another county.⁵² But, if no objection is made that the place of trial is not in the proper county, the regularity of the proceedings will not be affected.⁵³

O. Evidence.

A plaintiff suing to foreclose a mortgage must prove his ownership of the bond and mortgage in order to recover.⁵⁴ But the possession of a bond and mortgage by the mortgagee is evidence that they are valid and unpaid.⁵⁵

Where a mortgage was executed by husband and wife upon premises in which he had an undivided interest, evidence as to what the mortgagee said to the wife as to the effect of the mortgage upon her interest is not admissible

by are not within the constitutional provision as to trial by jury. *Manhattan Life Ins. Co. v. Hammerstein Opera Co.*, 184 App. Div. 440, 171 N. Y. Supp. 678. Where in a purchase-money mortgage foreclosure the only issues are those arising on a counterclaim for breach of covenant against incumbrances and reply thereto, it is not necessary that such issues be settled before being noticed for trial. *Herb v. Metropolitan Hospital & Dispensary*, 80 App. Div. 145, 80 N. Y. Supp. 552. A defendant in a suit in equity for the foreclosure of a mortgage, a lien upon real estate, who has a counterclaim stating causes of action at law may bring an action at law thereon in which case he has an absolute right to a trial by jury of the issues of fact, but if he sets up his cause of action by way of counterclaim in the suit in equity his right to a trial by jury will rest in the dis-

therefor, not made within twenty days of the joinder of issue as required by Rule 57 of the Rules of Civil Practice may be denied. *Manhattan Life Ins. Co. v. Hammerstein Opera Co.*, 184 App. Div. 440, 171 N. Y. Supp. 678. Where a counterclaim is interposed in foreclosure, defendants are not entitled to a compulsory reference where the same arose against plaintiff's assignor. *City Real Estate Co. v. Foster*, 44 App. Div. 114, 60 N. Y. Supp. 577.

⁴⁹ *Stephens v. Humphreys*, 32 St. Rep. 211, 10 N. Y. Supp. 455.

⁵⁰ *Guaranty Trust Co. v. Robinson*, 31 Misc. 277, 64 N. Y. Supp. 366.

⁵¹ *Binghamton Iron Foundry v. Hatfield*, 43 N. Y. 224; *Gould v. Bennett*, 59 N. Y. 124.

⁵² *Miller v. Hull*, 3 How. Pr. 325.

⁵³ *Marsh v. Lowry*, 26 Barb. 197.

⁵⁴ *Fox v. Bainbridge*, 151 App. Div. 510, 135 N. Y. Supp. 926.

⁵⁵ *Fitzmahoney v. Caulfield*, 25

for the purpose of showing that her estate in the premises was not incumbered by the mortgage, but that she only executed it for the purpose of releasing her inchoate right of dower in her husband's estate.⁵⁶

In an action by the executor of an assignee of the mortgagor, the wife of the mortgagor, who was a party to the mortgage and the notes secured thereby, and against whom a judgment for deficiency is demanded, is incompetent to testify to the giving of a bonus to the mortgagee, since deceased, at the time of giving the mortgage.⁵⁷

Where, in an action by an assignee to foreclose a purchase-money mortgage upon a farm, the heirs of the owner of the mortgaged premises set up the Statute of Limitations as a principal defense, the assignor of the mortgage is not incompetent under section 347 of the Civil Practice Act to testify to payments, made upon the mortgage within twenty years and while he was the owner thereof, by the husband of the owner of the farm who worked and managed it for his wife, and made the payments as her agent and who died prior to the trial.⁵⁸

P. Lost bond or mortgage.

Where in a suit for foreclosure it appears by the terms of the mortgage and is also alleged in the complaint that the bond is the principal security and the mortgage only collateral thereto, the plaintiff must either produce the bond or satisfactorily account for his failure to do so.⁵⁹ The want of possession of the bond, unexplained, will operate as evidence of payment and if payment be alleged as a defense, the mortgagee cannot succeed.⁶⁰ But the plaintiff is not obliged to produce the bond on the trial in order to make out a *prima facie* case where its making, execution, and delivery are admitted by the answer, and the defense set up is payment.⁶¹

A mortgage may be valid as a lien upon the land without a bond.⁶² And where it appears that although the mortgage recited the giving of a bond, no bond was in fact executed and the debt is shown by the statements contained in the mortgage, the non-production of a bond is not fatal to a

56. *Snyder v. Ash*, 30 App. Div. 183, 51 N. Y. Supp. 772.

57. *Danziger v. Deline*, 25 Misc. 635, 56 N. Y. Supp. 354; *aff'd*, 51 App. Div. 618, 64 N. Y. Supp. 1134.

58. *McCarthy v. Stanley*, 151 App. Div. 358, 136 N. Y. Supp. 386.

59. *Alverson v. Marshall*, 159 App. Div. 637, 145 N. Y. Supp. 96.

60. *Bergen v. Urbahn*, 83 N. Y. 49,

61. *Anderson v. Culver*, 127 N. Y. 377.

62. *Gaylord v. Knapp*, 15 Hun, 87.

judgment of foreclosure.⁶³ And even though a bond is recited in the mortgage, it is competent to show none was ever executed.⁶⁴

A mortgagee is entitled to foreclose without producing the bond, where the mortgage contains an admission of indebtedness and a covenant to pay the sum named in the mortgage, and it appears that the mortgage was held by the attorney for the mortgagee, and that it was the attorney's practice to keep the bonds of the mortgagee so as to credit interest thereon, there being no evidence outside the recitals in the mortgage that there was a bond accompanying it.⁶⁵ The loss of the bond may be shown, and if there is a presumption of loss, the mortgagee may have judgment.⁶⁶

Where the mortgage was put in evidence, and the loss of the bond was satisfactorily shown by proof that upon a reassignment to plaintiff of the bond and mortgage by his attorney, to whom an assignment thereof had been made, the bond could not be found, and that plaintiff had neither assigned nor delivered the bond and mortgage to any one since the assignment to his attorney, and that at the commencement of the suit he was the owner of said bond and mortgage, judgment of foreclosure will be awarded for the amount claimed to be due.⁶⁷

In foreclosing a lost bond and mortgage, it is unnecessary to exact from plaintiffs a bond to indemnify the mortgagor from loss or damage, since he may safely pay the mortgagee without the production of the lost instrument, if he has had no notice or knowledge of any assignment.⁶⁸

Q. Foreclosure suit after action on debt.

1. Civil Practice Act, § 1077. Action to foreclose after recovery of judgment for mortgage debt.

Where final judgment for the plaintiff has been rendered in an action to recover any part of the mortgage debt, an action shall not be commenced or maintained to foreclose the mortgage, unless an execution against the property of the defendant has been issued upon the judgment to the sheriff of the county where he resides, if he resides within the state, or if he resides without the state, to the sheriff of the county where the judgment-roll is filed; and has been returned wholly or partly unsatisfied.

63. *Munoz v. Wilson*, 111 N. Y. 295.

64. *Goodhue v. Berrien*, 2 Sandf. Ch. 630; *Bergen v. Urbahn*, 83 N. Y. 49.

65. *Bennett v. Edgar*, 46 Misc. 231, 93 N. Y. Supp. 203.

66. *Stoddard v. Gaylor*, 90 N. Y.

67. *Peterson v. Meyer*, 105 Misc. 719, 175 N. Y. Supp. 92.

68. *Blade v. Noland*, 12 Wend. 173; *Wright v. Wright*, 54 N. Y. 437; *Frank v. Wessels*, 64 N. Y. 155; *Stoddard v. Gailor*, 90 N. Y. 575; *Union Trust Co. v. Olmsted*, 102 N. Y. 729.

2. Effect of section.

Section 1077 applies to a judgment by confession. A sale and judgment which under that section prevents an action to foreclose a mortgage must have been obtained on account of the mortgage debt or some part thereof; it need not be recovered on the bond and mortgage or against the mortgagor.⁶⁹ Under Rule 255 of the Rules of Civil Practice, the complaint in foreclosure must allege whether an action has been brought to recover any part of the debt.⁷⁰

R. Action on debt after foreclosure action.

1. Civil Practice Act, § 1087. Action for mortgage debt subsequent to beginning foreclosure.

While an action to foreclose a mortgage upon real property is pending or after final judgment for the plaintiff therein, no other action shall be commenced or maintained to recover any part of the mortgage debt, without leave of the court in which the former action was brought.

2. General effect of statute.

After the holder of a mortgage has commenced an action of foreclosure, he must generally exhaust his remedy in that action before he can maintain a suit at law.⁷¹ The object of the statute is to prevent the unnecessary multiplicity of actions and to compel a plaintiff to get all the relief he can by way of a personal judgment for deficiency in the one suit.⁷² A party is not entitled as of right to remedies at the same time, both to foreclose a mortgage and to sue on the bond; and, where he fails to establish the validity of the mortgage he is not entitled to recover on the bond sought to be secured by the mortgage although the execution of the bond is averred in the complaint.⁷³ If the plaintiff fails to ask for a deficiency judgment against one of the defendants, or fails to make one liable a party, he cannot maintain a separate action against him for a deficiency without leave of

⁶⁹. *Guilford v. Crandall*, 69 Hun, 465, 52 St. Rep. 633, 23 N. Y. Supp. 465.

⁷⁰. See, *supra*, Article IV.

⁷¹. *Nichols v. Smith*, 42 Barb. 381.

Partition.—On sale in partition, part of the proceeds was deposited to meet decedent's debts; and it was held, that an action to apply the fund to the payment of a deficiency judgment in mortgage foreclosure could not be brought without leave of the court in

which the foreclosure was brought. In such an action the complaint must allege that such leave has been obtained. *United States Life Ins. Co. v. Gage*, 3 N. Y. Supp. 398; *Hauselt v. Fine*, 18 Abb. N. C. 142.

⁷². *Leighton v. Leighton Lea Assn.*, 62 Misc. 73, 114 N. Y. Supp. 918.

⁷³. *Dudley v. The Congregation of the Third Order of St. Francis*, 138 N. Y. 451.

the court.⁷⁴ But leave of the court is not necessary where the foreclosure is by advertisement.⁷⁵ And section 1078 applies only to the original debt which the mortgage was given to secure.⁷⁶ It does not require leave to sue on a judgment duly entered for a deficiency.⁷⁷ A judgment for deficiency may be enforced by an assignee of such judgment without obtaining leave to sue thereon, and although the mortgagee has realized more than the debt by selling the land which he bought at the foreclosure sale.⁷⁸

3. Foreclosure in foreign jurisdiction.

The provision of section 1078 that "while an action to foreclose a mortgage upon real property is pending, or after final judgment for the plaintiff therein, no other action may be commenced, or maintained to recover any part of the mortgage debt without leave of the court," does not apply to a case where the action for foreclosure was brought in a foreign jurisdiction.⁷⁹ The statutory provisions are intended to control the remedy in such cases within the territorial limits of the State, and have no extraterritorial force.⁸⁰ Where bonds of a domestic corporation executed in this State are secured by a mortgage upon real property in a sister State, which property is conveyed under a trust agreement to a domestic trust company, the registrar of

74. *Rutherford Realty Co. v. Cook*, 198 N. Y. 29; *Robert v. Kidansky*, 111 App. Div. 475, 97 N. Y. Supp. 913; *aff'd*, 188 N. Y. 638; *Schofield v. Doscher*, 10 Hun, 582, 72 N. Y. 491.

75. *Bush v. Robbins*, 23 Wkly. Dig. 405.

76. *Fernschild v. Yuengling Brewing Co.*, 18 Misc. 49, 40 N. Y. Supp. 1119; *rev'd on other ground*, 15 App. Div. 29, 44 N. Y. Supp. 106; *aff'd*, 154 N. Y. 667.

77. *Schultz v. Mead*, 29 St. Rep. 203, 8 N. Y. Supp. 663. And see *infra*, Art. XI—Judgment for deficiency.

Stockholders' liability.—Section 1078 of the Civil Practice Act must be read in connection with section 1079 which authorizes a plaintiff in a foreclosure suit to join as a defendant all who are liable to the defendant for the payment of the mortgage debt and does not refer to an action supplemental to and in aid of a judgment of deficiency to reach the assets of the

corporation mortgagor, which could not be reached by execution in the first action, and apply them to the payment of such judgment and does not prohibit the bringing of an action to enforce the liability of the stockholders of the corporation without leave of court. *Leighton v. Leighton Lea Assn.*, 62 Misc. 73, 114 N. Y. Supp. 918.

It is no defence to an action on a deficiency judgment that the mortgagor made a profit upon his purchase of the mortgaged premises. *Schultz v. Mead*, 8 N. Y. Supp. 663, 29 St. Rep. 203.

78. *Schultz v. Mead*, 8 N. Y. Supp. 663, 29 St. Rep. 203; *Knapp v. Valentine*, 67 St. Rep. 582, 24 Civ. Pro. 331, 33 N. Y. Supp. 712.

79. *New York Life Ins. Co. v. Aitkin*, 125 N. Y. 660, 36 St. Rep. 8.

80. *Mutual Life Ins. Co. v. Smith*, 7 St. Rep. 22.

the bonds, the obligee can maintain an action in this State to recover on the bonds, and it is no defense that, under a statute of the State in which the mortgaged property is situated, the remedy is first to foreclose the mortgage.⁸¹

4. Action by one other than holder of mortgage.

The provision contained in section 1078 applies only to the holder of the mortgage; it does not apply to an action by a mortgagor, who, before foreclosure, has conveyed to a grantee, who assumed the mortgage, in which action the grantor sues the grantee for the amount of the deficiency he has been held to pay.⁸² Nor does the statute prohibit a junior mortgagee who has filed a notice of claim to surplus moneys arising upon foreclosure of a prior mortgage, and is a party to proceedings for the distribution of such surplus, from bringing, without leave of court, an action to recover the debt secured by his mortgage.⁸³

5. Grounds for leave of court.

When an action is actually pending to foreclose the mortgage, leave will be granted to bring another action on the debt only in exceptional cases.⁸⁴ It is discretionary with the court whether to grant or refuse the leave.⁸⁵ The propriety of granting leave to bring an action to recover a portion of a mortgage debt while a prior suit of foreclosure is pending, or after final judgment therein, is to be determined upon equitable principles.⁸⁶ It should only be granted when specific reasons are shown why the personal liability

81. *Thompson v. Lakewood City Development Co.*, 105 Misc. 680, 174 N. Y. Supp. 825.

82. *Comstock v. Drohan*, 71 N. Y. 9; *Campbell v. Smith*, 71 N. Y. 26.

83. *Wyckoff v. Devlin*, 12 Daly, 144.

84. *Engle v. Underhill*, 3 Edw. Ch. 249.

Action by bondholder.—Section 1078 shows an intention on the part of the Legislature to place a restriction upon holders of bonds secured by a mortgage which is in process of foreclosure, and unless cogent reason is presented for the granting of an order of the court under such section, granting leave to a bondholder to commence an action on his bonds during the pendency of an action brought to foreclose the mortgage securing the

same, an application for such order should be denied. *Matter of Moore*, 81 Hun, 389, 63 St. Rep. 380, 31 N. Y. Supp. 110.

85. *Equitable L. Assur. Soc. v. Stevens*, 63 N. Y. 341; *Matter of Byrne*, 81 App. Div. 74, 80 N. Y. Supp. 977; *Darmstadt v. Manson*, 144 App. Div. 249, 128 N. Y. Supp. 992.

Ex parte application.—The application should not be granted upon an *ex parte* application, unless it is impossible to effect personal service upon the parties sought to be held liable. *Matter of Marshall*, 53 App. Div. 136, 65 N. Y. Supp. 760; *Cooper Co. v. Naumburg*, 154 App. Div. 225, 138 N. Y. Supp. 1005.

86. *Steiner v. Day*, 161 App. Div. 742, 147 N. Y. Supp. 200.

was not enforced in the suit of foreclosure.⁸⁷ But such leave may be properly granted, where mistake or inadvertence is shown.⁸⁸

An application for leave to sue persons not made parties should be denied if the course of the creditor, in delaying the enforcement of the mortgage, renders the enforcement of personal liability inequitable.⁸⁹ The court may, in its discretion, grant or refuse leave to bring an action at law to recover a deficiency arising on a sale in a judgment of foreclosure, in which no provision was made as to a deficiency. Where the mortgagee has voluntarily refrained from asking a judgment for a deficiency, some satisfactory reason should be given for permitting him to bring a separate action.⁹⁰ An application for leave to bring action against a person's heirs to enforce a deficiency judgment recovered against his estate is one which rests in the sound discretion of the court; and, where it would be inequitable to allow the enforcement of the judgment under all the circumstances of the case as they existed at the time of the application, the court should deny the motion.⁹¹ It is proper to allow suit to be brought against one who was a nonresident at the time of the foreclosure.⁹² The fact that there is claimed to be a valid defense to the action is no reason for denying the application. The validity of the defense should be left for determination in the action and should not be tried upon the affidavits used on the motion.⁹³

6. Action against guarantor.

Where, as additional security for the payment of a loan secured by a bond and mortgage, a third party guarantees, by a separate instrument, the payment of such bond and

87. *Darmstadt v. Manson*, 144 App. Div. 249, 128 N. Y. Supp. 992; *Carlin v. Lindtveit*, 175 App. Div. 940, 161 N. Y. Supp. 1120.

88. *Kane v. Prentice*, 13 Wkly. Dig. 361.

89. *Matter of Collins*, 17 Hun, 289.

Waiver of deficiency.—A plaintiff in an action to foreclose a mortgage upon real estate, who obtains leave to discontinue the action as to the mortgagors, upon stating that she was unable to serve them with process and was willing "to waive any right of a deficiency judgment in this action against them," should not be granted

leave to sue the mortgagors for a deficiency arising upon the foreclosure, especially where it appears that such deficiency was made up principally of the costs and expenses of the foreclosure action. *Matter of Marshall*, 53 App. Div. 136, 65 N. Y. Supp. 760.

90. *Equitable Life Assur. Society v. Stevens*, 63 N. Y. 341.

91. *U. S. Life Ins. Co. v. Poillon*, 27 St. Rep. 899, 7 N. Y. Supp. 834.

92. *Bartlett v. McNeil*, 60 N. Y. 53.

93. *La Grave v. Hellinger*, 109 App. Div. 515, 96 N. Y. Supp. 564; *Matter of Hallenbarton*, 1 Law Bull. 12.

mortgage, the mortgagees have three remedies: First, they may proceed upon the bond and guaranty alone against the guarantor or the bondsmen and guarantor, and, if the judgment obtained in that action be unsatisfied, foreclose the mortgage for the purpose of having the real estate sold and applied to the satisfaction of the deficiency; second, they may bring an action of foreclosure making both the mortgagor and the guarantor parties, and by asking such relief in the complaint obtain a judgment for any deficiency remaining after the foreclosure sale; or, third, they may foreclose the mortgage as against those in possession of the property, and then, with leave of the court, obtained pursuant to section 1078 of the Civil Practice Act, bring an action upon the guaranty to recover any deficiency resulting from the foreclosure sale.⁹⁴

An action upon a guaranty of the mortgage is within the provision, and, in the absence of authority from the court, the action is not maintainable.⁹⁵ Where the assignee of a mortgage fails to make the assignor, who guaranteed collection of the amount secured, a party to the action, he cannot sue such assignor for a deficiency without leave of court, and, without an allegation of leave, a complaint in an action therefor does not state a cause of action.⁹⁶

Leave to sue the guarantors will not be granted where, without other excuse than expediting the foreclosure, one of them was not made a party, and the other, though made a party, was served with notice of no personal claim.⁹⁷ But a plaintiff who fails to ask for a deficiency judgment against a guarantor, pursuant to an agreement that no recovery would be sought against such defendant on his guaranty until a judgment for deficiency had been entered against the mortgagor, is entitled, after entry of judgment against the mortgagor for a deficiency, to an order granting leave to sue the guarantor on the contract.⁹⁸

Plaintiff, in a suit to foreclose a mortgage, who entered a decree containing no provision for a deficiency judgment, so that the obligors on the bond secured by the mortgage were not called upon to appear at the sale and bid, in order that the lands might sell for an adequate price, should not,

94. *Shipman v. Niles*, 75 App. Div. 451, 78 N. Y. Supp. 440; *aff'd* without opinion, 177 N. Y. 527.

95. *Kernan v. Frazier*, 23 Alb. L. Jour. 255.

96. *Robert v. Kidansky*, 111 App.

Div. 475, 97 N. Y. Supp. 913; *aff'd*, 188 N. Y. 638.

97. *Morrison v. Slater*, 128 App. Div. 467, 112 N. Y. Supp. 855.

98. *Matter of Rothschild*, 160 App. Div. 530, 145 N. Y. Supp. 955.

after the expiration of two years, be allowed to maintain a separate action upon the bond.⁹⁹

An application for leave to commence an action to recover part of a mortgage debt, made by the assignee of the second mortgage, to recover from his assignor, who had guaranteed payment of the mortgage, after a foreclosure under the first mortgage, in which the surplus was paid over to the assignee of the second mortgage, which he had brought an action to foreclose, but had not prosecuted, was granted against the objection that no judgment for a deficiency had been demanded in the second action, and against a claim that a guaranty had been obtained by fraud.¹

7. Second foreclosure.

Where a mortgage has been foreclosed for interest only, a subsequent complaint to foreclose the mortgage is not one to recover the mortgage debt within section 1078, and leave to sue need not first be obtained.² Where a later mortgage upon different property is given as additional security for a debt already secured by mortgage, its foreclosure and a sale leaving a deficiency will not prevent a separate foreclosure of the first mortgage without leave of court. The later action is not to recover the mortgage debt under section 1078; nor is the judgment in such action a final judgment to recover the mortgage debt within section 1077, so as to prevent an action for the foreclosure of the mortgage unless execution has been issued and returned unsatisfied.³

8. Delay in asking leave.

A complaint in an action against a person who has assumed the payment of a bond and mortgage, for deficiency after judgment, is not insufficient because leave to sue was obtained after the commencement of the action, such leave being without prejudice to proceedings already had.⁴ Leave to bring suit for a deficiency may be granted *nunc pro tunc*, upon such terms as are equitable, where the plaintiff has sued without first obtaining leave.⁵ After a final judgment

99. Darmstadt v. Manson, 144 App. Div. 249, 128 N. Y. Supp. 992.

1. McLaughlin v. Durr, 76 App. Div. 75, 78 N. Y. Supp. 798.

2. Pretzfeld v. Lawrence, 34 Misc. 329, 69 N. Y. Supp. 807.

3. Reichert v. Stillwell, 172 N. Y. 83.

4. Earl v. David, 20 Hun, 527; aff'd, 83 N. Y. 634. See, also, Durham v. Chapin, 30 App. Div. 148, 52 N. Y. Supp. 188.

5. Earl v. David, 20 Hun, 527, 86 N. Y. 634; McKenan v. Robinson, 20 Hun, 289, 84 N. Y. 105.

an *ex parte* order granting leave to the mortgagee to sue, to secure payment of a deficiency arising upon the sale out of funds belonging to the estate of the mortgagor, and entered as of a prior date to the commencement of the action, should be set aside.⁶

On application for leave to sue on the bond made within twenty years from its date, the premises having been sold on foreclosure of prior mortgages and judgment entered for foreclosure upon a mortgage accompanying the bond, it was held that leave to sue should be granted notwithstanding an alleged agreement that defendant was not to be personally liable, as the Statute of Limitations had not run against the bond; the delay in making the application did not constitute laches.⁷ A plaintiff who omits to take judgment, as he is entitled, should be barred from leave to amend by a long delay, and the Court of Appeals will not review the Appellate Division decision refusing leave.⁸

S. Stay of proceedings.

1. Rules of Civil Practice, Rule 260. Notice of application for stay of sale.

No order to stay a sale under judgment for the foreclosure of a mortgage shall be made by a judge out of court, except on a notice of at least twenty-four hours to the plaintiff's attorney.

2. Another action pending.

The foreclosure of a subsequent mortgage will not be stayed, though judgment has been obtained on a prior mortgage.⁹ A stay until the conclusion of condemnation proceedings should not be granted on the application of a junior incumbrancer, where the delay will be considerable, unless he gives sufficient security that plaintiff shall not suffer by such delay.¹⁰

Where, after a suit had been begun to foreclose mortgages on lands of one not a party to the foreclosure, such party started an action to partition the same premises, and the plaintiff in the foreclosure action, default having been made by all the defendants, moved for the appointment of a referee to compute the amount due, and such party made a motion in the partition suit, returnable on the same day,

6. U. S. Life Ins. Co. v. Poillon, 25 St. Rep. 534, 6 N. Y. Supp. 370.

7. In the Matter of Howe, 41 St. Rep. 877, 16 N. Y. Supp. 465.

8. Grant v. Griswold, 21 Hun, 509,

on appeal, 82 N. Y. 569.

9. Dailly v. King, 41 How. Pr. 22.

10. Weekes v. McCormick, 16 App. Div. 432, 45 N. Y. Supp. 30.

asking that all proceedings in the foreclosure action be stayed pending the determination of the partition suit, it was held that an order thereupon made in the suit of foreclosure denying the application for a referee and staying all proceedings pending the determination of the action of partition should be reversed.¹¹

3. Stay of sale.

In the absence of fraud, a sale on foreclosure will not be stayed at the instance of subsequent judgment creditors, who have procured the appointment of the receiver of the personal property of the mortgagor, on the ground that it would be for the interest of all parties to have the real and personal property sold together after the completion of a pending accounting.¹² Nor will proceedings in foreclosure upon an undivided interest be stayed in order that the entire premises may be sold more advantageously at a partition sale, solely because, in the opinion of the expert, a better price would be obtained on the sale of the whole property than would be likely to be realized on the sale of the undivided interest.¹³ An injunction will not be granted at the suit of one having a subordinate interest to restrain a mortgagee from foreclosing his mortgage, on the ground that a sale of real estate or personal property of the debtor separately would produce less than a sale of all together or at the same time.¹⁴

A stay of a sale in an action to foreclose a land contract will not be granted at the instance of creditors or the receiver of the owner of the equity of redemption, who since the advertisement of the sale has been adjudicated a bankrupt, solely to give the receiver or the creditors an extension of time in which to endeavor to raise funds to obviate the necessity of the sale, where the plaintiff, the owner of the legal title, claims that an extension will result in his own insolvency.¹⁵

4. Pending litigation between two defendants.

The plaintiff's proceedings are not to be stayed by an issue merely between codefendants.¹⁶ A stay pending a

11. *North Central Realty Co. v. Blackman*, 145 App. Div. 199, 129 N. Y. Supp. 1005.

12. *Clark v. Vilas National Bank of Plattsburgh*, 24 Misc. 621, 53 N. Y. Supp. 641.

13. *Bradford v. Downs*, 24 App. Div. 97, 48 N. Y. Supp. 1051.

14. *Buffalo Chemical Works v. Bank of Commerce*, 79 Hun, 93, 61 St. Rep. 143, 29 N. Y. Supp. 663.

15. *Wayne Iron Ore Co. v. Ontario Mineral Co., Inc.*, 100 Misc. 187, 165 N. Y. Supp. 380.

16. *N. Y. Life Ins. Co. v. Devlin*, 3 Law Bull. 99.

litigation between two defendants as to their rights in the mortgaged premises is not justified by proof that the foreclosure was begun at the instance of one of such defendants.¹⁷

5. Pending appeal.

An application for a stay pending an appeal from a judgment of foreclosure by a party not in possession of the premises, nor adjudged liable for a deficiency, must be made under sections 614 and 615 of the Civil Practice Act, and not under section 598.¹⁸ An undertaking under section 598, conditioned against the commission of waste, is effectual as a stay on appeal from a judgment of foreclosure only where the appellant giving it is in possession of the property.¹⁹

A stay of proceedings pending an appeal from a judgment of foreclosure may be granted by a judge out of court under section 169 of the Civil Practice Act to a subsequent purchaser who is not liable for a deficiency, and who has surrendered possession of the premises.²⁰ A stay should not be granted upon an undertaking for the payment of costs alone, but the appellant is required to give an undertaking for any deficiency that might occur on the sale, with interest, costs, and expenses of the sale.²¹

When, in an action to foreclose a mortgage upon a leasehold, the mortgagor does not appear and has no claim except an alleged right to a redemption from summary proceedings, and the value of the leasehold is rapidly decreasing while the arrears in rents and taxes are rapidly increasing, a stay of execution upon an appeal which is apparently dilatory in character, by one not a party to the mortgage, but merely claiming that it was given partly for his benefit, should not be granted.²²

T. Receiver of property.

1. When receiver appointed.²³

The power to appoint a receiver of the rents and profits of mortgaged property was in the Court of Chancery before

17. *Swift v. Finnigan*, 53 App. Div. 76, 65 N. Y. Supp. 723.

18. *Rosenbaum v. Tobler*, 31 App. Div. 312, 53 N. Y. Supp. 722.

19. *Commercial Bank v. Foltz*, 35 App. Div. 237, 54 N. Y. Supp. 764.

20. *Mutual Life Insurance Co. v. Robinson*, 23 Misc. 563, 52 N. Y.

Supp. 795.

21. *Sternbach v. Friedman*, 29 App. Div. 480, 51 N. Y. Supp. 1068.

22. *Bouden v. Sire*, 119 App. Div. 194, 104 N. Y. Supp. 460.

23. **Corporations.**—As to receivers of corporations, see, *supra*, in volume 1, the chapter on Corporations.

the adoption of the Code of Procedure. It was continued by that code, and is not abrogated by the Civil Practice Act, section 974, defining cases in which receivers may be appointed, but, on the contrary, is reaffirmed by section 62, declaring that "each of the courts therein named shall continue to exercise the jurisdiction and powers now vested in it — except as otherwise prescribed."²⁴

A receiver to collect the rents, issues, and profits is appointed when it does not seem prudent to the court that the defendant should be allowed to collect and retain them, and it is his duty to take charge of the property pending the litigation, preserve it from waste and destruction, and receive the rents and profits.²⁵

In order to justify the appointment of a receiver of the mortgaged premises it must generally be shown that the property is insufficient to satisfy the mortgage.²⁶ A general equitable principle entitles a mortgagee to the appointment of a receiver pending the foreclosure action, so far as to preserve the rents and profits to meet a deficiency upon a

24. *Hollenbeck v. Donnell*, 94 N. Y. 342.

25. *Chautauqua Co. Bank v. White*, 6 Barb. 589; *Green v. Bostwick*, 1 Sandf. Ch. 185.

Temporary administratrix.—The appointment of a receiver in an action for the foreclosure of a mortgage is not in conflict with the prior appointment of a temporary administratrix by the Surrogate's Court, which court authorized her to take possession of the mortgaged premises and to collect the rents therefrom as provided by section 130 of the Surrogate Court Act, especially where the mortgage expressly gives the mortgagee the right to the appointment of a receiver without regard to the adequacy of the security for the debt. Nor does the appointment of a receiver by the Supreme Court involve any conflict with the jurisdiction of the surrogate. *Cohn v. Bartlett*, 182 App. Div. 245, 169 N. Y. Supp. 604.

Where taxes were unpaid and a sale had been made for their non-payment, insurance was neglected and adequacy of security doubtful, a receiver was appointed. *Wall Street Ins.*

Co. v. Loud, 20 How. Pr. 95.

A mortgagor who has parted with his interest in the premises cannot successfully oppose; the opposition must be made by a party having an interest. *Wall Street Fire Ins. Co. v. Loud*, 20 How. Pr. 95.

General assignment.—It is said that a receiver may be appointed after the mortgagor has made a general assignment. *Upham v. Lewis*, 1 Law Bull. 86.

A party to the action may be appointed receiver. *Bolles v. Duff*, 37 How. Pr. 162.

26. *Sickles v. Canary*, 8 App. Div. 308, 40 N. Y. Supp. 948; *Browning v. Stacey*, 52 App. Div. 626, 65 N. Y. Supp. 203; *N. Y. Building Loan Co. v. Begley*, 75 App. Div. 308, 78 N. Y. Supp. 169; *Welche v. Schoenberg*, 45 Misc. 126, 91 N. Y. Supp. 880.

An affidavit by the attorney of the plaintiff to the effect that he is informed by plaintiff that he is extremely doubtful whether the premises would sell for enough to pay the amount due on the mortgage is not sufficient. *Sickles v. Canary*, 8 App. Div. 308, 40 N. Y. Supp. 948.

sale; but, in the absence of a clause in the mortgage pledging the rents and profits as security for the mortgage debt, the mortgagor is entitled to them up to the time of the sale, and his right can be defeated only by showing with reasonable certainty that the mortgaged property is an inadequate security for the mortgage debt.²⁷ Moreover, it is sometimes held that a receiver will not be appointed, unless there is no responsible person liable to pay the deficiency.²⁸

The appointment of a receiver is not a matter of strict legal right, but in the discretion of the court, and will not be exercised if the property is sufficient to pay the mortgage debt, or the mortgagor is responsible, and the burden of proof as to those matters is on the mortgagee.²⁹ Receivers are appointed with great caution and only in clear cases.³⁰ A receiver will not be appointed ordinarily as against a mortgagee in possession.³¹ Before a receiver will be appointed, there must have been a default as to some portion of the mortgage debt and a suit brought to foreclose.³² And then a receiver of only a parcel will be appointed, if that will protect the plaintiff.³³

A receiver of rents and profits may be appointed *pendente lite* when the mortgage is insufficient, and the party per-

27. *Ross v. Vernan*, 6 App. Div. 246, 39 N. Y. Supp. 1031.

28. *Welche v. Schoenberg*, 45 Misc. 126, 91 N. Y. Supp. 880; *Sea Fire Ins. Co. v. Stebbins*, 8 Paige, 565; *Astor v. Turner*, 2 Barb. 444, 3 How. Pr. 225.

29. *Syracuse Bank v. Tallman*, 31 Barb. 201; *Shotwell v. Smith*, 3 Edw. Ch. 588; *Jenkins v. Hinman*, 5 Paige, 309; *Burlington v. Parce*, 12 Hun, 144; *Rider v. Bagley*, 84 N. Y. 461; *Frelinghuysen v. Colden*, 4 Paige, 204.

30. *Warner v. Gouverneur*, 1 Barb. 36; *Shotwell v. Smith*, 3 Edw. Ch. 588; *Jenkins v. Hinman*, 5 Paige Ch. 309.

31. *Quin v. Brittain*, 3 Edw. 314; *Patten v. Accessory Trust Co.*, 4 Abb. 237; *Bolles v. Duff*, 35 How. Pr. 481; *Sea Ins. Co. v. Stebbins*, 8 Paige, 565; *N. Y. Life Ins. Co. v. Glass*, 50 How. Pr. 88.

Mortgagee in possession.—Where a mortgagor conveyed the mortgaged lands under an agreement that the grantee would manage the property for a salary and a percentage of profits

and reconvey on demand to the mortgagor and the grantee, a corporation, being unsuccessful, turned over all its capital stock to the mortgagee to whom it thereafter paid rents as received from the property so that the mortgagee is practically a mortgagee in possession, a receiver in a suit to foreclose should not be appointed on motion of the mortgagor where there is no proof that the property is improvidently managed or that the plaintiff mortgagee is irresponsible and the receiver would have nothing to do except to collect the rents. *Manhattan Life Ins. Co. v. Hammerstein Opera Co.*, 180 App. Div. 69, 167 N. Y. Supp. 245.

32. *Howell v. Ripley*, 10 Paige, 43; *Quincy v. Cheeseman*, 4 Sandf. Ch. 405; *Astor v. Turner*, 11 Paige, 436; *Lofsky v. Majer*, 3 Sandf. Ch. 69; *Bank of Ogdensburgh v. Arnold*, 5 Paige, 38.

33. *Hollenbeck v. Donnell*, 94 N. Y. 342.

sonally liable is insolvent, or when it is provided by the deed that the mortgagee shall have the rents and profits after default.³⁴

Where the mortgaged premises are insufficient to pay the lien, and the persons responsible for any deficiency are insolvent, the plaintiff is entitled to a receiver of the rents of the mortgaged premises, although, by reason of an extension of time of the payment of the principal, the interest only can be collected in the action, the time within which the interest would become due not having expired at the time suit was brought.³⁵

2. When appointment is authorized by mortgage.

While a provision in a mortgage that the mortgagee shall be entitled as a matter of right, and without regard to the value of the premises, or the solvency or insolvency of the mortgagor, to the appointment of a receiver is not conclusive upon the court,³⁶ and does not operate to give an absolute right to have a receiver appointed on foreclosure,³⁷ and the receivership may be denied if the security of the mortgagee does not require it,³⁸ yet the contract of the parties in such a case is to be considered by the court in the exercise of its discretion.³⁹ And, if the mortgage, in addition to such a provision, specifically pledges the rents and profits of the premises to the mortgagee, a receiver may be appointed

34. Jones on Mortgages, Vol. 2, § 1516; Shotwell v. Smith, 3 Edw. Ch. 588; Warner v. Gouverneur, 1 Barb. Ch. 36; Clason v. Corley, 5 Sandf. Ch. 447; Bank of Ogdensburgh v. Arnold, 5 Paige, 38; Astor v. Turner, 11 Paige, 436; Sea Ins. Co. v. Stebbins, 8 Paige, 566; Howell v. Ripley, 10 Paige, 43; Frelinghuysen v. Colden, 4 Paige, 104; Syracuse City Bank v. Tallman, 31 Barb. 201; Mitchell v. Bartlett, 51 N. Y. 447; Smith v. Tiffany, 13 Hun, 673; Clark v. Binninger, 39 How. Pr. 363; Miller v. Bowles, 2 T. & C. 568; Rider v. Bagley, 84 N. Y. 461.

35. Veerhoff v. Miller, 30 App. Div. 355, 51 N. Y. Supp. 1048.

36. N. Y. Building Loan Banking Co. v. Begley, 75 App. Div. 308, 78 N. Y. Supp. 169.

37. Eidlitz v. Lancaster, 40 App. Div. 446, 59 N. Y. Supp. 54; Schwarz

v. Alexander, 178 App. Div. 641, 165 N. Y. Supp. 491.

38. Brick v. Hornbeck, 19 Misc. 218, 43 N. Y. Supp. 301; Jarvis v. McQuaide, 24 Misc. 17, 53 N. Y. Supp. 97; United States Life Ins. Co. v. Ettinger, 32 Misc. 378, 66 N. Y. Supp. 1; Degener v. Stiles, 6 N. Y. Supp. 474, 25 St. Rep. 422.

39. Pizer v. Herzig, 121 App. Div. 609, 106 N. Y. Supp. 370.

Tenant.—A provision in a recorded mortgage which entitles the mortgagee to an appointment of a receiver of the rents and profits, without notice and without regard to the adequacy of the security in case of default by the mortgagor, is binding upon a subsequent lessee of the premises, as he took his lease with notice of said provision. Moreover, the tenant takes his lease subject to having the rents of his subtenants impounded by a receiver in

without proof of the inadequacy of the security or insolvency of the mortgagor.⁴⁰

Where a mortgage contains a provision entitling the mortgagee to a receiver pending foreclosure, and it appears that it is a second mortgage and that the party in possession refuses to pay the interest and taxes and is in receipt of the rents, and there is doubt whether the security is adequate, a receiver will be appointed.⁴¹

3. Application by subsequent lienor.

Where there are two mortgages executed by different mortgagors on a leasehold, the first mortgagor having conveyed to a grantee, who assumed payment of the mortgage, and the holder of the first mortgage refuses to sell, a receiver should be appointed to collect the rents and apply to the payment of the first mortgage.⁴² Apart from a special agreement or of circumstances affecting the rights and equities of the parties, a junior mortgagee may through a receiver obtain the rents and profits of mortgaged real property. A senior mortgagee desiring to obtain such rents to apply upon his mortgage should actually possess himself of them or of the right to them through some mutual arrangement therefor, or he should make application to the court to have the receivership extended for his benefit.⁴³ The receiver appointed at the instance of a prior incumbrancer is entitled to receive the rents and profits until the prior mortgagee takes possession or has a receiver appointed.⁴⁴ A subsequent receivership in an action to foreclose a prior mort-

case of a foreclosure. But such receivership clause does not entitle the mortgagee to the appointment of a receiver as a matter of right. *Fletcher v. McKeon*, 71 App. Div. 278, 75 N. Y. Supp. 817; *Schwarz v. Alexander*, 178 App. Div. 641, 165 N. Y. Supp. 491. Where a mortgage provides for assignment of rents to the mortgagee on default, a lessee of the mortgagor, who became such after default, and paid his rent in advance, cannot enjoin a receiver of the premises from collecting rent, as the lessee is charged with notice of the rights of the mortgagee. *Moll v. McKeon*, 35 Misc. 551, 71 N. Y. Supp. 1127.

40. *Browning v. Sire*, 56 App. Div. 399, 67 N. Y. Supp. 798; *Pizer v.*

Herzig, 121 App. Div. 609, 106 N. Y. Supp. 370; *Sage v. Mendelson*, 42 Misc. 137, 85 N. Y. Supp. 1008; *Butler v. Fraser*, 57 N. Y. Supp. 900; *MacKellar v. Rodgers*, 52 Super. Ct. 360; *Byson v. James*, 55 Super. Ct. 374; appeal dismissed, 110 N. Y. 633.

41. *Thomas v. Davis*, 90 App. Div. 1, 85 N. Y. Supp. 661.

42. *Howard v. Robbins*, 67 App. Div. 245, 73 N. Y. Supp. 172; *aff'd*, 170 N. Y. 498.

43. *Sullivan v. Rossom*, 223 N. Y. 217.

44. *Post v. Dorr*, 4 Edw. 412; *Washington Life Ins. Co. v. Fleischauer*, 10 Hun, 117; *Howell v. Ripley*, 10 Paige, 43.

gage supersedes a former receivership under a junior mortgage.⁴⁵ A receivership created in an action for foreclosure of a third mortgage may be extended to cover the second mortgage in an action to foreclose it, where it is doubtful if the security is adequate.⁴⁶

Where, after a receiver of the rents and profits appointed in a suit to foreclose a second mortgage had collected considerable money, the holder of the first mortgage, without having the receivership extended, foreclosed his mortgage and sold the property for a sum insufficient to satisfy the amount due thereon, he should not be allowed to intervene in the suit to foreclose the second mortgage.⁴⁷ Where the question as to the appointment of a receiver of the rents and profits of mortgaged premises, pending an action of foreclosure, arises between lienors only, the moving party must show a superior equity.⁴⁸

The right of a prior mortgagee to the rents under an assignment thereof from the mortgagor is superior to that of the junior mortgage under an order appointing a receiver in an action to foreclose the junior mortgage, made without notice to the prior mortgagee.⁴⁹

4. Notice of application.

Under section 975 of the Civil Practice Act, a receiver cannot generally be appointed without notice of the application to adverse parties;⁵⁰ but notice is not required where an order for service of process by publication on the mortgagor has been granted.⁵¹ But, where the action is for the foreclosure of a mortgage which provides that a receiver may be appointed without notice, notice is not required. But a clause in a mortgage authorizing the appointment of a

45. *Hennessey v. Sweeney*, 28 Civ. Pro. 332, 57 N. Y. Supp. 901.

46. *Putnam v. McAllister*, 57 N. Y. Supp. 404.

47. *Kroehle v. Ravitch*, 148 App. Div. 54, 132 N. Y. Supp. 1056.

48. *Ross v. Vernan*, 6 App. Div. 246; 39 N. Y. Supp. 1031.

49. *Harris v. Taylor*, 35 App. Div. 462, 54 N. Y. Supp. 864; appeal dismissed, 159 N. Y. 533.

50. *Dazian v. Meyer*, 66 App. Div. 575, 73 N. Y. Supp. 328; *Coleman v. Goodman*, 37 Misc. 517, 75 N. Y. Supp. 973.

A receiver appointed in supplemen-

tary proceedings is not entitled to notice of an application for a receiver of the rents and profits in foreclosure, as he is not an adverse party within the meaning of the Practice Act, and the receiver in foreclosure has a right to such rents and profits superior to that of a receiver of the property of the owner in supplementary proceedings. *Grover v. McNeeley*, 72 App. Div. 575, 76 N. Y. Supp. 559.

51. *Fletcher v. Krupp*, 35 App. Div. 586, 55 N. Y. Supp. 146; *Straus v. Minkowski*, 181 App. Div. 877, 169 N. Y. Supp. 442.

receiver upon default does not dispense with notice of the application. Nor does a clause that upon default the mortgagee may enter the premises, take possession thereof and receive the rents and profits, dispense with the necessity of notice.⁵²

Although the court has jurisdiction to appoint a receiver of rents and profits pending the foreclosure of a mortgage without notice to the defendant, the appointment should not be made without notice when the mortgage contains a provision that the mortgagee may have such receiver appointed on giving ten days' notice to the mortgagor, unless it be shown that the plaintiff was unable to give the notice or would be prejudiced by the necessary delay. In determining whether the receiver should be appointed without notice, the court should take into consideration the provision of the mortgage requiring notice.⁵³ A provision in a mortgage requiring eight days' notice of motion for a receiver does not apply to an application for a receiver on the ground of inadequacy of security.⁵⁴

5. Powers and duties of receiver.

It is the duty of the receiver to act with a view to the rights of all of the parties interested and to protect the property to the best of his ability.⁵⁵ He is an officer of the court appointed on behalf of all who may establish an interest in the property; the property in his hands is in the custody of the law.⁵⁶ He should apply to the court for instructions before exercising unusual discretion.⁵⁷ Generally, he has no powers except those conferred upon him by the order appointing him.⁵⁸

52. *Straus v. Minkowski*, 181 App. Div. 877, 169 N. Y. Supp. 442.

53. *Woerishoffer v. Peoples*, 120 App. Div. 319, 105 N. Y. Supp. 506.

54. *Putnam v. McAllister*, 57 N. Y. Supp. 404.

55. *Howell v. Ripley*, 10 Paige, 43; *Iddings v. Bruen*, 4 Sandf. Ch. 417; *Lottimer v. Lord*, 4 E. D. Smith, 183.

Repairs.—A receiver has no power, without the order of the court, to lessen the funds in his hands by the expenditure for repairs. It seems that, if necessary for the protection of the property, the court may direct such repairs. *Wyckoff v. Scofield*, 103 N. Y. 630.

Liability for damage.—A receiver is not liable for work done by an adjoining owner engaged in excavating to make the wall of the mortgaged property safe. *Wyckoff v. Scofield*, 103 N. Y. 630.

56. *Decker v. Gardner*, 124 N. Y. 338; *Iddings v. Bruen*, 4 Sandf. 417; *Booth v. Clark*, 58 U. S. 323; *Lottimer v. Lord*, 4 E. D. Smith, 183.

57. *Parker v. Browning*, 8 Paige, 388.

58. *Rider v. Vrooman*, 12 Hun, 299; *Verplanck v. Mercantile Trust Co.*, 2 Paige, 438; *Matter of Eagle Iron Works*, 8 Paige, 385.

In the absence of any direction in the order appointing the receiver in foreclosure, it cannot be assumed that such order conferred on him a greater authority than that usually conferred on receivers appointed *pendente lite* to preserve property until the determination of the action.⁵⁹ It is his duty to collect the rents.⁶⁰ And the court may order the tenants to attorn to a receiver.⁶¹ And the receiver should compel tenants not parties to attorn.⁶²

He cannot generally oust tenants in lawful possession under existing leases made with the owner of the property, as his possession is subject to tenancies in existence at the time of his appointment.⁶³ Nor can he dispossess the mortgagor by summary proceedings for nonpayment of rent.⁶⁴ But he is entitled to possession of the premises and to an order for their surrender, although service upon the owner by publication has not been completed and defendant has not appeared in the action.⁶⁵

The court has no power to order debts already collected and in possession of the owner to be paid over and applied to payment of the mortgage debts.⁶⁶ When a receiver of the rents and profits, who is authorized to lease the premises, continues the lease to the tenant in possession in con-

59. *Dow v. Nealis*, 47 Misc. 153, 93 N. Y. Supp. 379.

60. *Frelinghuysen v. Colden*, 4 Paige, 204; *Astor v. Turner*, 3 How. Pr. 225; *Steele v. Sturges*, 5 Abb. 442; *Foster v. Townsend*, 2 Abb. N. C. 29.

Income tax.—A receiver of the rents and profits in foreclosure is not liable for any Federal income tax upon moneys received and paid out during the course of his receivership, and, therefore, he is not in duty bound to make any return to the treasury department of the United States government. *Lathers v. Hamlin*, 102 Misc. 563, 170 N. Y. Supp. 98.

61. *Seaman's Bank v. Quinn*, 1 Law Bull. 77.

62. *Bowery Savings Bank v. Richards*, 3 Hun, 366; appeal dismissed, 68 N. Y. 637.

Attornment.—Where a receiver in a foreclosure action recovered a judgment for rent, and the record on appeal contains no evidence to support a finding of actual attornment by the

tenant to the plaintiff, the judgment will be reversed, with leave to appeal to the Appellate Division. *Baerlein v. Winter*, 103 Misc. 506, 170 N. Y. Supp. 399.

63. *Burtaine v. Barr*, 194 App. Div. 906, 184 N. Y. Supp. 796.

Eviction of sub-tenants by lessee.—Where the lessee of premises, who was a defendant, after taking appeal from an order appointing a receiver of rents and profits, but before the appeal has been determined, institutes summary proceedings to evict his sub-tenants for non-payment of rent, he is guilty of contempt, but the fact that he acted under the advice of counsel should be taken into consideration in determining his punishment. *Coffin v. Burstein*, 68 App. Div. 22, 74 N. Y. Supp. 274.

64. *Curran v. Gillam*, 106 Misc. 652, 176 N. Y. Supp. 573.

65. *Citizens' Savings Bank v. Wilder*, 11 App. Div. 63, 42 N. Y. Supp. 481.

66. *Wyckoff v. Scofield*, 98 N. Y. 475.

sideration of an agreement by the tenant to expend money in repairs, the court is without jurisdiction to order a summary cancellation of the lease.⁶⁷ He is entitled to the rents of the mortgaged property which accrued during the pendency of the action, although prior to his appointment, as against a receiver of the mortgagor appointed in supplementary proceedings.⁶⁸ A tenant under a lease subsequent to a mortgage authorizing appointment of a receiver to collect rents in an action to foreclose is liable to the receiver for the value of the occupation after the receiver's appointment, though as against the landlord the tenant has an offset.⁶⁹ Where a tenant was in possession prior to the commencement of a foreclosure action, to which he was not a party, the court in the foreclosure suit cannot compel him by order to pay rent to receiver appointed therein, such rent being only recoverable in an action against him.⁷⁰

A receiver in foreclosure is not bound by an oral agreement between the mortgagor and the tenant of the premises.⁷¹ Where a purchaser assumes payment of a mortgage, and is unable to pay all of the purchase-price, agreeing to allow the vendor to occupy the premises until a certain date, and to credit the rent in full to that time, a receiver of rents appointed in a subsequent action to foreclose the mortgage is not entitled to rent during said period.⁷²

6. Distribution of funds.

Where a receiver is appointed, the plaintiff is only entitled to the rents in case a deficiency results upon the sale.⁷³ If no proceedings are taken for the appointment of a receiver, the mortgagor's right to the rents continues until after foreclosure.⁷⁴ The mortgagee can only be entitled to the rents

67. *Witthaus v. Capstick*, 117 App. Div. 212, 102 N. Y. Supp. 166.

68. *Donlon & Miller Mfg. Co. v. Cannella*, 89 Hun, 21, 34 N. Y. Supp. 1065, 69 St. Rep. 8.

Where an injunction restraining collection of the rents by a receiver appointed in another action was vacated, and such receiver was subsequently appointed receiver in the foreclosure action, it was held that rents collected by him between the order vacating the injunction and his subsequent appointment should be accounted for in the foreclosure action. *Volkening v. Brandt*, 14 Misc. 156, 35 N. Y. Supp. 797.

69. *Derby v. Brandt*, 99 App. Div. 257, 90 N. Y. Supp. 980.

70. *American Mortgage Co. v. Sire*, 103 App. Div. 396, 92 N. Y. Supp. 1082.

71. *Dow v. Nealis*, 74 Misc. 153, 93 N. Y. Supp. 379.

72. *Lawrence v. Conlon*, 26 Misc. 44, 56 N. Y. Supp. 345.

73. *Harris v. Taylor*, 22 App. Div. 109, 47 N. Y. Supp. 913.

74. *Howell v. Ripley*, 10 Paige, 43; *Lofsky v. Majer*, 3 Sandf. Ch. 69; *Mitchell v. Bartlett*, 51 N. Y. 447; *Argall v. Pitts*, 78 N. Y. 239.

and profits by commencing an action and obtaining the appointment of a receiver, and then he will be confined to the rents and profits accruing during the pendency of the suit.⁷⁵ Where a party omits to move for or fails to secure the appointment of a receiver, he loses all title to the rents and profits which accrue before the sale, even though the sum realized on the sale is insufficient to satisfy his judgment.⁷⁶

The party securing the appointment of a receiver obtains a lien on the rents and profits.⁷⁷ The object of his appointment is to give a priority of lien on the rents and profits of the premises so that they may be applied to payment of the plaintiff's claim.⁷⁸ The plaintiff cannot collect rents from the owner of the equity or from the receiver, for a junior incumbrancer.⁷⁹

Where, on motion of the plaintiff in an action to foreclose a second mortgage, a receiver of the rents has been appointed but the receivership has never been extended to the first mortgage, the senior mortgagee is not entitled to a preference of payment of his deficiency out of the rents in the hands of the receiver. Upon a motion to settle the accounts of the receiver, payment of the amount of the second mortgage, with interest and the costs of the action, will be first directed, and after payment of a judgment against the mortgagor, pursuant to an order in supplementary proceedings, which reached moneys not subject to any lien of the first mortgage, the balance will be directed to be paid to the senior mortgagee.⁸⁰

If the grantee of a mortgagor, not liable for the debt, takes the rents and profits and delays the litigation, and there is a deficiency, it has been said that he may be directed to pay to plaintiff enough to satisfy the debt, even if no receiver has been appointed.⁸¹ Where a receiver is appointed, but not for the benefit of any particular party to the action, rents

75. *Argall v. Pitts*, 78 N. Y. 239; *Rider v. Bagley*, 84 N. Y. 461; *Hollenbeck v. Donnell*, 94 N. Y. 342; *Wyckoff v. Scofield*, 98 N. Y. 475; *Stillman v. Van Beuren*, 100 N. Y. 439; *Mutual Life Ins. Co. v. Belknap*, 19 Abb. N. C. 345.

76. *Ross v. Vernal*, 6 App. Div. 246, 39 N. Y. Supp. 1031.

77. *Astor v. Turner*, 11 Paige, 436; *Ranny v. Peyser*, 83 N. Y. 1.

78. *Gillett v. Moody*, 3 N. Y. 479;

Porter v. Williams, 9 N. Y. 142;

79. *Astor v. Turner*, 11 Paige, 436; *Rider v. Bagley*, 84 N. Y. 467; *Howell v. Ripley*, 10 Paige, 33; *Hayes v. Dickinson*, 9 Hun, 277; *Washington Life Ins. Co. v. Fleischauer*, 10 Hun, 117.

80. *Izzo v. McKay*, 110 Misc. 708, 181 N. Y. Supp. 841.

81. *Ferguson v. Kimball*, 3 Barb. Ch. 616; *Bank of Utica v. Finch*, 3 Barb. Ch. 293.

and profits must be applied to the claims in the order of seniority.⁸²

The receiver must pay over all rents collected by him prior to the sale as directed by the judgment. Those collected after the conveyance belong of right to the purchaser of the premises. The rents in the hands of the receiver, collected previous to the conveyance, belong either to plaintiff or to the persons who, before the sale, owned the fee of the mortgaged premises.⁸³

A purchaser at foreclosure is entitled to the rents from the date of delivery of the deed, and, where a receiver has been appointed and has collected rent payable in advance, the receiver is entitled only to so much thereof as had actually accrued when the deed was delivered, and, on a hearing upon an application by the purchaser for an apportionment of the rent, the owner of the equity of redemption may be entitled to be heard.⁸⁴

On motion for the appointment of a receiver of rents and profits, claims of the respective mortgagees to the rent under successive mortgages should not be adjudicated.⁸⁵

U. Costs and allowances.

1. Discretion of court.

Under section 1477 of the Civil Practice Act, the costs in a foreclosure action are within the discretion of the court.⁸⁶ The allowance of costs is wholly within the power of the Special Term when it enters final judgment, irrespective of whether or not the interlocutory judgment includes costs.⁸⁷ Costs may properly be denied to a plaintiff who

82. *Ranney v. Peyser*, 20 Hun, 1; *Keogh v. McManus*, 34 Hun, 521.

83. *Nichols v. Foster*, 9 Wkly. Dig. 468.

84. *Cowan v. Arnold*, 35 St. Rep. 134, 12 N. Y. Supp. 601.

85. *Putnam v. Henderson*, Hull & Co., 49 App. Div. 361, 63 N. Y. Supp. 250.

86. *Reimer v. Dederick*, 4 Wkly. Dig. 230; *Church v. Kid*, 3 Hun, 254; *Lossee v. Ellis*, 13 Hun, 657; *Morris v. Wheeler*, 45 N. Y. 708; *Newcomb v. Hale*, 12 Abb. N. C. 338.

Appellate court.—Although costs in actions of foreclosure are in the discretion of the court, yet if it appears that such discretion has been exer-

cised under an erroneous view of the law affecting the rights of the parties, it is the duty of the appellate court to correct the error. *Morris v. Wheeler*, 45 N. Y. 708.

Referee.—Where the action has been referred for hearing and determination, the failure of the referee to award costs is equivalent to a refusal to do so, and in such case the Special Term has no power to review his report for the purpose of allowing costs. *Stevens v. Weiss*, 25 Misc. 457, 55 N. Y. Supp. 562.

87. *Weyand v. Park Terrace Co.*, 135 App. Div. 821, 120 N. Y. Supp. 192; *rev'd*, 202 N. Y. 231, on other grounds.

has failed to sustain more than half of his claim.⁸⁸ But costs will ordinarily be granted to the mortgagee out of the fund.⁸⁹

A finding by a referee that the plaintiff have his costs of the action does not authorize the entry of costs personally against any one.⁹⁰

A defendant, holding another mortgage on the property which the plaintiff alleges is an inferior lien, who appears by attorney and answers, may be granted taxable costs accruing prior to the service of an amended complaint admitting the priority of his mortgage.⁹¹ Where one has been made a defendant improperly he may have costs against plaintiff.⁹² It is not error to allow costs in foreclosure cases to defendants who are successful in defeating a judgment for deficiency, or in reducing the amount claimed to be due upon the mortgage.⁹³ But a defendant against whom no demand is made for a personal judgment is not allowed costs.⁹⁴ One who unreasonably defends may be charged with costs.⁹⁵ If the defendants on foreclosure of a junior mortgage answer so as unnecessarily to increase the costs, they may be charged with costs.⁹⁶ But the court will not impose costs where parties intervene for good cause, although unsuccessful.⁹⁷

2. In case of tender or offer of judgment.

If a tender is made before judgment, either party may apply to the court to fix the amount of costs.⁹⁸ But the costs must be tendered to avail a defendant in an answer of tender.⁹⁹ And it is said that the tender does not cut off the right to an allowance.¹

88. *Stevens v. Wise*, 25 Misc. 457, 55 N. Y. Supp. 562.

89. See *v. Manhattan Co.*, 1 Paige, 48; *Vroom v. Ditmas*, 4 Paige, 526; *Boyd v. Dodge*, 10 Paige, 42; *Chamberlain v. Dempsey*, 36 N. Y. 144.

90. *Case v. Mannis*, 33 St. Rep. 44, 11 N. Y. Supp. 243.

91. *Welch v. Graham*, 124 N. Y. Supp. 945; *aff'd*, 148 App. Div. 900, 132 N. Y. Supp. 1150.

92. *Nelson v. Montgomery*, 1 Edw. 657; *Millaudon v. Brugiere*, 11 Paige, 163; *Rosa v. Jenkins*, 31 Hun, 384.

93. *Bockes v. Hathorn*, 17 Hun, 87; *aff'd*, 78 N. Y. 222.

94. *McRoberts v. Pooley*, 12 St. Rep. 107.

95. *O'Hara v. Brophy*, 24 How. Pr. 379; *Barker v. Burton*, 67 Barb. 458; *Gallagher v. Egan*, 2 Sandf. 742; *Jones v. Phelps*, 2 Barb. Ch. 360.

96. *Barnard v. Bruce*, 21 How. Pr. 360.

97. *West v. West, etc., Co.*, 7 St. Rep. 386.

98. *Barlow v. Cleveland*, 16 How. Pr. 364; *Pratt v. Ramsdell*, 16 How. Pr. 59; *Stevens v. Veriane*, 2 Lans. 90; *Morris v. Wheeler*, 45 N. Y. 708.

99. *Eaton v. Wells*, 82 N. Y. 576.

1. *Astor v. Palache*, 49 How. Pr. 231.

An offer of judgment may be made, as in any other action, in a foreclosure case, where judgment is asked for deficiency.² And such offer will cut off the right to an extra allowance.³ An offer by defendant to allow judgment of foreclosure and sale for a certain sum "with costs to be taken against him" does not permit the entry of a personal judgment against the defendant; and, where the plaintiff is entitled to such personal judgment, the offer, if not accepted, is not effective to give the defendant the costs thereafter accruing.⁴

3. Statutory allowance to plaintiff.

The plaintiff in a foreclosure action is entitled to the percentages allowed by section 1512 of the Civil Practice Act.⁵ But they are not taxable to a defendant.⁶ The allowance may be made on the application for judgment, and special notice is not necessary.⁷ It may be made on final judgment on a demurrer.⁸ But the allowance should not be granted before the amount due is computed.⁹

4. Additional allowance.

Under section 1513 of the Civil Practice Act, the court in its discretion may award to any party an additional allowance, not exceeding 2½ per cent, upon the sum due or claimed to be due on the mortgage, nor the aggregate sum of \$200. The additional allowance is a matter for the court's discre-

2. *Bathgate v. Haskin*, 63 N. Y. 261. See, however, *Penfield v. James*, 56 N. Y. 659.

3. *Astor v. Palache*, 49 How. Pr. 231.

4. *Rollins v. Barnes*, 23 App. Div. 240, 48 N. Y. Supp. 779.

5. *Hunt v. Middlebrook*, 14 How. Pr. 300.

Computation of allowance.—Subdivision 5 of section 1512 of the Civil Practice Act, provides for the computation of the statutory allowance as follows:

In an action to foreclose a mortgage upon real property, where a part of the mortgage debt is not due, if the final judgment directs the sale of the whole property, the percentages specified in this section must be computed upon the whole sum unpaid upon the mortgage. But if it directs the sale

of a part only, they must be computed upon the sum actually due; and if the court thereafter grants an order directing the sale of the remainder or a part thereof, the percentages must be computed upon the amount then due; but the aggregate of the percentages shall not exceed the sum which would have been allowed if the entire sum secured by the mortgage had been due when final judgment was rendered.

6. *Downing v. Marshall*, 37 N. Y. 380; *Williams v. Hernon*, 13 Abb. 297.

7. *Walsh v. Weidenfield*, 3 Daly, 334.

8. *McDonald v. Mallory*, 46 Super. Ct. 58; *De Stuckle v. Tehuantepec R. Co.*, 30 Hun, 34.

9. *Citizens' Savings Bank v. Bauer*, 17 St. Rep. 81, 1 N. Y. Supp. 450.

tion.¹⁰ This section permits 2½ per cent allowance upon the rendition of judgment in the foreclosure suit, although no defense has been interposed and the judgment has been taken by default.¹¹ And the limitation in subdivision 1 of \$200 does not necessarily apply when the action is difficult and extraordinary, for in such a case the allowance may be fixed under subdivision 2 at not exceeding 5 per cent.¹² It has been held that a leasehold interest is not real property, and an action to foreclose the mortgage thereon is therefore not within the restrictions as to extra allowances in subdivision 1 of section 1513.¹³

An order should not be made granting an extra allowance before the amount upon which it is to be computed has been fixed and determined.¹⁴ Where an interlocutory judgment awards costs but does not fix the amount thereof or appoint a referee to sell, the court may subsequently appoint a referee and grant an extra allowance, although one of the parties has died in the meantime.¹⁵ The usual notice that the plaintiff will apply for the relief demanded in the complaint is sufficiently broad, without further notice, to entitle the plaintiff to apply for allowance provided for by section 1513.¹⁶

5. Fees of referee.

Section 1544 of the Civil Practice Act fixes, in general, the fees of a referee in foreclosure as the same as those allowed to the sheriff on a sale of real property. The fees of a sheriff are fixed by section 1558. A referee who has collected over \$1,000 is entitled to a fee of \$50 for the sale, although the sale falls through because the title proved unmarketable by reason of defect of parties. The referee in such a case cannot obtain his fees by motion in the action, but his remedy is by action to recover them.¹⁷ He is not entitled to more than \$10 where it appears that such

10. *Moran v. Midville Realty Co.*, 162 N. Y. Supp. 117, aff'd, 176 App. Div. 807, 163 N. Y. Supp. 833; *Gott-scho v. Burger*, 161 N. Y. Supp. 784.

11. *Badger v. Johnston*, 106 App. Div. 237, 94 N. Y. Supp. 421.

12. *Long Island Loan and Trust Co. v. Long Island City & N. R. Co.*, 85 App. Div. 36, 82 N. Y. Supp. 644, aff'd without opinion, 178 N. Y. 588. Compare *Waterbury v. Tucker & Carter Cordage Co.*, 152 N. Y. 610, under a

prior statute.

13. *Huntington v. Moore*, 36 St. Rep. 541, 13 N. Y. Supp. 97.

14. *Citizens' Savings Bank v. Bauer*, 14 Civ. Pro. 340.

15. *Wasson v. Hoff*, 27 Misc. 55, 57 N. Y. Supp. 953.

16. *Badger v. Johnston*, 106 App. Div. 237, 94 N. Y. Supp. 421.

17. *Hover v. Hover*, 25 Misc. 95, 54 N. Y. Supp. 693.

commissions are based upon a sum bid by a party and applied upon that party's demand, as fixed by the judgment, without being paid to the referee.¹⁸ The provision allowing additional compensation where the property sells for more than \$10,000 applies only where the referee actually receives more than that sum and becomes accountable therefor.¹⁹ He is not entitled to additional compensation in every case where the property sells for more than \$10,000, but only in exceptional cases where he has had more than the ordinary amount of labor.²⁰ The plaintiff in foreclosure, by receiving money held by the referee applicable to the payment of costs awarded, does not waive his right to object to the referee's disbursements.²¹ A referee appointed to sell on foreclosure should not refuse to file a report showing his own disbursements merely because he has money applicable to the payment of costs awarded to the plaintiff's attorney, which the latter refuses to receive. On the filing of such report and notice to the plaintiff's attorney, he may question the disbursements charged by the referee against the purchase money.²²

6. Security for costs.

When the trustee of a mortgage given to secure bonds sues to foreclose at the instance of a sole bondholder who is financially irresponsible, and the mortgagor claims that the issue of the bonds was procured by fraud, the trustee should be required to give security for costs. The discretion to require security for costs under section 1523 is lodged in the Appellate Division as well as in the Special Term.²³

18. *Kant v. Bergman*, 97 App. Div. 118, 89 N. Y. Supp. 593.

19. *Metropolitan Life Insurance Co. v. Bendheim*, 59 N. Y. Supp. 793.

20. *James v. Peppard Realty Co.*, 108 Misc. 565, 178 N. Y. Supp. 585; *Dime Savings Bank of Brooklyn v. Pettit*, 59 N. Y. Supp. 794.

21. *Carter v. Builders' Construction*

Co., 134 App. Div. 553, 119 N. Y. Supp. 670.

22. *Carter v. Builders' Construction Co.*, 134 App. Div. 553, 119 N. Y. Supp. 670.

23. *Hagar v. Radam Microbe Killer Co.*, 119 App. Div. 839, 104 N. Y. Supp. 896.

ARTICLE VII.**REFERENCE TO COMPUTE AMOUNT DUE.****A. Rules of Civil Practice, Rule 256. Reference on default or admission.**

If, in an action to foreclose a mortgage, the defendant fail to answer within the time allowed for that purpose, or the right of the plaintiff, as stated in the complaint, is admitted by the answer, unless the court shall ascertain and determine the amount due, the plaintiff may have an order referring it to some suitable person as referee to compute the amount due to the plaintiff and to such of the defendants as are prior incumbrancers of the mortgaged premises, and to examine and report whether the mortgaged premises can be sold in parcels. Where the defendant is an infant, and has put in a general answer by his guardian, or if any of the defendants be absentees, the order of reference also shall direct the person to whom it is referred to take proof of the facts and circumstances stated in the complaint and to examine the plaintiff or his agent, on oath, as to any payments which have been made, and to compute the amount due on the mortgage, preparatory to the application for judgment of foreclosure and sale.

B. Rules of Civil Practice, Rule 257. Application for judgment on default or admission.

In an action to foreclose a mortgage, when no answer is put in by the defendant within the time allowed for that purpose, nor any answer denying any material facts of the complaint, the plaintiff may apply for judgment at any special term on due notice to such of the defendants as have appeared in the action, and without putting the cause on the calendar.

In such case, when he moves for judgment, the plaintiff must show whether any of the defendants who have not appeared are absentees, and, if the court has not computed, he must produce the referee's report as to the proof of the facts and circumstances stated in the complaint, and of the examination of the plaintiff or his agent, on oath, as to any payments which have been made.

C. Rules of Civil Practice, Rule 265. Referee to be selected by court.

The referee to be appointed in foreclosure cases to compute the amount due or to sell mortgaged premises or to report on application for surplus moneys, shall be selected by the court, and the court shall not appoint as such referee a person nominated by a party to the action or his counsel.

D. In general.

When there is no issue raised by answer, the practice is to apply for the appointment of a referee to compute the sum due on the bond and mortgage.²⁴ Upon the foreclosure

²⁴ *Kelly v. Searing*, 4 Abb. Pr. 354. Findings.—Where the answer was insufficient, and no evidence was given, and the court ordered judgment upon the pleadings when the case was called, held, that no findings of fact were re-

quired. *Eaton v. Wells*, 22 Hun, 123, aff'd, 82 N. Y. 576.

Demurrer overruled.—Where one of several defendants demurred for misjoinder of causes of action, which demurrer was overruled with privilege

of a trust mortgage securing the issue of bonds, where there are other creditors, the court may appoint a referee to compute the amount due and to ascertain and determine what property is covered by the mortgage.²⁵ The referee may be required to compute the amount due on other mortgages in case they are set up in the answer, and ordered to ascertain whether there are any prior liens upon the premises.²⁶ But the action cannot be referred while any of the defendants, against whom the plaintiff seeks a judgment for a deficiency, have not been served with a summons, or have been served only with a notice that no personal claim is made against them and have not appeared.²⁷

E. Affidavit to obtain reference.

The affidavit to obtain reference to compute amount due should state that no answer has been received, whether moneys secured have all become due and payable, and whether any defendants are absentees or infants.²⁸ Where it is conceded that plaintiff owns the mortgages in suit, that they are past due, and that he has a right to foreclose and sell the premises, the motion for a referee to compute the amount due should be granted, and it is immaterial that the plaintiff is influenced by a sinister or unworthy motive.²⁹

F. Infant defendant.

In case of infants or absentees, the plaintiff must prove his debt before the referee, in the same manner as if nothing had been admitted in the answer.³⁰ Failure to comply with rule 256, which provides that, if defendant is an infant, plaintiff shall be examined under oath as to payments, is fatal to the title.³¹ But the title to lands sold on foreclosure is not unmarketable merely because the referee took no proof of the heirship of the infants and absent defendants, whose guardian made the usual answer in such action, if the order

to answer, and one of the other defendants did not avail himself of the privilege within the time specified, it was held error to enter judgment against him before the other defendants were in default. *Fales v. Lawson*, 21 St. Rep. 710, 4 N. Y. Supp. 284.

25. *Metropolitan Trust Co. v. Dolgeville, etc., Co.*, 34 Misc. 354, 69 N. Y. Supp. 822.

26. *Chamberlain v. Dempsey*, 36 N.

Y. 144.

27. *Goodyear v. Brooks*, 2 Abb. (N. S.) 296.

28. *Anonymous*, 3 How. Pr. 158.

29. *North Central Realty Co. v. Blackman*, 145 App. Div. 199, 129 N. Y. Supp. 1005.

30. *Mills v. Dennis*, 3 Johns. Ch. 367.

31. *Smith v. Warringer*, 41 Misc. 94, 83 N. Y. Supp. 655.

of reference contained the directions required by rule 256, and the referee took proof of the facts and circumstances stated in the complaint and examined the plaintiff's agent under oath as to the mortgage, the payment thereon, the amount due, and where any evidence as to heirship would not have affected the judgment.³² Where an answer, interposed by an infant, alleges payment of part of the amount due, the issue thus formed should be tried by the court, or by a referee appointed for that purpose, and cannot be summarily disposed of under the order of reference.³³ If an infant's answer raises a material issue, it must be tried by the court or referred, though he fail to appear.³⁴ Where the order of reference to compute the amount due does not contain a direction to the referee to take proof of the facts and circumstances set forth in the complaint, as required by rule 256, but the referee does take such proof and files the evidence with his report, the same as if the order had conformed to the requirements of the rule, and the report is confirmed, and judgment of foreclosure and sale entered, and thereafter an order is made and entered appointing a referee to compute *nunc pro tunc*, and inserting therein the direction required by the rule, the title acquired under the foreclosure sale is marketable.³⁵

G. Absentee defendant.

There can be no judgment rendered against a nonresident defendant who does not appear, and who has not been personally served with a summons, except upon the report of a referee as to the truth of the matters stated in the complaint.³⁶ Where there are absentees, the order should direct the referee, among other things, to take proof of the facts set forth in the complaint, and report to the court the proof and examinations had before him. The proof should be legal, not secondary, proof.³⁷ And the reference and examination must be had though there are other defendants who appear and contest the plaintiff's claim, and although they have a common interest with such absentee in the defense of the action.³⁸ But it has been held that, where defendants

32. *Franklin v. Di Clemente*, 123 App. Div. 664, 108 N. Y. Supp. 123.

33. *Jackson v. Reon*, 60 How. Pr. 103.

34. *Exchange Fire Ins. Co. v. Early*, 54 How. Pr. 279; *Jackson v. Reon*, 60 How. Pr. 103.

35. *Ames v. Danzilo*, 158 App. Div. 232, 143 N. Y. Supp. 75.

36. *Corning v. Baxter*, 6 Paige, 178.

37. *Wolcott v. Weaver*, 3 How. Pr. 159.

38. *Corning v. Baxter*, 6 Paige, 178; *Hill v. McReynolds*, 30 Barb. 490.

in a suit of foreclosure have been duly served by publication and do not appear, the title of a purchaser on the foreclosure sale is marketable, although the order of reference did not direct the referee to take proof of the facts and circumstances stated in the complaint, pursuant to rule 256, and although upon application for judgment such proof was not presented pursuant to rule 192. Said defects are at most irregularities which in no way affected the jurisdiction of the court or its judgment. Especially is this so where the referee did in fact take proof as to the facts set forth in the complaint.³⁹

H. Issue raised by answer.

Where a defendant interposes an answer raising a material issue, but fails to appear at the trial, the plaintiff cannot have an order of reference to compute the amount due as upon default.⁴⁰ In such a case the cause should be placed on the calendar and judgment demanded upon the pleadings.⁴¹ The issues between the plaintiff and the answering defendants are generally decided before a reference is made to compute the amount due.⁴² Rule 256 does not purport to relate in any way to a trial by the court where issues arise upon the pleadings in the action.⁴³ The reference is largely for the protection of infants and absentees, and not to facilitate the proceedings of the plaintiff.⁴⁴ If the answer in foreclosure raises an issue against plaintiff, the court cannot proceed summarily and determine whether the issue be material.⁴⁵

I. Order of reference.

The court cannot, on the appointment of a referee to compute, direct that on the coming in of the report it be con-

39. *Brody, etc., Co. v. Hochstadter*, 160 App. Div. 310, 144 N. Y. Supp. 631.

40. *Exchange Fire Ins. Co. v. Early*, 4 Abb. N. C. 78.

41. *Van Valen v. Lapham*, 13 How. Pr. 243; *Boyce v. Brown*, 7 Barb. 81; *Stuyvesant v. Browning*, 33 N. Y. Super. Ct. 203.

42. *Cram v. Bradford*, 4 Abb. Pr. 193; *Dow v. Lansdel*, 10 St. Rep. 373.

Proceeding regular.—In an action in which some of the defendants answered and some of the defendants did not, a reference was taken and the issues decided against defendants, but the amount due was not computed. The

plaintiff then applied for the relief demanded in the complaint, on notice, and, no opposition being made, took an order of reference to compute the amount due, and, after obtaining the report, on notice, brought the cause to a hearing and took judgment of foreclosure and sale. Held, that he was regular. *Hill v. McReynolds*, 30 Barb. 490.

43. *Redmond v. Hughes*, 151 App. Div. 99, 135 N. Y. Supp. 843.

44. *Godwin v. Liberty Nassau Bldg. Co.*, 144 App. Div. 164, 128 N. Y. Supp. 791.

45. *Stuyvesant v. Browning*, 33 Super. Ct. 203.

firmed, and usual judgment had for foreclosure and sale, nor can an extra allowance be granted in such order.⁴⁶ An order of reference is in due form which directs the referee to examine the plaintiff as to the truth of the allegations of the complaint where it was averred that no payments had been made and plaintiff so testified before the referee.⁴⁷ An order of reference of this character is in the nature of an interlocutory decree and must be made by the court. It is not appealable, but is brought up for review on appeal from a final judgment.⁴⁸ If, however, a reference is directed which is unauthorized, an appeal will lie.⁴⁹ The referee should not act until the order has been actually entered and a certified copy served upon him.⁵⁰

J. Qualifications of referee.

In addition to the requirements of Rule 265 as to the qualifications of the referee in foreclosure cases, Rule 172 and section 251 of the Judiciary Law make other disqualifications applying to referees in general.⁵¹ Any claim that a referee was disqualified by reason of the fact that he had formerly been the clerk of one of the attorneys in the case is waived when the other counsel mentioned the fact to the referee and disclaimed any intention of questioning his integrity or objecting to his taking the evidence.⁵² The nomination of a referee by one of the parties is not an irregularity.⁵³

K. Notice of hearing before referee.

A defendant who was served with notice of motion for judgment and failed to appear is not entitled to have the

46. *Citizens' Savings Bank v. Bauer*, 14 Civ. Pro. 340.

47. *Hatfield v. Malcolm*, 71 Hun, 51, 24 N. Y. Supp. 596.

48. *Roberts v. White*, 39 Super. Ct. 272; *Johnson v. Everett*, 9 Paige Ch. 636; *Dickenson v. Mitchell*, 19 Abb. Pr. 286; *Ubsdell v. Root*, 3 Abb. Pr. 142; *Harris v. Mead*, 16 Abb. Pr. 257.

49. *Cram v. Bradford*, 4 Abb. Pr. 193; *Whitaker v. Desfosse*, 7 Bosw. 678; *Chamberlain v. Dempsey*, 36 N. Y. 144.

50. *Bonner v. McPhail*, 31 Barb. 106. See also, *Bucklin v. Chapin*, 53

Barb. 488.

51. In Kings county, all sales made under Laws 1876, chapter 439, must be made by the sheriff, except where he is a party or both parties agree to the appointment of a referee. *Kerrigan v. Force*, 9 Hun, 185, *aff'd*, 68 N. Y. 381. But a sale so made in that county is not invalid, and the purchaser obtains a good title. *Dickinson v. Dickey*, 14 Hun, 617; *Abbott v. Curran*, 98 N. Y. 665.

52. *Fleck v. Cohn*, 131 App. Div. 248, 115 N. Y. Supp. 652.

53. *White v. Coulter*, 3 T. & C. 608.

judgment set aside because he did not receive notice of hearing before the referee to compute the amount due.⁵⁴

L. Proceedings before referee.

The referee cannot accept an affidavit as proof of the amount due.⁵⁵ If the plaintiff is a corporation, its officers should be examined, in a proper case, as to the payments which ought to be credited on the mortgage.⁵⁶ The recital in the bond and mortgage is evidence of its execution.⁵⁷ The mortgage should not be received in evidence until the bond has been proved.⁵⁸ The referee must take testimony and report upon the validity of bonds secured by a mortgage.⁵⁹ The offering of evidence by a plaintiff does not prevent his obtaining the benefit of any admissions on the part of the defendant by reason of failure to deny the allegations in the complaint.⁶⁰

When a decree has been made upon pleadings and proofs appointing a referee to compute the amount due, to examine the plaintiff as to payments, and to take proof as to the allegations of the bill against an absent defendant, and directing a sale of the premises on the confirmation of the report, the parties who have appeared and answered are concluded by such decree as to the issues and pleadings, and the referee has no right to examine as to any facts except those relating to payments on the mortgage, nor to examine the absent defendant on behalf of his co-defendant as to a defense of fraud set up in the answer.⁶¹

M. Determination of amount due.

The owner and holder of a mortgage may pay taxes remaining unpaid on mortgaged premises in order to protect the security, although there is no clause in the mortgage authorizing him to do so, and the claim can be enforced as part of the mortgaged debt.⁶² The referee should include the amount of such taxes, assessments or liens of a like

54. *Eyring v. Hercules Land Co.*, 9 App. Div. 306, 41 N. Y. Supp. 191. See also, *Kelly v. Searing*, 4 Abb. Pr. 354.

55. *Security Fire Ins. Co. v. Martin*, 15 Abb. Pr. 479.

Referee's oath.—As to the necessity of taking the oath, see *Exchange Fire Ins. Co.*, 4 Abb. N. C. 78; *McGowan v. Newman*, 4 Abb. N. C. 80.

56. *Ontario Bank v. Strong*, 2 Paige, 301.

57. *Cooper v. Newland*, 17 Abb. Pr. 342.

58. *Knickerbocker L. Ins. Co. v. Hill*, 16 Abb. Pr. N. S. 321.

59. *Bockes v. Hathorn*, 20 Hun, 503.

60. *Darling v. Brewster*, 55 N. Y. 667.

61. *McCracken v. Valentine*, 9 N. Y. 42.

62. *Sidenberg v. Ely*, 90 N. Y. 257; *Williams v. Townshend*, 31 N. Y. 414.

nature and include interest, adding it to the mortgage debt.⁶³ Where the mortgage contained a clause requiring the mortgagor to keep the premises insured, and agreeing that in case of failure to do so the mortgagee should insure, moneys paid by the mortgagee for insurance will be a charge on the premises and may be included in the amount due; otherwise, where there is no such agreement in the mortgage.⁶⁴ And it is held that where a mortgagee has been compelled to pay rents to preserve the property, the amount so paid by him may be included in the amount found due, where the action is against the mortgagor or against his grantee, with notice of that fact, but not in case it is against the grantee without such notice.⁶⁵

The referee should report the amount due even though the allegation is that a less amount is due than appears by the mortgage,⁶⁶ or though it exceed the penalty of the bond.⁶⁷ He need not set out at length the items making up the amount due.⁶⁸

N. Determination of manner of sale.

The first duty of the referee under the statute, aside from computing the amount due, is to ascertain whether the mortgaged premises are so situated that they can be sold in parcels, without injury to the interests of the parties. The inquiry is, how can the mortgaged premises be sold so as to realize the most money? The benefit mentioned and intended by the statute is a benefit to all parties. The court will look at the pleadings and other papers before it on the hearing, aside from the report of the referee, in determining the manner of sale.⁶⁹ The referee, in case the premises can be sold to advantage in parcels, should report that fact together with the order of sale.⁷⁰

63. *Robinson v. Ryan*, 25 N. Y. 320; *Foure v. Winans*, Hopk. Ch. 283; *Burr v. Veeder*, 3 Wend. 412.

64. *Faure v. Wynans*, Hopk. Ch. 283.

65. *Cattlin v. Grissler*, 57 N. Y. 363; *Robinson v. Ryan*, 25 N. Y. 320.

66. *Peck v. N. Y. Co.*, 85 N. Y. 246.

Admissions by mortgagee.—Where the mortgagee was dead and receipts had not always been taken by the mortgagors for payments made, there was positive testimony that deceased had said, in order to reduce his taxes, that the mortgages were pretty much all paid, and that the defendants had paid their mortgage off to a certain

sum named, held, that the referee to compute the amount due had the right to believe and find as a fact that the sum named was all that was then due deceased. *Whitman v. Foley*, 36 St. Rep. 133, 125 N. Y. 651.

67. *Mower v. Kip*, 6 Paige, 88.

68. *Sidenberg v. Ely*, 90 N. Y. 257.

69. *Gregory v. Campbell*, 16 How. Pr. 417.

70. *Ferguson v. Kimball*, 3 Barb. Ch. 616; *Rathbone v. Clark*, 9 Paige Ch. 648; *Perrine v. Striker*, 7 Paige Ch. 598; *Erie Co. Savings Bank v. Roop*, 48 N. Y. 292.

O. Confirmation of report.

The report of the referee should be confirmed by the court at special term.⁷¹ And when confirmed, it becomes the act of the court.⁷² If any party has objections to the report of a referee to compute, it is his duty to file and serve exceptions, or if any irregularity is alleged, to move to set the report aside; silence must be deemed acquiescence in the report of the referee and of the regularity of the proceedings before him.⁷³ The computation of the referee may be overruled by the court.⁷⁴ The court has control over the computation and may send the report back for further findings.⁷⁵

P. Form of affidavit on application for judgment.

(Title.)

STATE OF NEW YORK, }
COUNTY OF } ss.:

....., being duly sworn, says that he is the attorney for the plaintiff in the above-entitled action, and that this action was brought to foreclose a certain mortgage on real property situate in the county of, N. Y., and that the complaint herein was filed in the office of the clerk of the county of, N. Y., on the day of, 19...

That all of the defendants herein have been duly served with the summons and complaint herein more than twenty days since. (Make appropriate allegations as to appearances or default of parties.) That the time for answering has expired as to all of the defendants and that no answer or demurrer has been received, except (If any of the defendants have answered facts relating thereto should be stated.)

That on the day of, 19..., and more than twenty days since, a notice of the pendency of this action, in the form prescribed by the Civil Practice Act, and containing the names of all of the parties thereto, the object of the action and a description of the property in that county affected thereby, the date of the mortgage and the parties thereto and the time and place of recording the same, and containing correctly and truly all of the particulars required by law to be stated in such notice, was duly filed in the office of the clerk of the county of, N. Y., that being the county where the mortgaged premises are situated, which said filing was done at or immediately after the time of the filing of the complaint herein, and that since the filing of said notice the complaint in this action has not been amended by making new parties to the action, or so as to affect other property not described in the original complaint, or so as to extend the claim of the plaintiff as against the mortgaged premises.

71. McGowen v. Newman, 4 Abb. N. C. 80; Swarthout v. Curtis, 4 N. Y. 415; Empire Association v. Stevens, 8 Hun, 515.

72. McGovern v. Newman, 4 Abb.

N. C. 80.

73. Chamberlain v. Dempsey, 36 N. Y. 144.

74. Crine v. White, 1 Law Bull. 92.

75. Austin v. Ahearne, 61 N. Y. 6.

That the whole amount of said mortgage is due and unpaid, except the sum of dollars to become due, .. (or state the amount due and the amount to become due).

(If any of the defendants are infants or absentees the facts in relation thereto must be stated. If there are no such parties, that fact should be stated.)

That no previous application has been made for judgment or for an order of reference to compute the amount due to the plaintiff on said bond and mortgage.

THEREFORE, Deponent asks that an order be granted appointing a referee to ascertain and compute the amount due to the plaintiff on said bond and mortgage.

(Jurat.)

.....

.....

Q. Form of order of reference.

(Caption.)

(Title.)

It appearing from the summons and verified complaint herein, filed in the office of the clerk of the county of on the day of, 19.., and the affidavit of, attorney for the plaintiff in this action, verified on the day of, 19.., and the affidavit of the filing of notice of pendency herein, that this is an action to foreclose a mortgage on certain premises located in county, N. Y., and that due and personal service of summons has been made on all of the defendants in this action and that none of such defendants are infants or absentees; and that all of such defendants have made default in pleading and that notice of the pendency of this action was duly filed in the office of the clerk of the county of, N. Y., which is the county within which the mortgaged premises are situated, more than twenty days since and at or immediately after the time of the filing of the complaint herein as required by law, and that no answer or demurrer or copy thereof has been served upon or received by the plaintiff's attorney in behalf of either or any of the said defendants.

NOW, THEREFORE, On motion of, Esq., attorney for the plaintiff,

It Is Ordered, That it be referred to, Esq., of the of, N. Y., to ascertain and compute the amount due to the plaintiff upon said bond and mortgage as set forth in the complaint in this action, and to examine and report whether the mortgaged premises can be sold in parcels.

(If the whole amount is not due, the order should contain a clause that the referee should ascertain and report the amount not due and which remains unpaid, including the interest thereon to the date of his report, and also to ascertain and report the situation of the mortgaged premises and whether in his opinion the same can be sold in parcels without injury to the interest of the parties and if he shall be of the opinion that a sale of the said premises in one parcel will be most beneficial to the parties, then he shall report his reasons for such opinion.)

(If any of the defendants is an infant or absentee the order should direct the referee to take proof of the facts and circumstances stated in the complaint and to examine the plaintiff, or his agent, on oath as to any payments which have been made and to compute the amount due to the plaintiff for principal and interest on the bond and mortgage set forth in the complaint.)

It Is Further Ordered, That the hearing before said referee proceed forthwith, and that, immediately upon the incoming of the report of said referee, and without further notice, the plaintiff have judgment of foreclosure and sale and for the relief demanded in the complaint besides costs.

.....

.....

R. Form of report of referee.

(Title.)

To the Supreme Court of the State of New York:

In pursuance to an order of this court, made and entered in the above-entitled action and dated on the day of, 19.., by which it was referred to the above-named referee, to ascertain and compute the amount due to the plaintiff for principal and interest on the bond and mortgage set forth in the complaint. (In case of infants or absentees, or in case the whole amount is not due, make appropriate recitals.)

I,, the referee named in said order, do report that before proceeding to hear the testimony I was first duly sworn fairly and faithfully to determine the questions referred to me and to make a just and true report thereof according to the best of my understanding, and I do report that I have computed and ascertained the amount due to the plaintiff upon and by virtue of said bond and mortgage and that I find, and accordingly report, that there is due to the plaintiff for principal and interest on said bond and mortgage, at the date of this, my report, the sum of dollars.

Schedule "A," hereunto annexed, contains a schedule of the documentary evidence introduced before me and shows the amounts due for principal and interest respectively, the period of computation of interest and its rate.

(If the entire sum is not due.) That I have computed and ascertained the amount secured by said bond and mortgage which has not become due and which remains unpaid, and that the same is the sum of dollars. Schedule "B," hereunto annexed, is a part of this report and contains a statement of the said unpaid and not due principal and interest, respectively, and names the period of computation of interest and its rate.

And I do further report that I have ascertained the situation of the said mortgaged premises and am of the opinion that the same can (or cannot) be sold as parcels without injury to the interests of the parties. That my reasons for such opinion are as follows: (State reasons.)

(In case of infants or absentees.) And I do further report that I have taken proof of the facts and circumstances stated in the complaint and have examined the plaintiff (or his agent) on oath as to

any payments which have been made, and that I am of the opinion and do hereby report that the facts and circumstances stated in the said complaint are true and that no payments have been made on said bond and mortgage, except such as are duly credited in said complaint.

Dated, the day of, 19...

.....

Referee.

(Annex schedule of documentary evidence and sum due and to become due and evidence taken before referee.)

ARTICLE VIII.

JUDGMENT.

A. Civil Practice Act, § 1082. Final judgment must direct sale.

In an action to foreclose a mortgage upon real property, if the plaintiff becomes entitled to final judgment, it must direct the sale of the property mortgaged or of such part thereof as is sufficient to discharge the mortgage debt, the expenses of the sale and the costs of the action.

B. Rules of Civil Practice, Rule 258. Proof of notice of pendency.

In all foreclosure cases, the plaintiff, when he moves for judgment, must show by affidavit, or by the certificate of the clerk of the county in which the mortgaged premises are situated, that a notice of the pendency of the action containing the names of the parties thereto; the object of the action; a description of the property in that county affected thereby; the date of the mortgage, the parties thereto, and the time and place of recording the same; has been filed at least twenty days before such application for judgment and at or after the time of filing the complaint, as required by law.

C. Rules of Civil Practice, Rule 259. Contents of judgment of sale.

In every judgment for the sale of mortgaged premises, the description and particular boundaries of the property to be sold, so far as the same can be ascertained from the mortgage, and other instruments on record affecting the property, shall be inserted. Unless otherwise specially ordered by the court, the judgment shall direct that the mortgaged premises, or so much thereof as may be sufficient to discharge the mortgage debt, the expenses of the sale and the costs of the action, and which may be sold separately without material injury to the parties interested, be sold by or under the direction of the sheriff of the county, or a referee, and that the plaintiff, or any other party, may become a purchaser on such sale; that the sheriff or referee execute a deed to the purchaser; that out of the proceeds of the sale, unless otherwise directed, he pay the expenses of the sale, and that he pay to the plaintiff, or his attorney, the amount of his debt, interest and costs, or so much as the purchase money will pay of the same and that he take the receipt of the plaintiff, or his attorney, for the amount so paid, and file the same with his report of sale, and that the purchaser at such sale be let into possession of the premises on production of the deed.

D. Nature of foreclosure judgment.

For some purposes a judgment of foreclosure is a final judgment;⁷⁶ but, while it is final for purposes of review, in other respects it is interlocutory; and parties to the action, having judgment liens upon the property, may sell it upon execution, notwithstanding the judgment, prior to the foreclosure sale.⁷⁷

E. Notice of application.

In an action to foreclose a mortgage, defendants who have appeared and demanded service of all papers, but do not answer, are entitled to eight days' notice of application for judgment; and where no such notice is given them nor any notice of trial served on them, the judgment will not be signed unless the plaintiff procures a waiver of such notice from such defendants.⁷⁸

Where, in an action to foreclose a mortgage, the defendants, there being no infants, incompetents or absentees, were all served within the jurisdiction, and three of them appeared, but none of them answered, and the plaintiff served a notice of motion on all the defendants who had appeared for judgment as demanded in the complaint, and none of them appeared, and the application for judgment was not opposed, whereupon the court appointed a referee to compute, the plaintiff, the referee having reported the amount due upon the mortgage, was entitled to judgment without further notice. Upon the refusal of the justice presiding to grant the judgment, the plaintiff should ask for an order denying his application, from which he may appeal, and he should not apply for a peremptory mandamus directing entry of judgment by default.⁷⁹

Where the summons and complaint are duly served upon all of the defendants personally, and all but one defaults in appearance, and that one appears by his attorneys, but defaults in answering, and thereafter gives the plaintiff's attorney a written waiver upon the back of the notice of appearance that "notice of application for reference and judgment of foreclosure and sale is hereby waived" said

76. *Barnard v. Onderdonk*, 11 Abb. N. C. 349.

Direction of judgment by referee.—The statement at the conclusion of the report that plaintiff is entitled to judgment as specified in the report is a sufficient direction where the reference was to hear and decide. *Albany County Savings Bank v. McCarty*, 71

Hun, 227, 24 N. Y. Supp. 991, reversed, 149 N. Y. 71.

77. *Nutt v. Cumming*, 155 N. Y. 309.

78. *Selinger v. The G. C., Inc.*, 81 Misc. 343, 142 N. Y. Supp. 194.

79. *People ex rel. Rosenquest v. Donnelly*, 168 App. Div. 500, 153 N. Y. Supp. 997.

waiver constitutes the consent required by section 491 of the Civil Practice Act to make the application for judgment to a justice of the Supreme Court out of court.⁸⁰

F. Contents of final judgment.

Rule 259 prescribes, in general, the form of the judgment in a foreclosure action.⁸¹ Where the owner of mortgaged premises appears in a suit of foreclosure and demands service of all papers except the complaint, he reserves the right to be heard on the form of the judgment to be entered.⁸² The proceeds of a sale under a mortgage given by the mortgagor to secure various debts are paid over to the creditor, not as a voluntary payment, but by operation of law, and in the absence of directions given in the security, their application, when several obligations are secured by the mortgage and their proceeds will not pay all, is to be made by the court in accordance with equitable principles.⁸³ A recital in a judgment of foreclosure that affidavits were read and filed showing the service of the summons means the service of a summons necessary for the commencement of the action against all the defendants.⁸⁴

80. *Bartlett v. Lundin*, 182 App. Div. 117, 169 N. Y. Supp. 391.

81. *Removal of building.*—Form of judgment where there is a right to remove a building. See *Brown v. Keeney Cheese Assoc.*, 59 N. Y. 242.

Building loan mortgage.—Where, upon the trial of an action to foreclose a mortgage brought by the receivers of a loan association upon which some amount was due, the court declined to find the amount due or to award judgment of foreclosure and sale for any portion of the mortgage debt, upon the theory that, owing to litigation pending and uncertainty as to the amount of the assets of the association, it was then impossible for the receivers to state even approximately the amount of the dividends which the defendants would be entitled to receive upon their stock in the association, and postponed the foreclosure and sale until that fact could be ascertained upon the final accounting of the receivers, and directed that a judgment should be entered for its ascertainment as soon as the assets of the association were sufficiently liqui-

dated for the purpose, the judgment must be reversed; the plaintiffs are entitled to a sale of the premises to secure the payment of their mortgage debt and cannot be deprived of it unless some adverse dominating equity requires it and the proofs bring the case within the exceptional class. *Breed v. Ruoff*, 173 N. Y. 340. The foreclosure of a building loan mortgage payable on installments should not be denied on the mortgagor's default because there is a possibility that the loan association may not be able to mature the building loan stock when the payments are completed, especially so when the issue is not raised by the defendant and there is no proof that the plaintiff cannot perform its contract. *Harbor & Suburban Building & Savings Ass'n v. Wood*, 121 App. Div. 507, 106 N. Y. Supp. 173, *aff'd*, 194 N. Y. 601.

82. *Silverstein v. Brown*, 153 App. Div. 677, 138 N. Y. Supp. 848.

83. *Orleans Co. National Bank v. Moore*, 112 N. Y. 543.

84. *Bosworth v. Vandewalker*, 53 N. Y. 597.

G. Direction as to payment of subsequent liens.

It is competent for the court to direct the land to be sold free of all liens, taxes or assessments, or subject thereto, or it may require them to be paid out of the proceeds of the sale under such terms and conditions as it shall prescribe.⁸⁵ Where there are liens subsequent to the mortgage, the court may order the entire mortgaged premises sold, though not necessary to pay plaintiff's claim, or part of the whole may be sold.⁸⁶ The rights of subsequent incumbrancers may be protected by the court in the sale of the property, where a portion of it is sufficient to satisfy the mortgage by ordering the sale of enough so that other incumbrancers may be paid.⁸⁷

Where the mortgaged premises have been sold under a prior mortgage pending foreclosure of the junior mortgage, the plaintiff should proceed to enter judgment of foreclosure and sale, and to have the surplus in the hands of the chamberlain applied as far as it will go in reduction of his mortgage lien, and be relieved from the necessity of a sale by order because of the circumstances. Thereafter he may apply for a deficiency judgment.⁸⁸

Where a mortgage is so worded as to cover after-acquired property, including property the title to which is to remain in the vendor until the purchase price is paid, it should be directed that the whole be sold and the vendor under the conditional contract be paid first.⁸⁹

H. Directions as to prior liens.

A judgment in an action to foreclose a junior mortgage may direct a sale subject to the prior incumbrance.⁹⁰ Prior incumbrancers may be made parties, for the purpose of

^{85.} *Day v. Town of New Lots*, 107 N. Y. 148; *Poughkeepsie Savings Bank v. Winn*, 56 How. Pr. 368.

Deduction of assessment.—Where a purchaser at a foreclosure sale, who has deducted from the purchase price an assessment, thereafter has the assessment vacated, the decree of sale will not be amended so as to compel him to allow the amount of the assessments, although similar assessments had, at the time of the sale, been vacated at the instance of other parties. *Browning v. O'Connell*, 4 Law Bull. 9.

^{86.} *McBride v. Lewisohn*, 7 Hun, 524; *DeForest v. Farley*, 62 N. Y. 628. *Contra*, *Merchants and Traders' Savings Bank v. Roberts*, 1 Abb. 381.

^{87.} *Livingston v. Mildrum*, 19 N. Y. 440.

^{88.} *Lowe v. Weil*, 117 N. Y. Supp. 1025.

^{89.} *Washington Trust Co. v. Morse Iron Works*, 106 App. Div. 195, 94 N. Y. Supp. 495, reversed, 187 N. Y. 307.

^{90.} *Western Ins. Co. v. Eagle Fire Ins. Co.*, 1 Paige, 284; *Daily v. Kingston*, 41 How. Pr. 22.

Unrecorded deed.—One who claims under an unrecorded deed prior to the mortgage is a proper defendant, and the question of priority is necessarily involved and proper to be determined in the action. *Brown v. Volkening*, 64 N. Y. 76.

having the amount of their incumbrances ascertained, but if their priority is not stated in the complaint, or provided for in the judgment, they do not lose any rights by failing to answer, and do not waive priority of their liens, unless the land is sold free of their liens, with their consent.⁹¹ Only the rights and interests possessed by the mortgagor at the time of the mortgage can be sold. A judgment which forecloses a prior mortgage is irregular and may be opened on motion of the prior mortgagee.⁹² But, in case the prior mortgagee has been negligent in asserting his rights, he will not be allowed to disturb a *bona fide* purchaser, but will be compelled to follow the fund realized at the sale.⁹³ In an action by a junior mortgagee, the court will not direct a disposition of rents assigned to a prior mortgagee by a prior assignment, where he is not a party to the proceeding.⁹⁴

I. Direction as to deficiency.

Directions as to the payment of the deficiency may be inserted in the judgment of foreclosure.⁹⁵ The courts have power to direct the payment by the mortgagor of any residue of the mortgage debt that may remain unpaid after sale, in cases where the mortgagor shall be personally liable for the debt secured by the mortgage, and if the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor, the plaintiff may make such person party to the action, and the court may adjudge payment of the residue of such debt remaining unsatisfied after a sale of the mortgaged premises against such other person, and may enforce such payment as in other cases.⁹⁶ But the plaintiff cannot have a contingent personal judgment against some of the defendants, before final judgment of foreclosure.⁹⁷ And a judgment against the administrator of the mortgagor, for a deficiency, cannot be declared a lien upon the surplus arising from another foreclosure sale.⁹⁸ After

91. *Emigrant Industrial Savings Bank v. Goldman*, 75 N. Y. 127.

92. *McReynolds v. Munns*, 2 Keyes, 214.

93. *Hamlin v. McCahill, Clarke*, 249.

94. *State Bank v. Cohen*, 124 N. Y. Supp. 433.

95. *Moore v. Shaw*, 15 Hun, 428, appeal dismissed, 77 N. Y. 512.

96. *Schwinger v. Hickok*, 53 N. Y. 280.

Lands in another State.—A judg-

ment of foreclosure on lands situated partly in this and partly in an adjoining State is properly restricted to the sale of the lands in this State and may direct judgment for the deficiency without waiting the result of the foreclosure in the other State. *Clark v. Simmons*, 55 Hun, 175, 28 St. Rep. 738, 8 N. Y. Supp. 74.

97. *Cobb v. Thornton*, 8 How. Pr. 66.

98. *Fliess v. Buckley*, 24 Hun, 514, 90 N. Y. 286.

one of two joint purchasers who had assumed an existing mortgage has paid his share of the debt, the court will direct the interest of the other purchaser to be first applied in payment of the mortgage.⁹⁹

J. Relief not sought in pleadings.

A judgment of foreclosure is ineffectual if it attempts to determine rights of persons not parties to the suit.¹ And, if it attempts to give any relief not asked for by the pleadings, it will be vacated.^{1a} No greater relief will be granted as against parties not appearing than is demanded in the complaint.² The court has no jurisdiction to enter a decree directing the sale of other real estate not subject to the mortgage, although the owner thereof is a party to the action, and so far as it purports so to do, the decree is void.³

The fact that a judgment of foreclosure and sale, in describing the lands, departs from the language of the complaint and directs the sale of a parcel which had been excepted in the complaint, cannot be taken advantage of by the plaintiff who purchased at the sale, so as to sustain a claim of title to the excepted parcel. So far as the decree directs the sale of lands not covered by the mortgage, or described in the complaint, it is wholly unauthorized and void as against a defaulting defendant.⁴

K. Sale of part of premises.

The court has power to direct the sale of all the property covered by the mortgage, though the amount due may be raised by the sale of a portion only.⁵ And it may direct the

99. *Cornell v. Prescott*, 2 Barb. 16.

1. *Watson v. Spence*, 20 Wend. 260; *Totten v. Stuyvesant*, 3 Edw. 500.

1a. *Simonson v. Blake*, 20 How. Pr. 484.

2. *Jacobson v. Smith*, 73 App. Div. 412, 77 N. Y. Supp. 49, appeal dismissed, 172 N. Y. 654; *Shneider v. Mahl*, 84 App. Div. 1, 82 N. Y. Supp. 27.

Accounting.—A complaint in foreclosure prayed that if the proceeds were insufficient, an accounting might be had of the rents and profits by the then owner, who had purchased the premises subject to the mortgage and taxes, but had not assumed to pay them, and that he might be adjudged to pay any deficiency to the extent of the rents and profits received by him.

None of the defendants answered or demurred. There being a deficiency, the referee, on the accounting, found that the owner had collected more than the taxes amounted to. On motion to confirm the report and for judgment, held, that the owner's failure to answer was not an admission that plaintiff was entitled to the relief demanded, but simply that he was entitled to such relief as the facts alleged entitled him to have. *Argall v. Pitts*, 78 N. Y. 239.

3. *Clapp v. McCabe*, 84 Hun, 379, 32 N. Y. Supp. 425, 65 St. Rep. 699, aff'd, 155 N. Y. 525.

4. *Clapp v. McCabe*, 155 N. Y. 525.

5. *Brevoort v. Jackson*, 1 Edw. 477; *DeForest v. Farley*, 4 Hun, 640; *Dobbs v. Niebuhr*, 3 N. Y. Supp. 415, 19 St.

entire premises to be sold for the benefit of subsequent incumbrancers, although they are more than sufficient to satisfy the plaintiff's claim.⁶ If the premises at the time of the execution of the mortgage consisted of a single tract, the mortgagee, upon a foreclosure, is not bound to sell in parcels because it was subsequently subdivided into lots.⁷ A sale of two buildings in one lot is not necessarily invalid; whether such a sale be valid or not is to be determined by the circumstances of the particular case.⁸

When, by subsequent conveyances, different equities have been created as to interests in different parcels of a mortgaged estate, the portion will be sold last on foreclosure which constitutes an owner's single security, and if it would be a sacrifice to sell undivided interest in a parcel separately, where the whole parcel may be sold, a sale of the whole will be decreed and the equities between the different parts will be adjusted on the coming in of the surplus.⁹

Where a mortgage covers separate parcels of land, some of which are included in a prior mortgage, a judgment of foreclosure must order a sale of the parcels separately and direct that the prior mortgage be paid out of the proceeds of the sale of the parcels covered thereby, and the balance, if any, applied on the second mortgage.¹⁰

L. Sale of parcels in a particular order.

The judgment may provide that the parcels be sold in a particular order, where such course is for the best interests of the parties,¹¹ or the judgment may commit to the referee

Rep. 909. And see chapter on Real Property, Provisions Relating to.

Property condemned.—In an ordinary action of foreclosure, judgment for payment to plaintiff of moneys awarded for a portion of the land taken for public purposes and for foreclosure of the balance is proper. *Hooker v. Martin*, 10 Hun, 302. Where, subsequent to an action of foreclosure and at the date of an interlocutory decree for sale, a city acquired an easement in the property for the construction and maintenance of a sewer and made an award to the mortgagors, the decree should be amended so as to exempt the easement from the sale, as under the circumstances it cannot be sold on foreclosure even though the lien of the mortgage attached to the award.

Woolf v. Leicester Realty Co., 134 App. Div. 484, 119 N. Y. Supp. 288.

6. *Wallace v. Feeley*, 61 How. Pr. 225.

7. *Lane v. Conger*, 10 Hun, 1.

8. *Wallace v. Feeley*, 61 How. Pr. 225.

9. *Van Slyke v. Van Loan*, 26 Hun, 344.

10. *Citizens' Permanent Savings & Loan Association v. Rampe*, 116 N. Y. Supp. 597, aff'd, 139 App. Div. 927, 123 N. Y. Supp. 1110.

11. *Thomas v. Moravia, etc., Foundry Co.*, 43 Hun, 487.

Right of way.—The rule that real estate should be sold in the inverse order of alienation applied to the right of way over lands, and where the owner of the right of way agreed to bid upon a foreclosure sale for the

the discretion as to selling in the inverse order of alienation as the rights of the parties may appear.¹² If a party to the suit wishes to have the premises sold in a particular order, he should see that the decree so provides; or, after the entry of the decree, he may move for an order directing the manner in which the premises are to be sold;¹³ a provision directing a sale of several lots in the inverse order of alienation does not settle relative rights and equities of the parties in respect to their priorities as subsequent incumbrancers, where no such issue has been raised in the pleadings and prior proceedings.¹⁴ The holder of the equity of redemption is not entitled to have a particular parcel sold first which corresponds to no prior division of the whole tract.¹⁵

M. Amendment of judgment.

A judgment of foreclosure may be amended in a proper case.¹⁶ But it cannot be amended after the sale by inserting the deficiency clause.¹⁷ The court has ample power to make

property, exclusive of the right of way, the amount of the mortgage debt and costs, the court will protect his rights, and order the premises other than the right of way to be first sold. *Case v. Mannis*, 11 N. Y. Supp. 243, 33 St. Rep. 44.

Restrictive covenants.—An owner of real property entered into restrictive covenants after mortgaging the property. He then stipulated to bid the amount of the mortgage with the foreclosure expenses and costs. Held, that he was entitled to have the foreclosure judgment provide for the selling of the premises subject to the restrictions, over the objections of the holder of the record title, who purchased subject to the restrictions. *Rhoades v. Card*, 16 App. Div. 261, 44 N. Y. Supp. 621.

Property in two States.—A purchaser of a part of mortgaged premises may require that all the remainder be first sold to satisfy the mortgaged premises before resort to his property, although the mortgaged property be situated in two States, and the court in which the action to foreclose the mortgage is pending may order an assignment of the bond and mortgage to such part purchaser upon his paying the amount due, with costs. *Welling*

v. Ryerson, 94 N. Y. 98.

12. *Rathbone v. Clark*, 9 Paige, 648.

13. *Vandercook v. Cohoes Savings Institution*, 5 Hun, 641. The court may order a reference for that purpose. *N. Y. Life Ins. and Trust Co. v. Cutler*, 3 Sandf. Ch. 176; *Bard v. Steele*, 3 How. Pr. 110.

14. *Burchell v. Osborne*, 119 N. Y. 486, 29 St. Rep. 788.

15. *Ellsworth v. Lockwood*, 9 Hun, 548.

16. *Lease.*—A judgment of foreclosure upon a leasehold interest in lands in the Indian reservation will not be amended on the ground the lease is invalid. *Sheehan v. Mayer*, 41 Hun, 609, aff'd, 129 N. Y. 675.

17. *Baehr v. Smith*, 169 App. Div. 574, 165 N. Y. Supp. 453; *United States Trust Co. v. Schliep*, 59 St. Rep. 867, 28 N. Y. Supp. 382, 31 Abb. N. C. 52, 23 Civ. Pro. 264.

Waiver of deficiency.—Where there is a claim for deficiency against several defendants and a waiver of claim therefor as to all but one defendant, it is, in effect, an amendment of the complaint and the judgment in such action is not an adjudication as to the liability of the defendants as to whom the waiver was made.

such corrections in the judgment as changed conditions may render necessary.¹⁸ The court has power to modify directions inserted in the judgment commanding the parties to do particular things for the purpose of carrying the judgment into effect, which do not relate to the merits of the controversy.¹⁹

A court having jurisdiction of the parties and the subject-matter has power, after the entry of judgment of sale, but before the sale, to amend the judgment, by directing that the premises be sold subject to the life estate of one of the defendants, without giving notice of the application for such amendment to any of the defendants who were in default in the action.²⁰

An amendment made before the sale, striking out a direction that the referee deduct from moneys arising on the sale any lien or liens on the premises, and directing him to sell subject to such liens, cannot affect the rights of defendant and is within the power of the court.²¹ A judgment may be amended by including taxes paid by the mortgagee after the entry of judgment; but it seems that the payment of insurance on the property cannot be included.²²

N. Vacating or modifying judgment.

Where a mortgagor has had his day in court and failed to offer any proof in support of his defense, a judgment recovered should not be set aside unless there is clear proof that the moving parties have suffered an injustice.²³ When

National Hudson River Bank v. Reynolds, 57 Hun, 307, 10 N. Y. Supp. 669, 32 St. Rep. 124.

18. Mutual Life Ins. Co. v. Newell, 78 Hun, 293, 60 St. Rep. 241, 28 N. Y. Supp. 913; aff'd, 144 N. Y. 627.

19. Columbia Knickerbocker Trust Co. v. Ithaca Street Ry. Co., 141 N. Y. Supp. 249.

Trustee.—An amendment of a judgment of foreclosure in an action in which the mortgagee's trustee was made a party but did not answer, by directing such trustee to convey to the purchaser at the sale, is at most voidable and not void, and disobedience thereof by the trustee is ground for his removal. Harrison v. Union Trust Co., 144 N. Y. 326, 39 N. E. Rep. 353, 63 St. Rep. 668.

Lands in another State.—In an

action to foreclose a mortgage where a part of the lands covered by it are in another State, the court has power to decree a sale of the whole and may require the mortgagor to execute a conveyance to the purchaser. Where the provisions for the conveyance are omitted from the judgment, the court has power after a sale to amend the judgment by inserting therein such a provision. Union Trust Co. of New York v. Olmstead, 102 N. Y. 729.

20. Brown v. Beckmann, 53 App. Div. 257, 65 N. Y. Supp. 740.

21. Valentine v. McCue, 26 Hun, 456.

22. Mutual Life Insurance Co. v. Newell, 78 Hun, 293, 60 St. Rep. 241, 28 N. Y. Supp. 913, aff'd, 144 N. Y. 627.

23. Cook v. New Amsterdam Real

a judgment is once entered, it cannot be set aside for a mere irregularity in the proceeding.²⁴ In the absence of an appeal by plaintiff from the judgment, the failure to award costs to plaintiff is not a ground for interfering with the judgment.²⁵

A judgment by default may be set aside as in other actions in case the defendant produces the proposed sworn answer, so that the court may see that he has merits on his petition, or by affidavit states the nature of his defense and his belief in the truth of the matter constituting his defense, so far, at least, as to enable the court to see that injustice will probably be done if the judgment be permitted to stand.²⁶

An action may be maintained to set aside an assignment of a mortgage and judgment of foreclosure where the same has been procured by fraud, and plaintiff had no notice of the action until after the sale.²⁷

A tenant of the mortgagor may be allowed to come in and defend, after judgment and sale, on the ground that the mortgagor was the real owner of the mortgage, and the action was merely brought to dispossess such tenant.²⁸ A judgment may be opened, after foreclosure, to enable a defendant to protect himself against liability for a deficiency by pleading his discharge in bankruptcy.²⁹

A motion to set aside a judgment will not be granted as a favor, where the moving party shows no defense or merits, but relies merely on technical irregularities.³⁰ A judgment should not be vacated nearly seven years after its entry where, because of the delay, the rights of innocent parties have intervened.³¹

Estate Association, 2 App. Div. 55, 37 N. Y. Supp. 161.

24. *Trowbridge v. Hayes*, 21 Misc. 234, 45 N. Y. Supp. 635.

25. *Ewell v. Hubbard*, 46 App. Div. 383, 61 N. Y. Supp. 790.

26. *Powers v. Trenor*, 3 Hun, 3. See, also, *Heat v. Wallis*, 6 Paige, 371; *Winship v. Jewell*, 1 Barb. Ch. 173; *Goodhue v. Churchman*, 1 Barb. Ch. 596.

27. *Baker v. Byrn*, 89 Hun, 115, 35 N. Y. Supp. 55, 69 St. Rep. 469.

Joint creditors.—In *Hull v. Canandaigua Electric Lt. Co.*, 55 App. Div. 419, 66 N. Y. Supp. 865; appeal dismissed, 166 N. Y. 598, it was held that one of two joint creditors could not move solely upon the ground that no summons had been served upon him,

the summons having been served upon the other joint creditor.

28. *Read v. Stokes*, 5 Wkly. Dig. 438.

29. *Mutual Life Ins. Co. v. Cameron*, 1 Abb. N. C. 424. See *Trustees v. Merriam*, 59 How. Pr. 226.

30. *White v. Coulter*, 1 Hun, 357; rev'd in part, 59 N. Y. 629.

31. *Atlantic Trust Co. v. N. Y. City S. W. Co.*, 75 App. Div. 354, 78 N. Y. Supp. 120.

Seventeen years.—A motion to open a judgment of foreclosure to allow a defendant to answer, made after the lapse of seventeen years, is properly denied on the ground of laches. *Meyer v. Mallon*, 85 Hun, 450, 32 N. Y. Supp. 889, 66 St. Rep. 206.

Where the owner and the mortgagor suffer judgment by default in action to which they are parties, they are concluded by the judgment and cannot maintain an action to set it aside.³²

O. Appeal from judgment.

A decree of foreclosure will not be reversed on appeal merely because the referee has failed to note on the margin of requests to find, the manner in which the requests have been disposed of, as required by sections 439 and 471 of the Civil Practice Act, where the Appellate Court accords to the party making the requests all rights which he would have had if the referee had complied with the statute.³³

Where a judgment in favor of the defendant in an action to foreclose a mortgage must be reversed, but the facts cannot be changed, an interlocutory judgment will be entered and the case remitted to the special term to ascertain the amount due.³⁴

An undertaking on appeal in a foreclosure case against waste and for value of use operates as a stay of proceedings without a covenant to pay a deficiency.³⁵ On appeal from an order directing the sale of mortgaged premises, the appellant has his election to give an undertaking conditioned against waste and to pay for use and occupation or to pay any deficiency which may occur on the sale.³⁶ An undertaking on appeal to the Appellate Division from a judgment of foreclosure, which states that the sureties "do hereby, pursuant to the statute, jointly and severally undertake," that appellant "will pay all costs and damages which may be awarded against her on said appeal, not exceeding \$500," and on affirmance or dismissal pay the sum recovered or directed to be paid by the judgment, constitutes merely a valid common-law agreement, and the words used are to be given their usual, ordinary significance, and have not the force and effect of statutory undertaking.³⁷

32. *Barker v. Miller*, 32 App. Div. 364, 53 N. Y. Supp. 283.

33. *Stickles v. Millar*, 143 App. Div. 763, 128 N. Y. Supp. 487.

34. *Weyand v. Randall*, 131 App. Div. 167, 115 N. Y. Supp. 279.

35. *Werner v. Tuch*, 119 N. Y. 632.

36. *Horton v. Childs*, 11 N. Y. Supp. 797.

37. *The Concordia Savings and Aid Assn. v. Read*, 124 N. Y. 189, 35 St. Rep. 222.

P. Form of judgment of foreclosure.

(Caption.)

(Title.)

An order of reference having been duly made to compute the amount due to the plaintiff upon the bond and mortgage set forth in the complaint in this action and also to (make further proper recitals); and that the referee named in said order having made his report, dated the day of, 19.., by which it appears that there was due and payable to the plaintiff at the date of his said report the sum of dollars. (If the sum is not all due, make recitals as to amount not due and the propriety of the sale.)

Now, On filing the said report, together with due proof that the notice of the pendency of this action in the form prescribed by law, together with the complaint herein, were duly filed in the office of the clerk of the county of, New York, where the said mortgaged premises are situated, more than twenty days since and on motion of, attorney for the plaintiff, it is

Ordered, That the said report of the said referee by and the same hereby is, in all respects, ratified and confirmed.

And It Is Further Ordered, Adjudged and Decreed, That the mortgaged premises described in the complaint herein, as hereinafter described, or such part thereof as is sufficient to discharge the mortgage debt, the expenses of the sale and the costs of this action, and which may be sold separately without material injury to the parties interested, be sold at public auction to the highest bidder in county at, by or under the direction of, Esq., who is hereby appointed referee for that purpose; and that said referee give public notice of the time and place of such sale according to law and the practice of this court and that the plaintiff, or any other party to this action, may become a purchaser at such sale and that said referee execute to the purchaser, or purchasers, a deed of the premises so sold, and that out of the proceeds of the sale, after deducting the amount of his fees and expenses of said sale, the said referee shall pay all taxes, assessments or water rates, with interest, the penalties thereon, which are liens on said premises at the time of sale, and all sums necessary to redeem said premises from any sales for taxes, assessments or water rates which have not apparently become absolute; and that the said referee shall pay to the plaintiff, or his attorney, the sum of dollars, adjudged to the plaintiff for costs and charges in this action, with interest thereon from the date hereof.

And that the said referee shall pay to the plaintiff the amount which was reported due as aforesaid, with interest thereon from the date of said report, or so much thereof as such proceeds will pay of the same, and take a receipt of the plaintiff or his attorney therefor and file the same with his report of sale, and that if there is any surplus of the proceeds of said sale, after making the payments above specified, he shall bring the same into court by paying the same to the treasurer of the county of, New York, within five days after the same shall be received and be ascertainable, for the use of the person or persons entitled thereto, subject to the further order of the court.

It Is Further Ordered, That the said referee shall make a report of such sale and file it with the clerk of this court with all convenient

speed, and that if the proceeds of such sale are not sufficient to pay the amount so adjudged due, with interest and costs as aforesaid, the said referee shall specify the amount of any such deficiency in his report of sale, and that the defendant pay the same to the plaintiff and that execution issue therefor, and that the purchaser or purchasers at such sale be let into possession of the premises so sold on production of the referee's deed.

And It Is Further Ordered, Adjudged and Decreed, That each and all of the defendants in this action and all persons claiming under them, or any of them, after the filing of the said notice of the pendency of this action be, and they hereby are, forever barred and foreclosed of all right, claim, lien, title, interest and equity of redemption in and to the aforesaid premises and each and every part thereof.

(If the entire principal sum is not due, the judgment shall provide.) *It Is Further Adjudged,* That if the defendant shall pay the amount reported as actually due the plaintiff, with the interest and the costs of this action, together with the expenses of the proceedings to sell, if any, at any time before the sale is made pursuant to this judgment, all proceedings upon this judgment shall be stayed, but upon any subsequent default in the payment of principal or interest accruing on said bond and mortgage, the court may, upon the application of the plaintiff, make an order directing the enforcement of this judgment for the purpose of collecting the sum then due. (And make further directions to rebate or investment of proceedings.)

The following is a description of the mortgaged premises hereinbefore mentioned: (Insert description.)

ARTICLE IX.

SALE AND CONFIRMATION.

A. Civil Practice Act, § 1087. Payment of taxes, assessments and water rates out of proceeds of sale.

Where a judgment rendered in an action to foreclose a mortgage upon real property directs a sale of the real property, the officer making the sale must pay out of the proceeds, unless the judgment otherwise directs, all taxes, assessments and water rates which are liens upon the property sold, and redeem the property sold from any sales for unpaid taxes, assessments or water rates which have not apparently become absolute. The sums necessary to make those payments and redemptions are deemed expenses of the sale within the meaning of that expression as used in any provision of this article.

B. Civil Practice Act, § 1088. Report of officer making sale.

Within thirty days after completing the sale and executing the proper conveyance to the purchaser, unless such time be extended by an order of the court entered in the office of the clerk within said thirty days, the officer making the sale must file with the clerk his report under oath of the disposition of the proceeds of the sale, accompanied by the vouchers of the persons to whom payments were ordered to be made.

C. Rules of Civil Practice, Rule 266. Mortgage and assignments to be filed or recorded before conveyance.

Whenever a sheriff or referee sells mortgaged premises under a decree, order or judgment of the court, it shall be the duty of the plaintiff, before a deed is executed to the purchaser, to file such mortgage and any assignment thereof in the office of the clerk, unless such mortgage and assignments have been duly proved or acknowledged so as to entitle the same to be recorded; in which case, if it has not been done, it shall be the duty of the plaintiff to cause the same to be recorded at full length in the county or counties where the lands so sold are situated before a deed is executed to the purchaser on the sale; the expense of which filing or recording, and the entry thereof, shall be allowed in the taxation of costs; and, if filed with the clerk, he shall enter in the minutes, the filing of such mortgage and assignments, and the time of filing. But this rule shall not extend to any case where the mortgage or assignments appear, by the pleadings or proof in the suit commenced thereon, to have been lost or destroyed.

D. Powers and duties of referee.

The conduct of judicial sales of real property is particularly discussed in another place in this work.³⁸ It is the duty of the referee to sell the property, pay off existing liens and incumbrances and convey the property free and clear of all encumbrances to the purchaser.³⁹ He should select the time of sale, the auctioneer and the means of advertising, and the exercise of his discretion should not be delegated to the plaintiff's attorney.⁴⁰ The usual practice of stating in the terms of sale the condition of the title, when truthfully and fairly done, is to be commended.⁴¹ The failure to publish a notice of a postponement of the sale, pursuant to section 986, is a mere irregularity, and does not constitute a jurisdictional defect; it is ground for setting aside the sale upon seasonable application by a party to the suit, but is not available to a purchaser two years after confirmation of

38. See Real Property, Provisions Relating to.

Waste.—After judgment and sale, while awaiting confirmation, the court has power, on petition of the purchaser, to restrain the mortgagor from committing waste. *Mutual Life Ins. Co. v. Bigler*, 79 N. Y. 668.

39. *Equitable Life Assurance Soc. of U. S. v. Toplitz*, 69 Misc. 457, 128 N. Y. Supp. 153.

Execution of deed.—Where a judgment did not expressly authorize the referee to execute a deed to the purchaser, but provided that the purchaser should be entitled to possession on production of his deed, and that the mort-

gagor and the receiver should join in the deed, it was held that a claim that the referee had no authority under the judgment to execute the deed was untenable; that such authority was to be understood from the language of the judgment, and that as the court below had sanctioned the giving of the deed and thus construed its judgment, no ground of complaint on that account remained. *Farmers' Loan & Trust Co. v. Banks, etc.*, *Telegraph Co.*, 119 N. Y. 13.

40. *Van Boskerck v. Hayward*, 81 Misc. 370, 142 N. Y. Supp. 412.

41. *Luker v. Fitzer*, 107 Misc. 308, 177 N. Y. Supp. 559.

the sale, no objection having been made by any of the parties to the action.⁴² In order to hold a defaulting purchaser liable for a deficiency on a resale, the second sale must be made on the same terms as the first.⁴³

The proceeds of a sale under a mortgage given by the debtor to secure various debts are paid over to the creditor, not as a voluntary payment, but by operation of law and in the absence of directions given in the security, their application is to be made by the court in accordance with equitable principles. The rule of equity in such cases where the proceeds are insufficient to satisfy all of the debts is that they should be applied *pro rata*, each debt sharing in the funds without regard to priority of date or to the fact that for some of the debts the creditor holds other security.⁴⁴

The holder of interest coupons detached from bonds before their delivery is not entitled to share in the proceeds of the foreclosure of the mortgage to secure such bonds.⁴⁵

E. Contents of deed.

Section 508 of the Civil Practice Act requires that the referee's deed shall distinctly state in the granting clause whose right, title or interest is sold, without naming in that clause any of the other parties to the action.⁴⁶ A permissible form of the deed is enacted in section 258 of the Real Property Law. An order requiring the referee to convey by a valid and sufficient deed requires a deed sufficient in form and terms to make the title obtained by it as valid to the purchaser as it is in the power of the referee officially to make it.⁴⁷

F. Confirmation.

Rule 261 provides that no report of a sale shall be filed or confirmed unless accompanied by a proper voucher for the surplus moneys and showing that they have been paid

42. Beckstein v. Schultz, 45 Hun, 19.

43. Riggs v. Pursell, 74 N. Y. 370.

44. Orleans Co. National Bank v. Moore, 112 N. Y. 543.

45. Holland Trust Co. v. Thomson-Houston Co., 62 App. Div. 299, 71 N. Y. Supp. 51; aff'd, 170 N. Y. 68.

46. Randall v. Von Ellert, 12 Hun, 577.

One of several co-mortgagees holding the mortgage in her own name for her own and their benefit may pur-

chase the property on the foreclosure of a first mortgage to protect her own interest, and will not be deemed to hold the property in trust for her co-mortgagees, in the absence of an agreement to that effect, or conduct on her part which misled the other mortgagees to their prejudice. Rodger v. Bowie, 134 App. Div. 596, 119 N. Y. Supp. 177.

47. Easton v. Pickersgill, 55 N. Y. 310.

over, deposited or disposed of in pursuance of the judgment.⁴⁸ The questions in dispute between the mortgagor and purchaser arising upon the sale should be settled upon the motion to confirm the report.⁴⁹ Lack of a formal order of confirmation is an irregularity for which judgment will not be set aside where the proceedings are conceded to have been correctly taken.⁵⁰ It is not proper to provide for confirmation in the order of reference.⁵¹ To sustain a report of sale it cannot be shown by affidavits as against exceptions to it, that the terms of sale were different from the report.⁵²

G. Resale.

It rests wholly in the discretion of the court whether the sale should be confirmed or not, and this power will be exercised prudently and fairly in the interest of all concerned. An order directing a resale is not subject to review on appeal.⁵³ Where a judgment determines the amount due, and no appeal has been taken therefrom, it cannot be modified on a motion to vacate the sale.⁵⁴ The report should not be set aside on the ground that the referee illegally allowed the purchaser on the sale to deduct from the purchase price the amount due on a prior mortgage, where the sale was made without objection pursuant to the terms of the judgment and notice.⁵⁵ On an application for a resale, the court in granting the application has power to preserve the rights of those who purchased in good faith without knowledge of any irregularity.⁵⁶

48. See Surplus Proceedings, Art. XII.

49. Farmers' Loan and Trust Co. v. Banker's, etc., Co., 11 Civ. Pro. 307.

50. Bickwell v. Byrnes, 23 How. Pr. 486; Moore v. Shaw, 15 Hun, 428; appeal dismissed, 77 N. Y. 572. It was formerly held otherwise. Bank of Rochester v. Emerson, 10 Paige, 115; Hanover Ins. Co. v. Tomlinson, 3 Hun, 630.

51. Citizens' Savings Bank v. Bauer, 17 St. Rep. 81, 1 N. Y. Supp. 450.

52. Koch v. Purcell, 13 J. & S. 162.

53. Crane v. Stiger, 58 N. Y. 625; Hale v. Maxon, 60 N. Y. 339; Goodell

v. Harrington, 76 N. Y. 547.

A bondholder's action to procure the resale of a railroad under foreclosure, and a bill of review of the suit in which a receiver was appointed, who paid out large sums to the prejudice of bondholders, was sustained in Stevens v. Union Trust Co., 33 St. Rep. 130, 11 N. Y. Supp. 268.

54. Vingut v. Ketcham, 102 App. Div. 403, 92 N. Y. Supp. 605.

55. Kelly v. Wronkow, 111 N. Y. Supp. 874.

56. Martin Realty Co. v. Bayview Heights Land Co., 107 Misc. 140, 177 N. Y. Supp. 158.

H. Form of notice of sale.**SUPREME COURT — ULSTER COUNTY.**

THE ULSTER COUNTY SAVINGS
INSTITUTION

agst.

GEORGE W. BASTEN AND SARAH M. BASTEN,
HIS WIFE; EDGAR H. BASTEN,
LOUIS B. BASTEN, JAMES OLIVER AND
SAMUEL M. BASTEN.

Pursuant to a judgment of foreclosure and sale, rendered herein on the 11th day of June, 1888, and duly entered in Ulster county clerk's office on the same day, I, the undersigned, the referee duly appointed for such purpose by said judgment, will sell at public auction, to the highest bidder, on Saturday, the 28th day of July, 1888, at 2 o'clock in the afternoon of that day, at the front door of the hotel of James O. Schoonmaker, in the village of Kerhonkson, town of Wawarsing, Ulster county, N. Y., the real estate directed by said judgment to be sold, and therein described as follows: (Here insert description.)

Dated, June 11, 1888.

E. B. WALKER, JR.,
Referee.

WM. S. KENYON,
Plaintiff's Attorney.

I. Form of terms of sale.

JOHN H. DE PUY

agst.

ISAAC GRIFFIN, DU BOIS FLUCIKER AND
ADAM DEYO.

The premises described in the annexed advertisement of sale will be sold under the direction of John V. V. Keyon, referee, upon the following terms:

1. Ten per cent of the purchase money of said premises will be required to be paid to the said referee at the time and place of sale, and for which the referee's receipt will be given.

2. The residue of said purchase money will be required to be paid to the said referee at his office, in the city of Kingston, on the 14th day of June, 1888, when the said referee's deed will be ready for delivery.

3. The referee is not required to send any notice to the purchaser; and if he neglects to call, at the time and place above specified, to receive his deed, he will be charged with interest thereafter on the whole amount of his purchase, unless the referee shall deem it proper to extend the time for the completion of said purchase.

4. All taxes, assessments and water rates, which, at the time of sale, are liens or incumbrances upon said premises, which have not apparently become absolute, will be allowed by the referee out of the purchase money, provided the purchaser shall, previously to the delivery of the deed, produce to the referee proof of such liens, and duplicate receipts for the payment thereof.

5. The purchaser of said premises, or any portion thereof, will, at the time and place of sale, sign a memorandum of his purchase.

6. The biddings will be kept open after the property is struck down, and in case any purchaser shall fail to comply with any of the above conditions of sale, the premises so struck down to him will be again put up for sale, under the direction of said referee, under these same terms of sale, without application to the court, unless the plaintiff's attorney shall elect to make such application; and such purchaser will be held liable for any deficiency there may be between the sum for which said premises shall be struck down upon the sale and that for which they may be purchased on the resale, and also any costs or expenses occurring on such resale.

Dated, May 14, 1888.

JOHN V. V. KENYON,
Referee.

Memorandum of sale.

I, Isaac Dean, have, this 14th day of May, 1888, purchased the premises described in the above annexed printed advertisement of sale, for the sum of \$1,495, and hereby promise and agree to comply with the terms and conditions of the sale of said premises, as above mentioned and set forth.

Dated, May 14, 1888.

ISAAC DEAN.

May 14, 1888, received from Isaac Dean the sum of \$149.50, being 10 per cent on the amount bid by him for property sold by me, under the judgment in the above-entitled action.

\$149.50.

JOHN V. V. KENYON,
Referee.

J. Form of referee's report.

SUPREME COURT.

THE ULSTER COUNTY SAVINGS
INSTITUTION
agst.
GEORGE W. BASTEN.

To the Supreme Court:

In pursuance and by virtue of a judgment of this court, made in the above action, on the 13th day of March in the year 1906, by which it was, among other things, ordered and adjudged, that all and singular the mortgaged premises mentioned in the complaint in this action, and hereinafter described, or so much thereof as might be sufficient to raise the amount adjudged to be due to the plaintiff as therein

mentioned, for principal and interest, and the costs in the action, and which might be sold separately without material injury to the parties interested, be sold at public auction by or under the direction of the subscriber, a referee duly appointed therein, for the purpose of making such sale; that the said sale be made in the county where the said mortgaged premises, or the greater part thereof, are situated; that the referee give public notice of the time and place of such sale, according to the course and practice of this court, and the plaintiff, or any of the parties to this action, might become the purchaser; that the referee execute a deed to the purchaser of the mortgaged premises on the said sale; and that the said referee, after deducting fees and expenses as provided by sections 1082 and 1087 of the Civil Practice Act, pay to the said plaintiff's attorney, out of the proceeds of the said sale, his costs in this action as adjusted by the court, and also the amount so adjudged to be due as aforesaid, together with the legal interest thereon from the date of said decree, or so much thereof as the purchase money of the mortgaged premises would pay of the same, and that the referee take receipts for the amount so paid, and file the same with his report; and that he pay over the surplus moneys arising from the said sale, if any there should be, to the treasurer of the county of Ulster, within five days after the same shall be received and ascertainable, subject to the further order of the court. And whereby it was further ordered and adjudged that if the moneys arising from the said sale should be insufficient to pay the amount so reported due to the plaintiff, with the interests and costs aforesaid, that the said referee specify the amount of such deficiency in his report of the sale, I, the subscriber, Edward B. Walker, Jr., referee as aforesaid, residing in the village of New Paltz, do respectfully certify and report, that having been charged by the attorney for the plaintiff with the execution of said judgment, I advertised said premises to be sold by me at public auction, at the front door of the court house in the city of Kingston, N. Y., at 12 o'clock noon, on the 30th day of April, in the year 1906; that previous to said sale I caused notice thereof to be publicly advertised for six weeks successively, as follows, viz.: By causing a printed notice thereof to be fastened up in three public places in the city of Kingston, where such premises were to be sold, and three notices fastened up in the town of Marbletown, in which the said mortgaged premises are situated, and by causing a copy of such notice to be printed once in each week during the six weeks immediately preceding such sale, in a public newspaper printed in said county of Ulster, to wit, the *Kingston Daily Leader*, printed at the city of Kingston, in said county, which notices contained a brief description of said mortgaged premises.

And I do further report that on the said 30th day of April, in the year 1906, the day on which the said premises were so advertised to be sold as aforesaid, I attended, at the time and place fixed for said sale, and exposed said premises for sale at public auction to the highest bidder, and the said premises were then and there fairly struck off to Eliza C. Van Wagonen, of Marbletown, Ulster county, N. Y., for the sum of \$4,250, she being the highest bidder therefor, and that being the highest sum bidden for the same.

And I do further certify and report that I have executed, acknowledged and delivered to said purchaser the usual referee's deed for

said premises, and have paid over or disposed of the purchase moneys, or proceeds of such sale, as follows, viz.: I have paid to the attorney for the plaintiff the sum of \$200.68, being the amount of his costs of this suit, with the interest as adjusted, and have taken a receipt therefor, which is hereto annexed. I have also retained in my hands the sum of \$49.93, being the amount of my fees and disbursements on said sale. And I have paid to the plaintiff the sum of \$3,971.39, and have taken a receipt therefor, which is hereunto annexed. I have paid to James M. Cooper, guardian ad litem, the sum of \$50, his costs, and have taken his receipt therefor, which is hereto annexed; and have paid taxes and water rates as specified in schedule attached.

And I do further certify and report that the premises so sold and conveyed as aforesaid were described in said judgment and in the deed so executed by me aforesaid, as follows, viz.: (Here insert description of premises sold.)

And I also report that the deficiency due to the plaintiff from the defendant George W. Basten, and for which he is personally liable under the judgment herein, is \$325.10, with interest from the date of this my report.

All of which is respectfully reported to this court.

Dated, May 3, 1906.

E. B. WALKER, JR.,
Referee.

SUPREME COURT.

(Title as before.)

Received April 30, 1906, of John N. Van Derlyn, the referee who made the sale of the premises under and by virtue of the judgment in the above-entitled cause, the sum of \$3,971.39, which sum, being part of the proceeds of the sale of said premises, is received by me under and by virtue of the provisions of said judgment, being the amount adjudged to be paid to said plaintiff, with interest thereon as mentioned in said judgment.

J. E. OSTRANDER,
Treasurer Ulster County Savings Institution.

SUPREME COURT.

(Title as before.)

Received April 30, 1906, of Edward B. Walker, Jr., the referee who made the sale of the premises under and by virtue of the judgment in the above-entitled cause, the sum of \$200.68, being the amount of the costs and disbursements of the plaintiff in said action, as fixed by the court, with the interest as taxed, which costs are paid me by said referee under and by virtue of the provisions of said judgment.

WILLIAM S. KENYON,
Attorney for Plaintiff.

SUPREME COURT.

(Title as before.)

April 30, 1906, received of Edward B. Walker, Jr., the referee herein, the sum of \$50, being in full for my fees as guardian ad litem.

J. M. COOPER.

K. Form of final order of confirmation.

(Caption, usual form.)

(Title as before.)

On reading and filling the report, dated August 1, 1907, of C. M. Woolsey, referee, heretofore appointed herein, of the sale of the mortgaged premises mentioned and described in the complaint in this action, and on motion of D. W. Ostrander, attorney for plaintiff,

Ordered, That said report be and the same is in all things confirmed.

And It Is Further Ordered, That the clerk of Ulster county enter and docket judgment for deficiency in favor of plaintiff upon said report against George C. Schoonmaker for \$625.25, with interest from June 11, 1907, and that plaintiff have execution therefor.

ARTICLE X.**EFFECT OF CONVEYANCE.****A. Civil Practice Act, § 1085. Effect of conveyance upon sale.**

A conveyance upon a sale made pursuant to a final judgment in an action to foreclose a mortgage upon real property vests in the purchaser the same estate only that would have vested in the mortgagee if the equity of redemption had been foreclosed. Such a conveyance is as valid as if it was executed by the mortgagor and mortgagee, and is an entire bar against each of them and against each party to the action who was duly summoned and every person claiming from, through or under a party by title accruing after the filing of the notice of the pendency of the action.

B. In general.

Speaking in general terms, the referee's deed conveys the title of the mortgagor in the premises at the time of the execution of the mortgage, and the title of the mortgagee under the mortgage.⁵⁷ The estate of the defendants is not extinguished, but the estate of each is transmitted to the purchaser.⁵⁸ The effect of the deed is to vest in the purchaser the entire interest and estate of the mortgagor and mortgagee, as it existed at the date of the mortgage, and unaffected by the subsequent conveyances or incumbrances of the mortgagor.⁵⁹ The sale carries title to all rights in the

57. *Marshall v. United States Trust Co.*, 93 App. Div. 252, 87 N. Y. Supp. 747; rev'd on other grounds, 180 N. Y. 516.

The words "forever barred and foreclosed," used in a judgment of foreclosure, mean shut out and excluded from all right, claim, title, and interest in the mortgaged premises. *Hope v. Seaman*, 119 N. Y. Supp. 713.

Sale of less estate.—Where the terms of the mortgage are followed in

the direction of sale, and the referee sells a less estate than that expressed in the mortgage, the sale transfers all the title the mortgagor had in the premises, and it does not lie with a mortgagor nor with a purchaser who has full knowledge of the facts to object. *Graham v. Bleakie*, 2 Daly, 55.

58. *Hope v. Shevill*, 137 App. Div. 86, 122 N. Y. Supp. 127; aff'd, 204 N. Y. 563.

59. *Rector of Christ Church v. Mack*,

premises sold, which were held by persons bound by the judgment.⁶⁰ If, for any reason, the title of the mortgagor is not subject to a prior mortgage, the purchaser is equally free.⁶¹ The purchaser takes the title of the mortgagor at the date of the mortgage, and if his title is a mere equity, that is all that is transferred.⁶² Upon the foreclosure of a mortgage given by the owners of a fractional part of the fee of the mortgaged premises, though purporting to cover the entire premises, the purchaser on the mortgage sale acquires the interest of the mortgagors only.⁶³

C. Owner of equity.

The foreclosure has the effect of barring the equity of redemption if the owner is properly made a party to the action.⁶⁴ The deed may be construed as a release by the mortgagor of the equity of redemption.⁶⁵ But the equity is not generally barred if the owner thereof is not a party.⁶⁶ A foreclosure is ineffective as to the owner of half of the equity of redemption, who was not made a party.⁶⁷ Where

93 N. Y. 488; *Vroom v. Ditmas*, 4 Paige, 531; *Vanderkemp v. Sheldon*, 11 Paige, 28; *Seward v. Huntington*, 94 N. Y. 104.

Elevated railroad.—A purchaser of property at foreclosure is not bound by a release executed by the mortgagor, with the mortgagee's consent, of the easements appurtenant to the property by an elevated railroad operated in front of the premises, where the mortgagee failed to join in the instrument of release, and the purchaser had no knowledge of such consent. *Caccia v. Brooklyn Union Elevated R. R. Co.*, 98 App. Div. 294, 90 N. Y. Supp. 582.

60. *People's Trust Co. v. Tonkonogy*, 144 App. Div. 333, 128 N. Y. Supp. 1055.

61. *Westbrook v. Gleason*, 79 N. Y. 23.

62. *Stewart v. Hutchinson*, 29 How. (N. Y.) 181.

63. *Schein v. Erasmus Realty Co.*, 194 App. Div. 38, 184 N. Y. Supp. 840.

64. *Lansing v. Goelet*, 9 Cow. 346; *Mygatt v. Somerville*, 54 St. Rep. 269, 23 N. Y. Supp. 808.

Where heirs-at-law of a deceased

mortgagor in a mortgage of real estate situated in a sister State were parties to the foreclosure, the decree is conclusive as against them, and their interest in the property is cut off by the foreclosure. *Nunally v. Robinson*, 113 App. Div. 848, 99 N. Y. Supp. 594.

65. *Packer v. R. & S. R. R. Co.*, 17 N. Y. 283.

66. *Herrman v. Cabinet Land Co.*, 217 N. Y. 526; *Wing v. Field*, 35 Hun, 617.

Crops.—Where a mortgage existed upon a farm belonging to defendant's mother, on which he had planted crops, and he was not a party to the foreclosure; *held*, his rights as to the growing crops were not affected. *St. John v. Swain*, 14 N. Y. Supp. 743, 38 St. Rep. 784.

67. *Schrivver v. Schriver*, 86 N. Y. 575.

All partners must be served with a summons in a suit of foreclosure of a mortgage in order that the purchaser may obtain a marketable title. *Liebert v. Reiss*, 174 App. Div. 308, 160 N. Y. Supp. 535; *aff'd*, 227 N. Y. 557.

one of the defendants who owns an undivided interest in the property dies pending foreclosure, and her heirs or devisees are not brought in as parties, the entry of judgment against him is without authority, and his interest is not affected.⁶⁸ If the owner of the equity is not made a party, the purchaser acquires the rights of the mortgagee; and, if he enters into possession, he assumes the position of a mortgagee in possession of the premises.⁶⁹

D. Matters not litigated.

A judgment of foreclosure is not *res adjudicata* as to matters which were not and could not have been litigated in the action.⁷⁰ A judgment in a suit brought by the assignee of the mortgage which expressly determines that the plaintiff's ownership of the mortgage was absolute, and that the sum secured thereby is due to the plaintiff, creates an estoppel so long as it remains in force, and is final not only as to the matters actually determined, but as to all other matters which the parties might have litigated, and they cannot thereafter be litigated between the parties in another action.⁷¹ A judgment, although determining the obligation to pay, does not necessarily determine the rights of the defendants in the action against each other.⁷²

E. Action by pledgee of mortgage.

When one who holds an assigned mortgage as collateral security makes the assignor and mortgagee parties under the general allegation of interest, all their rights are cut off by a sale.⁷³

F. Title of mortgagee paramount to mortgage.

The declaration in section 1085 that the conveyance "is as valid as if it were executed by the mortgagor and mortgagee, and is an entire bar against each of them," is not

68. *Stephens v. Humphreys*, 73 Hun, 199, 56 St. Rep. 70, 25 N. Y. Supp. 946; *aff'd*, 141 N. Y. 586.

Power of sale.—Where a testatrix having power of sale with certain trusts was made a defendant, but the persons entitled were not made parties, it was held that defendant only acquired the title of the parties to foreclosure and that the fee being vested in the heirs-at-law had not been divested. *Noonan v. Brennemann*, 64

Super. Ct. 337, 8 St. Rep. 91.

69. *Wing v. Field*, 35 Hun, 617. See, *infra*, Art. X-L, Purchaser as Mortgagee in Possession.

70. *Mehlhop v. Central Union T. Co.*, 114 Misc. 464, 187 N. Y. Supp. 431.

71. *Archer v. Archer*, 164 App. Div. 81, 149 N. Y. Supp. 426.

72. *Peet v. Kent*, 5 St. Rep. 134.

73. *Bloomer v. Sturges*, 58 N. Y. 168.

intended to convey any other title which might be in the mortgagee paramount to the mortgage foreclosed, but simply for the purpose of conveying the mortgagor's equity of redemption and an entire bar as to the mortgagee of all his claim under that mortgage.⁷⁴

G. Paramount claims.

The foreclosure judgment is a bar only as against parties properly made parties to the action, and does not bar the title of one who has paramount title to that of the mortgagor and mortgagee.⁷⁵ As a general rule, no question of title adverse to the mortgagor can be determined in foreclosure, although the judgment properly bars and forecloses any rights acquired subsequent to the mortgage.⁷⁶ Although he is made a party and the complaint contains a general allegation that he claims an interest as subsequent purchaser or incumbrancer or otherwise, the judgment does not affect his paramount title.⁷⁷ But, if he litigates without objection the question of his paramount title and judgment goes against him, he will be estopped from afterwards setting up his title against the judgment in the foreclosure action.⁷⁸ And, if the complaint alleges the prior incumbrance and prays for relief that the amount due thereon be ascertained, and that

74. *Clements v. Griswold*, 46 Hun, 377.

75. *Lewis v. Smith*, 9 N. Y. 502; *Payn v. Grant*, 23 Hun, 134; *Ocumbaugh v. Wing*, 12 Wkly. Dig. 566; *Merchants' Bank v. Thompson*, 55 N. Y. 7; *Rathbone v. Hooney*, 58 N. Y. 463; *Emigrant Industrial Bank v. Goldman*, 75 N. Y. 127; *Frost v. Coon*, 39 N. Y. 428.

Where a conditional bill of sale of chattels affixed to real property has been filed as required by the Personal Property Law, a purchaser of the realty on foreclosure is chargeable with notice thereof, and hence the referee on the foreclosure sale should not allow him the amount unpaid on the fixtures, but should pay the same over to the proper depository for the benefit of a junior mortgagee. *Foreman v. Nordon Construction Co.* No. 1, 167 App. Div. 712, 152 N. Y. Supp. 592.

Fixtures.—It seems that if the purchaser of real property subject to an

existing mortgage intends to assert title to fixtures which he has erected upon the mortgaged premises, by virtue of a special agreement, he is bound to do so in the foreclosure action. *McFadden v. Allen*, 134 N. Y. 489, 48 St. Rep. 324.

Lease.—Foreclosure and sale of a mortgage upon a lease containing a covenant to pay rent, expressed as binding the lessees and their assigns, does not impair the covenant to pay rent, but the covenant runs with the land and binds the purchaser. *Pardee v. Steward*, 37 Hun, 259.

76. *Fleischman v. Tilt*, 10 App. Div. 271, 42 N. Y. Supp. 506.

77. *Goebel v. Iffla*, 111 N. Y. 170; *Ruyter v. Reid*, 121 N. Y. 498; *Stillwell v. Hart*, 40 App. Div. 112, 57 N. Y. Supp. 639.

78. *Helck v. Reinheimer*, 105 N. Y. 470; *Goebel v. Iffla*, 111 N. Y. 170; *Cromwell v. McLean*, 123 N. Y. 475.

such amount be first paid out of the proceeds of the sale, and the judgment follows the prayer of the complaint, such prior incumbrancer, although sustaining default, is bound by the judgment.⁷⁹

The ordinary provision in a judgment of foreclosure, that out of the moneys arising from the sale of the mortgaged property the referee retains the amount of any lien or liens for taxes or assessments, does not estop a purchaser from questioning the validity of the tax sale.⁸⁰ A purchaser at a tax sale is not affected by foreclosure of a subsequent mortgage in an action to which he was not a party.⁸¹ Hence, a purchaser at a tax sale, subsequent to the mortgage, may be proper party to the foreclosure.⁸² Where a purchaser at a tax sale subsequent to the delivery of the mortgage claimed title by virtue of such sale and tax deed, no notice having been given to the mortgagee of such sale as required by law, it was held that plaintiff's lien was superior to the claim of the purchaser.⁸³

A purchaser of lands at a foreclosure sale, subject to "the liens of all valid taxes, assessments, water rates and sales thereunder," who makes a settlement of the claim for taxes for a smaller amount than actually due, is not liable to the mortgagor or his successor in title for the amount saved in settlement of the taxes.⁸⁴

H. Dower.

The dower right of the wife of a mortgagor is not cut off by a foreclosure of a mortgage in an action to which she was not a party.⁸⁵ Where the wife is not a party to the suit, the purchaser acquires the property incumbered by a contingent dower interest, and an assignment of the mortgage so far as unforeclosed upon such interest.⁸⁶ Foreclosure is not a proper proceeding in which to determine the right of dower. Dower can only be cut off or barred by proceedings in which it is clearly brought in question, and neither decree in foreclosure nor the sale thereunder preclude a widow from bringing her action for dower.⁸⁷

79. *Jacobie v. Mickle*, 144 N. Y. Div. 663, 153 N. Y. Supp. 8.
237.

80. *Simms v. Vought*, 94 N. Y. 654.

81. *Becker v. Howard*, 66 N. Y. 6.

82. *Roosevelt Hospital v. Dowley*,
57 How. Pr. 489.

83. *Ruyter v. Wickes*, 4 N. Y. Supp.
743, 22 St. Rep. 200.

84. *Stemmler v. Alsdorf*, 167 App.

85. *Kursheedt v. Union Dime Sav.
ings Inst. of N. Y.*, 118 N. Y. 358;
Campbell v. Ellwanger, 81 Hun, 259,
30 N. Y. Supp. 792.

86. *Ross v. Boardman*, 22 Hun, 527.

87. *Fern v. Osterhout*, 11 App. Div.
319, 42 N. Y. Supp. 450.

I. Subsequent liens.

A subsequent incumbrance or lien, the holder of which is duly made a party to the foreclosure action, is cut off by the judgment and sale.⁸⁸ A foreclosure operates to cut off the rights of all subsequent parties who were made parties to the action.⁸⁹ A subsequent mortgagee may be cut off, though his mortgage has not been paid from the proceeds, and though they were sufficient for that purpose.⁹⁰ If the holder, however, is not made a party, his rights are not barred;⁹¹ and he may redeem by paying the mortgage debt, principal and interest.⁹² As to the holder of a junior mortgagee who was not made a party, the purchaser occupies the position of a mortgagee in possession.⁹³ The purchaser then acquires the rights of an assignee of the mortgagee.⁹⁴

Although a junior mortgagee is made a defendant to an action to foreclose a prior mortgage covering only one-half of the property, its lien upon the remaining one-half is not cut off by reason of the fact that it did not protest against an erroneous judgment which directed the sale of the entire premises even if it had notice of the terms of sale.⁹⁵

88. A tax, which by the terms of the statute was payable in installments, some of which had not become due at the time of sale, but the assessment of which the statute made a lien was held such a lien as was directed to be discharged by the judgment and terms of sale, notwithstanding the use of the word "payable" in the latter. *Greene v. Bunzick*, 23 App. Div. 103, 48 N. Y. Supp. 374.

Defendant's appearance is equivalent to due personal service, and hence the judgment and sale cuts off and extinguishes any lien it has upon the premises. *Johnson v. Putnam Foundry & Machine Co.*, 167 App. Div. 99, 152 N. Y. Supp. 792.

A mortgage executed by a grantee holding under an unrecorded deed, of which mortgage an assignment to one not a party has been recorded before filing the *lis pendens*, is cut off by a foreclosure of a prior mortgage. *Kipp v. Brandt*, 49 How. N. Y.) 358.

89. *Johnson v. Snell*, 11 N. Y. Supp. 868, 34 St. Rep. 177, citing *Smith v. Gardner*, 42 Barb. 356.

90. *Wood v. McGlughan*, 2 Hun, 150.

91. *Gage v. Brewster*, 31 N. Y. 218.

Service by publication.—A judgment in foreclosure is ineffectual to cut off an apparent lien where the order of publication of the summons against the lienor was granted upon an insufficient affidavit, and a purchaser will not be compelled to accept title thereunder although it is proved in the case that such lien has, in fact, been discharged. *Argall v. Bachrach*, 18 Wkly. Dig. 267.

92. *Brainard v. Cooper*, 10 N. Y. 356; *Reynolds v. Park*, 53 N. Y. 36; *Gage v. Brewster*, 31 N. Y. 218; *Messinger v. Messinger*, 12 Wkly. Dig. 368; appeal dismissed, 89 N. Y. 604; *Naylor v. Colville*, 20 App. Div. 581, 47 N. Y. Supp. 267.

93. *Naylor v. Colville*, 20 App. Div. 581, 47 N. Y. Supp. 267; *Welch v. Rutgers F. Ins. Co.*, 13 Abb. Pr. 33.

94. *Gage v. Brewster*, 31 N. Y. 218; *Reynor v. Selmes*, 52 N. Y. 579; *Winslow v. Clark*, 47 N. Y. 261; *Dunning v. Fisher*, 20 Hun, 178.

95. *Mayer v. Burr*, 133 App. Div. 604, 118 N. Y. Supp. 203.

J. Trustee in bankruptcy.

A foreclosure suit is not binding on a trustee in bankruptcy, when he is not made a party to the action.⁹⁶ But it is binding on a trustee, who has notice of the action.⁹⁷ Where an assignee in bankruptcy, who held an interest as such, was a party to a foreclosure as an individual, the complaint containing the usual allegation, that he had or claimed an interest in the premises, it was held that the judgment did not foreclose the interest he had as assignee in bankruptcy.⁹⁸

K. Tenant.

The rights of a tenant are not affected by the foreclosure of a prior mortgage, unless he was a party to the suit. Where the deed expressly conveys the premises subject to the leasehold interest and the tenant never attorns to the purchaser, no privity of estate or of contract exists between the purchaser and the tenant, and the purchaser cannot maintain an action for rent under the lease.⁹⁹

L. Purchaser as mortgagee in possession.

A purchaser at a real estate foreclosure sale which is defective and void as against the owner of the equity of redemption, because he was not made a party, becomes an assignee of the mortgage, and if he lawfully enters into possession of the land becomes a mortgagee in possession.¹

Although a sale in foreclosure is a nullity as to the owner of the equity of redemption, who is not made a party to the action, it is not void as a whole, but the purchaser acquires all the rights of the mortgagee, and if he thereafter goes into possession with the consent of the owner of the equity of redemption, he becomes a mortgagee in possession, and a purchaser at a sale in foreclosure, given after the one first foreclosed, cannot maintain ejectment against him.² If the owner of a half of the equity of redemption is not made a defendant, the foreclosure is void as to him and his assigns, and they have twenty years to bring suit to gain possession.³ Where the holder of a duly recorded junior mortgage is not made a party to the foreclosure of a prior mortgage, the purchaser at the sale occupies as to such junior mortgagee the

96. *Landon v. Townshend*, 16 Civ. Pro. 161.

97. *Cleveland v. Boerum*, 24 N. Y. 613.

98. *Landon v. Townshend*, 112 N. Y. 93.

99. *Wacht v. Erskine*, 61 Misc. 96,

113 N. Y. Supp. 130.

1. *Townshend v. Thompson*, 139 N. Y. 152.

2. *Wing v. Field*, 35 Hun, 617.

3. *Schrivver v. Schriver*, 96 N. Y. 575.

position of mortgagee in possession from whom the junior mortgagee is entitled to redeem.⁴

When a mortgage is foreclosed without joining the holder of a subsequent mortgage on the same premises, whose title appeared of record, and on the sale under foreclosure the first mortgagee purchases the property and receives the rent and profits, as to the second mortgage, he merely becomes a mortgagee in possession, and is liable to account for the rents and profits, and that the utmost effect of the foreclosure and sale is to transfer the equity of redemption from the mortgagor to the plaintiff in the action.⁵

A mortgagee who purchased at a foreclosure sale, fraudulent as to infant owners, will be charged as a mortgagee in possession if he was privy to the fraud.⁶

One who takes an absolute deed as security for advances, and by arrangement took possession and appropriates the rents and profits which should be applied to the mortgage, and on foreclosure buys the premises, is a trustee in his own wrong, and the debtor is entitled to redeem, even though the debtor does not defend.⁷

M. Title transferred as of date of sale.

The interest of the parties to a foreclosure action is barred and foreclosed from the time of the sale, and not from the date of the judgment.⁸ If the proceedings in the action have been regular, the title passes to the purchaser as of the date of the deed, the confirmation relating back to that time.⁹ But title does not vest until the delivery of the deed.¹⁰ The deed generally passes the title immediately on delivery, without a report of sale and order of confirmation.¹¹ But the decree, in some cases, may have the effect of delaying the passing of the title until the confirmation of the sale.¹²

4. *Naylor v. Cölville*, 20 App. Div. 581, 47 N. Y. Supp. 267.

5. *Welch v. Rutgers Fire Ins. Co.*, 13 Abb. Pr. 33.

6. *McMurray v. McMurray*, 66 N. Y. 175.

7. *Bennett v. Austin*, 81 N. Y. 308.

8. *Nutt v. Cumming*, 22 App. Div. 92, 47 N. Y. Supp. 800; *aff'd*, 155 N. Y. 309.

The rents of the mortgaged premises accruing or becoming payable between the day of the sale and the time when the purchaser will be entitled to the possession of the premises belong

to the owner of the equity and not to the purchaser at the sale. *Astor v. Turner*, 11 Paige, 436.

9. *Fort v. Burch*, 6 Barb. 60; *Stimson v. Arnold*, 5 Abb. N. C. 377; *Fuller v. Van Geesen*, 4 Hill, 171; *Mitchell v. Bartlett*, 51 N. Y. 447.

10. *Mitchell v. Bartlett*, 51 N. Y. 447.

11. *Fort v. Burch*, 6 Barb. 60; *Moore v. Shaw*, 15 Hun, 428; appeal dismissed, 77 N. Y. 512.

12. *Peck v. Knickerbocker*, 18 Hun, 186.

N. Effect of condemnation of part of premises.

Where, after the city of New York had become vested with the title to that portion of mortgaged premises which was within a street line, the mortgage was foreclosed, the purchaser at the sale in foreclosure obtained no title to that part of the property which had been covered by the mortgage, nor had he any claim or right to the award, the owner of the property at the time title vested in the city being entitled thereto.¹³

O. Collateral attack on judgment.

In the absence of fraud, a judgment of foreclosure, rendered by a court having jurisdiction of the subject-matter and the parties, cannot be attacked collaterally, but the remedy is by motion in the foreclosure action.¹⁴ A judgment of foreclosure, which is not void, cannot be attacked in a collateral action.¹⁵ After a mortgage is foreclosed by an administrator after proper service on all the defendants, the judgment and sale on such foreclosure cannot be assailed on the ground of any irregularity or even want of jurisdiction, in granting the letters of administration to plaintiff.¹⁶

P. Discharge of mortgage.

In some cases the mortgage may be said to be merged in the judgment;¹⁷ but the judgment of foreclosure and sale is not necessarily a merger of the debt. It is a means of enforcing the lien of the mortgage, which remains until the debt is satisfied.¹⁸ The entry of judgment in an action of foreclosure does not bar an action by the assignees of the mortgagor to recover damages for breach of an agreement pursuant to which the judgment was entered.¹⁹ So long as the sale of property on foreclosure remains incomplete by reason of refusal of mortgagor, who was purchaser, to complete the sale, the mortgagee cannot be compelled to waive his security and take a cause of action as on a contract debt.²⁰

13. *Matter of Jones*, 96 Misc. 32, 160 N. Y. Supp. 33; rev'd, 178 App. Div. 654, 165 N. Y. Supp. 896.

14. *Drake v. N. Y. Suburban Water Co.*, 36 App. Div. 275, 55 N. Y. Supp. 225, 162 N. Y. 646.

15. *Batterman v. Albright*, 6 St. Rep. 334.

16. *Abbott v. Curran*, 98 N. Y. 665.

17. *Hope v. Seaman*, 119 N. Y. Supp. 713.

18. *Barnard v. Onderdonk*, 98 N. Y. 158.

19. *Campbell v. N. Y. Life Ins. Co.*, 14 App. Div. 611, 44 N. Y. Supp. 5; aff'd without opinion, 160 N. Y. 699.

20. *Morehouse v. Morehouse*, 3 St. Rep. 790.

ARTICLE XI.

JUDGMENT FOR DEFICIENCY.

A. Civil Practice Act, § 1083. Judgment for deficiency.

If a person who is liable to the plaintiff for the payment of the debt secured by the mortgage is made a defendant in the action, and has appeared or has been personally served with the summons, the final judgment may award payment by him of the residue of the debt remaining unsatisfied, after a sale of the mortgaged property, and the application of the proceeds, pursuant to the directions contained therein.²¹

B. Mortgagor.

A mortgagor who has not conveyed the premises is generally liable for any deficiency which may arise upon its foreclosure.²² Where a deed absolute in form is given to secure a loan and is foreclosed as a mortgage, a deficiency judgment may be given.²³ If, however, he has conveyed the premises to another who has assumed the mortgage, the mortgagor assumes the position of a surety, while the grantee becomes the principal debtor. As a surety he may be discharged from liability according to the rules of law

21. Action for deficiency.—See, *supra*, Action on Debt after Foreclosure Action, VI-R.

Lands in another State.—The provisions of section 1083, relating to judgments for deficiency arising upon a sale, refer to such a sale as the courts in this State are authorized to order. *Clark v. Simmons*, 55 Hun, 175, 8 N. Y. Supp. 74.

22. Failure to serve other defendants.—A defendant against whom a judgment for deficiency has been rendered cannot object that other defendants, who had no interest in the mortgaged premises, were not served. *Wager v. Link*, 150 N. Y. 549.

Rents deposited.—A mortgagor defending an action of foreclosure on the ground that he is not liable for a deficiency by agreeing that the rents from the premises be deposited to the joint account of the parties, "to be held to abide the event of this action," the taxes, insurance premiums, etc., to be paid from the sum deposited, merely agrees that the balance of the deposit shall be applied in satisfaction

of the mortgage only in case it is determined that he is liable for a deficiency. After a decision that he is not so liable, the mortgagee has no right to have the balance of the deposit applied to cover a deficiency. *Rutherford Realty Co. v. Cook*, 130 App. Div. 76, 114 N. Y. Supp. 274.

Absence of mortgagor.—The prosecution of a foreclosure action to judgment in the absence of the mortgagor does not release the mortgagor from liability for the deficiency. *Shipman v. Niles*, 75 App. Div. 451, 78 N. Y. Supp. 440; *aff'd* without opinion, 177 N. Y. 527.

Mortgagor acting for another.—Land was purchased for the benefit of an association, but title taken in the name of an individual, who gave back a mortgage. The receipt for the money loaned specified it was for the association. *Held*, that the mortgagor should be exonerated from the payment of any deficiency arising on the mortgage. *Bowman v. Johnson*, 6 St. Rep. 22.

23. Dickey v. Goertner, 146 N. Y. Supp. 284.

that pertain to sureties.²⁴ Thus, if the mortgagee fails to foreclose the mortgage against the grantee, upon the request of the mortgagor, such mortgage may be discharged.²⁵ The failure of the mortgagee to foreclose at the request of the mortgagor, made after the mortgage became due, relieves the mortgagor, who has conveyed the land subject to the mortgage, from liability for any deficiency arising on a subsequent foreclosure and sale to the extent that such deficiency resulted from the delay.²⁶ Or, if a binding extension of payment is made between the mortgagee and the grantee, the mortgagor may be discharged.²⁷ And, if the mortgagee releases the grantee, the mortgagor is also discharged.²⁸ But, if the conveyance to another is merely subject to the mortgage and cannot be construed as an assumption of liability by the grantee, the original mortgagor retains his position as principal debtor.²⁹ The effect of an extension of payment to the grantee under such circumstances is to release the mortgagor only to the extent of the value of the property at that time.³⁰ And, where the mortgagee has no actual notice of the assumption of the mortgage by a mesne grantee of the premises, he may hold the mortgagor for a deficiency, although the grantee was not made a party to the foreclosure.³¹

24. Consideration for agreement.— Marshall v. Davies, 78 N. Y. 415.

An agreement, which is unenforceable for want of any consideration does not discharge the surety. *Rafel v. Maurer*, 101 Misc. 621, 167 N. Y. Supp. 941; *aff'd*, 170 N. Y. Supp. 1107.

Change of rate of interest.— On foreclosure it appeared that after the mortgagor had conveyed the property, the mortgagee directed an increase in the rate of interest which the grantee voluntarily paid and the mortgagee received for a short period, when the former rate was restored; *held*, insufficient to show a valid agreement between the mortgagee and grantee to change the rate of interest, so as to relieve the mortgagor, who had no notice of such agreement. *N. Y. Life Insurance Co. v. Casey*, 178 N. Y. 381.

25. *Russell v. Weinberg*, 4 Abb. N. C. 139.

26. *Osborne v. Heyward*, 40 App. Div. 78, 57 N. Y. Supp. 542; *Gottschalk v. Jungmann*, 78 App. Div. 171, 79 N. Y. Supp. 551.

27. *Calvo v. Davies*, 73 N. Y. 211;

28. *Paine v. Jones*, 76 N. Y. 274; *Knoblock v. Zschwetzke*, 1 St. Rep. 238.

29. *Feigenbaum v. Hizsnay*, 187 App. Div. 126, 175 N. Y. Supp. 223, *Brusse v. Paige*, 1 Keyes. 87; *Tillotson v. Boyd*, 4 Sandf. 516; *Munnay v. Smith*, 1 Duer, 412.

30. *Feigenbaum v. Hizsnay*, 187 App. Div. 126, 175 N. Y. Supp. 223.

31. *Title Guaranty & Trust Co. v. Weiher*, 30 Misc. 250, 63 N. Y. Supp. 224.

A mortgagee assigned the mortgage to a bona fide purchaser and afterwards purchased the equity from the mortgagor and covenanted with him to assume the mortgage and to release the mortgagor from all liability. This transaction was never recorded nor was any notice of it given to the assignee; *held*, that the latter might in a foreclosure action recover a deficiency from the original mortgagor. *Merchants' Bank v. Weill*, 163 N. Y. 486.

C. Wife of mortgagor.

Prior to the "Married Women Acts," a married woman was not liable on a bond secured by a mortgage on her separate estate, where the loan was to her husband, and the bond did not charge her separate estate.³² But previous to such act it was presumed that where a married woman received money on a promise to repay it, although the bond did not charge her separate estate, the money was borrowed for the benefit of such estate.³³ She is now presumptively liable on the bond if she signs it.³⁴ And, where a loan is made to husband and wife jointly on their joint property, a judgment for deficiency may be entered against the wife, and such judgment will be deemed final and only reviewable on direct appeal.³⁵ And a married woman who takes a conveyance assuming the payment of a mortgage is liable, though she has no other property.³⁶ But a wife is not liable to pay a deficiency where the claim is based upon the assumption contained in the deed conveying the property to her, of which she had no knowledge, and which was made as a gift from her husband to her.³⁷

D. Heirs or representatives of mortgagor.

The plaintiff cannot make the heirs or devisees of a deceased mortgagor parties, they having no interest in the mortgaged premises, for the purposes of obtaining a judgment for deficiency which will bind the real estate of the decedent.³⁸ A judgment for a deficiency must be recovered in order to sustain an action to enforce payment of the deficiency from land devised by the mortgagor.³⁹ But the personal representatives of a deceased mortgagor may be made parties for the purpose of obtaining a judgment for the payment of deficiency out of the assets in their hands in due course of administration.⁴⁰ The interest of an heir-at-

32. *McKeon v. Hagan*, 18 Hun, 65; *Life Assn. of America v. Lessler*, 19 Alb. L. J. 399.

33. *Williamson v. Duffy*, 19 Hun, 312. *Contra*, *Mack v. Austin*, 29 Hun, 534; *aff'd*, 95 N. Y. 513.

34. *Feigenbaum v. Hizsnay*, 187 App. Div. 126, 175 N. Y. Supp. 223.

35. *Bert v. Palmer*, 22 Wkly. Dig. 282.

36. *Cashman v. Henry*, 75 N. Y. 103. *Contra*, *Manhattan Life Ins. Co. v. Stover*, 14 Hun, 153.

37. *Munson v. Dyett*, 56 How. Pr. 333.

38. *Leonard v. Morris*, 9 Paige, 90.

The legatee of a grantor of a mortgage may be liable for a deficiency to the extent of the property he receives from the grantor's estate. *Collier v. Miller*, 62 Hun, 99, 42 St. Rep. 66, 16 N. Y. Supp. 633; *aff'd*, 137 N. Y. 332.

39. *Lockwood v. Fawcett*, 17 Hun, 146.

40. *Collins' Petition*, 6 Abb. N. C.

law of a deceased mortgagor in the mortgaged property is subject to be wiped out by a judgment in foreclosure and, in case of a deficiency, judgment may be entered against the administratrix of the deceased mortgagor, she having been made a party to the foreclosure action, and collected out of property coming into her hands in due course of administration.⁴¹ Where an assignee for benefit of creditors is joined as a defendant in foreclosure of a mortgage assumed by the assignors, judgment for deficiency should be rendered against the assignors, not against the assignee.⁴²

E. Surety or guarantor.

A person who guarantees the payment of the mortgage debt either in the assignment of the mortgage to plaintiff, or otherwise, is a proper party to the action, and judgment can be rendered against him for deficiency.⁴³ It is also held that a person who has covenanted that the mortgage was due and collectible is a proper party.⁴⁴ An obligor in a bond, though not joining in the mortgage, may be made a defendant and held liable for a deficiency.⁴⁵

After the entry of an interlocutory judgment of foreclosure and sale, the obligor upon the bond cannot contest an application for a judgment for a deficiency upon the ground that he never executed the bond or mortgage, for the interlocutory judgment is conclusive against him on that issue.⁴⁶ A guarantor of a mortgage may be released from a liability from a deficiency on a resale which had been so conducted that the purchaser on the first sale was relieved

227; *Mitchell v. Bowne*, 63 How. Pr. 1; *Lockwood v. Fawcett*, 17 Hun, 146; *Glacius v. Fogel*, 88 N. Y. 439.

41. *Buckley v. Beaver*, 99 Misc. 643, 166 N. Y. Supp. 131.

42. *Payne v. Smith*, 28 Hun, 104.

43. *Vanderbilt v. Schreyer*, 91 N. Y. 392; *Alger v. Alger*, 83 App. Div. 168, 82 N. Y. Supp. 523; *Bristol v. Morgan*, 3 Edw. Ch. 142; *Rushmore v. Gracie*, 4 Edw. Ch. 84; *Northern Insurance Co. v. Wright*, 13 Hun, 166; *aff'd*, 76 N. Y. 445; *Officer v. Burchell*, 44 Super. Ct. 575.

Death of guarantor.—Where the guarantor dies pending the action, the court has no power to order a judgment for a deficiency against him as of a date prior to his death, *nunc pro tunc*, without bringing in his personal representatives. *Grant v. Griswold*, 21

Hun, 509; appeal dismissed, 82 N. Y. 569.

44. *Curtis v. Tyler*, 9 Paige, 432.

Guaranty of collection.—A person who has guaranteed the collection of the mortgage debt is a proper party, but in such case the judgment should provide that no execution should issue as against him until an execution against the parties primarily liable has been returned unsatisfied. *Leonard v. Morris*, 9 Paige, 90; *Harlem Savings Bank v. Mickelsburgh*, 57 How. Pr. 106.

45. *Randrup v. McBeth*, 116 App. Div. 195, 101 N. Y. Supp. 604; *aff'd*, 191 N. Y. 531; *Thorn v. Newby*, 59 How. Pr. 120.

46. *Davies v. Freund*, 152 App. Div. 819, 137 N. Y. Supp. 735.

for irregularity in the resale.⁴⁷ If the name of the principal debtor is stricken out by order of the court, and judgment against him for deficiency expressly waived by such order, a judgment for deficiency cannot be ordered against the surety.⁴⁸

F. Purchaser subject to mortgage.

One who buys mortgaged premises, but does not assume the payment of the mortgage, is not liable for a deficiency. In the absence of a covenant or agreement to that effect, the grantee of lands does not assume a personal obligation to pay existing incumbrances.⁴⁹ On the other hand, a purchaser who assumes the mortgage assumes also responsibility for a deficiency upon foreclosure.⁵⁰ He then becomes the principal debtor,⁵¹ and the original mortgagor is only a surety.⁵² If the purchaser of part of mortgaged premises assumes the payment of the entire mortgage, he is bound to protect the portion not purchased from the lien of the mortgage.⁵³

Where the mortgagor sells the equity subject to the mortgage, and the purchaser assumes the payment as a portion of the purchase money, the latter becomes personally liable for the payment of the debt in the first instance, and, if the

47. *Riggs v. Boucicault*, 20 Wkly. Dig. 184.

48. *Hencken v. James*, 16 Wkly. Dig. 33.

49. *Smith v. Cornell*, 111 N. Y. 554; *Belmont v. Cowan*, 22 N. Y. 438; *Equitable Life Ass. Co. v. Bortwick*, 100 N. Y. 629.

50. *Ayres v. Dixon*, 78 N. Y. 318; *Wilbur v. Warren*, 104 N. Y. 192; *Howard v. Robbins*, 67 App. Div. 245, 73 N. Y. Supp. 172; *aff'd*, 170 N. Y. 498.

Paramount title.—A grantee who has covenanted to pay a mortgage is not bound to pay a deficiency if he has been evicted by paramount title. *Dunning v. Leavitt*, 85 N. Y. 30.

Deed as security.—The grantee in a deed taken merely as security, though he assumes an enlisting mortgage on the property, is not liable to the mortgagee for a deficiency on foreclosure. *Root v. Wright*, 84 N. Y. 72. Compare *Ricard v. Sanderson*, 41 N. Y. 179.

Parol evidence.—Where a deed con-

tains no assumption of a mortgage debt or agreement to pay it, parol proof of such a contract does not contradict the deed, and is competent to establish the liability of the grantee to pay such debt. *Peet v. Kent*, 5 St. Rep. 134.

Discharge of grantee.—Where the court finds that the plaintiff is entitled to a personal judgment for a deficiency against a grantee of the premises who is made defendant, but plaintiff enters a judgment without relief against such defendant for deficiency, he thereby discharges him from such liability. *Mutual Life Ins. Co. v. Hoyt*, 15 Wkly. Dig. 489.

51. *Ayres v. Dixon*, 78 N. Y. 318; *Ranny v. McMullen*, 5 Abb. N. C. 246; *Wales v. Sherwood*, 52 How. Pr. 413.

52. *Calvo v. Davies*, 73 N. Y. 211; *Ayres v. Dixon*, 78 N. Y. 318; *Wilbur v. Warren*, 104 N. Y. 192. See, *supra*, Art. XI-B, Mortgage.

53. *Wilcox v. Campbell*, 106 N. Y. 325.

mortgagor is compelled to pay it, he can recover it from the purchaser of the equity.⁵⁴ If the grantee of the premises is not made a party to the action, the mortgagor is not bound to give him notice in order to hold him for deficiency.⁵⁵

The assumption of the mortgage by a grantee rests on contract; in the absence of proof showing an acceptance of the deed by the grantee, he is not liable.⁵⁶ But, if there are words in the deed importing that the grantee is to pay the mortgage to which the land is subject, he is deemed to have entered into an express agreement to do so by the acceptance of the deed; no precise or formal words are necessary if the intent appears.⁵⁷

The purchaser of a mere equity, without any words in the grant importing that he assumes the payment of the mortgage, does not bind himself personally to pay the debt; there is no implied promise or covenant. If, however, in the conveyance there are words importing that the grantee will pay the debt, he is deemed to have entered into an express agreement to do so, although he does not sign or seal the instrument. The acceptance of a deed containing such language is evidence of the most satisfactory kind that he has promised to do what the deed says he is to do. The insertion of words, to the effect that it is subject to a mortgage of a specified amount which has been estimated as part of the purchase money and deducted therefrom, does not bind the grantee personally.⁵⁸ A personal obligation on the part of the grantee is not to be inferred from a statement in his deed that it is subject to a mortgage, and that the amount thereof "forms part of the consideration and is deducted therefrom."⁵⁹

Under a conveyance, by which the grantee assumes no personal liability, the fact that the grantee takes possession and receives the rents and profits does not make him liable

54. *Ayres v. Dixon*, 78 N. Y. 318; *Halsey v. Reed*, 9 Paige, 447; *Marsh v. Pike*, 10 Paige, 595; *Blyer v. Mulholland*, 2 Sandf. Ch. 478; *Ferris v. Crawford*, 2 Den. 595; *Cornell v. Prescott*, 2 Barb. 16; *Thayer v. Marsh*, 11 Hun, 501; *Russell v. Pistor*, 7 N. Y. 171; *Hartley v. Harrison*, 24 N. Y. 170; *Comstock v. Drohan*, 71 N. Y. 9. See, also, as to the grantee of a grantee, *Marsh v. Pike*, 10 Paige, 595.

55. *Comstock v. Drohan*, 71 N. Y. 9. See, also, *Drewry v. Clark*, 16 How. Pr. 424.

56. *Blass v. Terry*, 156 N. Y. 722.

57. *Curtis v. Tyler*, 9 Paige, 432; *Halsey v. Reed*, 9 Paige, 446; *Marsh v. Pike*, 10 Paige, 595; *Vail v. Foster*, 4 N. Y. 312; *Trotter v. Hughes*, 12 N. Y. 74; *Ricard v. Sanderson*, 41 N. Y. 179; *Lawrence v. Fox*, 20 N. Y. 268.

58. *Collins v. Rowe*, 1 Abb. N. C. 97; *Belmont v. Coman*, 22 N. Y. 438.

59. *Equitable Life Ass. Co. v. Bostwick*, 100 N. Y. 628. Compare *Dorr v. Peters*, 3 Edw. Ch. 132; *Smith v. Tusslow*, 84 N. Y. 660.

for deficiency.⁶⁰ A grantee of the equity, subject to a mortgage, is not liable if his grantor was not so liable.⁶¹ A purchaser of the equity from one not personally liable to the holder of the mortgage incurs no liability by the insertion of a clause assuming payment of a mortgage as part of the consideration.⁶²

A covenant in a deed, by which the grantee assumes and agrees to pay a mortgage upon the premises conveyed, after it has come to the knowledge of the owner of the mortgage, and has been assigned and adopted by him as a security for his own benefit, is not revocable. A release, therefore, by the grantor, without the assent of the mortgage creditor, under such circumstances does not discharge the grantee.⁶³

G. Subsequent mortgagee.

A clause in a second mortgage, by which a mortgagee covenants and agrees to pay a prior mortgage, does not render him personally liable to the prior mortgagee for the first mortgage debt. The stipulation, in such a case, differs from a similar stipulation in a conveyance, in that it is not a promise made by the mortgagee to the mortgagor for the benefit of the prior mortgagee, but is a promise for the benefit of the mortgagor only, to protect his property by advancing money to pay his debts.⁶⁴

H. Absence of bond.

If there is no bond and no covenant to pay the money, and no pre-existing debt, the remedy is confined to the land.⁶⁵ A mortgage stated to be an existing obligation, and which provides that it shall apply to, bind or inure to the benefit of the heirs, successors, legal representatives and assigns of the respective parties thereto, is in legal effect a bond, and on foreclosure the plaintiff may be entitled to judgment for a deficiency.⁶⁶

60. *Argall v. Pitts*, 78 N. Y. 239.

61. *Smith v. Cross*, 16 Hun, 478; *Cashman v. Henry*, 75 N. Y. 103; *Vrooman v. Turner*, 69 N. Y. 280; *Jenkins v. Bishop*, 136 App. Div. 104, 120 N. Y. Supp. 825; *aff'd*, 207 N. Y. 697.

62. *Smith v. Cross*, 16 Hun, 487; *Munson v. Dyett*, 56 How. Pr. 333.

63. *Gifford v. Corrigan*, 117 N. Y. 257.

64. *Garnsey v. Rogers*, 27 N. Y. 233.

65. *Smith v. Rice*, 12 Daly, 307; *Gaylord v. Knapp*, 15 Hun, 87; *Mack v. Austin*, 95 N. Y. 513.

66. *Katz v. Katz*, 80 Misc. 170, 140 N. Y. Supp. 971; *aff'd*, 159 App. Div. 921, 144 N. Y. Supp. 1122; *aff'd*, 217 N. Y. 651.

I. Demand in complaint for relief.

Where there is no answer, and complaint does not ask judgment for deficiency, it cannot be granted.⁶⁷ Where the relief demanded is a foreclosure and sale and judgment for deficiency against a defendant not answering, a judgment granting such relief is not authorized, where it appears from the findings that such defendant had no interest in the bond.⁶⁸

J. Non-resident defendant.

A personal judgment for a deficiency cannot be rendered against a nonresident defendant, who neither appeared in the action nor had been served with process within this State.⁶⁹

K. No sale had.

A personal judgment may be entered against the obligor on a bond under an interlocutory judgment foreclosing a junior mortgage, although no sale has been had pursuant to the judgment, owing to the fact that after the entry thereof the property was sold on the foreclosure of a prior mortgage, which sale resulted in a deficiency.⁷⁰ A judgment for deficiency may be entered where the foreclosure is against lands in this State and an adjoining State, without waiting the result of foreclosure in the other State.⁷¹ Where the original indebtedness is set forth in the complaint in an action to foreclose usurious securities, and is not denied, a

67. *Bullwinker v. Ryker*, 12 Abb. Pr. 311; *Simonson v. Blake*, 20 How. Pr. 484; *French v. New*, 20 Barb. 484.

68. *Olcott v. Kohlsaas*, 8 N. Y. Supp. 118, 27 St. Rep. 914.

69. *Schwinger v. Hickok*, 53 N. Y. 280; *Bartlett v. McNeil*, 60 N. Y. 53.

70. *Davies v. Freund*, 152 App. Div. 819, 137 N. Y. Supp. 735. See, also, *Frank v. Davis*, 29 Abb. N. C. 294.

Sale abandoned.—After a mortgagor had conveyed the premises, without reference to the mortgage and for full value, the mortgage was foreclosed and the land sold for more than the amount due on the judgment. No note or memorandum, or report of the sale, was made. The purchaser paid no part of his bid and the sale was abandoned, but the purchaser thereafter obtained a conveyance from the mortgagor's grantee, and also paid the amount called for by the foreclosure

judgment, and received an assignment thereof and of the bond, and then, by leave of the court, brought suit upon the bond. *Held*, that the foreclosure sale, even if binding upon the plaintiff therein, did not affect the rights of defendants and furnished no defense, as they were bound to pay the bond and could not ask to have the land sold to discharge the debt; they were no way damaged and acquired no equities by reason of the failure to complete the sale; that it was not essential for plaintiff to set up his equities in his complaint; he had a right to sue simply as assignee of the bond and to prove his equities in answer to any defense sought to be established by defendants. *Wadsworth v. Lyon*, 93 N. Y. 201.

71. *Clark v. Simmons*, 55 Hun, 175, 8 N. Y. Supp. 74, 28 St. Rep. 738.

personal judgment for the amount thereof, with legal interest, may be granted.⁷²

L. Manner of determining liability for deficiency.

In foreclosure cases, the question of liability for deficiency must be determined by the judgment.⁷³ Mortgaged premises constitute the primary fund for the payment of the mortgaged debt, and only where the mortgagee has endeavored to collect the same out of the land can a just judgment for deficiency be entered.⁷⁴

M. Ascertainment of deficiency.

A mortgagee cannot have judgment for deficiency till after sale;⁷⁵ and the amount of the deficiency must be ascertained before the judgment is docketed.⁷⁶ A referee's report of sale, which shows that the apparent deficiency was wholly caused by an unauthorized allowance to the purchaser, is treated as not reporting any deficiency.⁷⁷ The deficiency is ascertained as against the mortgagor by deducting from the proceeds all taxes and other liens, and treating the balance as net proceeds.⁷⁸

N. Action at law for deficiency.

The right to obtain a deficiency judgment in an action to foreclose a mortgage rests entirely on our statutory provisions. Before the enactment of those statutes, a mortgagee to collect a deficiency was compelled to resort to an action at law after the sale. This course may still be pursued, though leave of the court is necessary for the institution of the second action.⁷⁹ The statute authorizing judg-

72. *Troy Carriage Co. v. Simson*, 15 Misc. 424, 37 N. Y. Supp. 846, 73 St. Rep. 58; *aff'd*, 12 App. Div. 626, 43 N. Y. Supp. 1166.

73. *Wager v. Link*, 134 N. Y. 122.

74. *Purdy v. Wilkins*, 95 Misc. 706, 160 N. Y. Supp. 17.

75. *Loeb v. Willis*, 22 Hun, 508.

Resale.—One liable for deficiency was held not discharged because the time for completing the sale was extended, and a resale was subsequently ordered without proceeding against the original purchaser for contempt to compel him to complete his purchase, because it did not appear that the purchaser was personally responsible and that his bid would have been enforced; nor that, if the resale had been ordered

immediately, the premises would have brought more; further, that there was no fraud and no request that the purchaser should be proceeded against, and that a plaintiff in foreclosure has his election to compel the purchaser to complete his purchase or to apply for a resale. *Goodwin v. Simonson*, 74 N. Y. 133.

76. *De Agreda v. Mantel*, 1 Abb. 134.

77. *Bache v. Doscher*, 41 Super. Ct. 150; *aff'd*, 67 N. Y. 429.

78. *Marshall v. Davis*, 78 N. Y. 414; *Fleishauer v. Doellner*, 60 How. Pr. 438.

79. *Rutherford Realty Co. v. Cook*, 198 N. Y. 29, 33.

ment for deficiency in actions for foreclosure was enacted to save the necessity for actions at law, and to allow one court to dispose of the whole subject.⁸⁰

O. Docketing judgment.

A judgment for deficiency is not a lien on real estate until the report fixing the amount is filed.⁸¹ There is no statutory limitation for the docketing of the deficiency judgment, and it may be docketed, although more than ten years have elapsed since the referee's report of sale.⁸²

P. Execution to collect deficiency judgment.

Where a judgment adjudges a defendant to pay any deficiency which may arise and one is reported, an execution may issue for such deficiency against the defendant named without further application to the court or notice to the defendant, and without notice of the confirmation of the report.⁸³ Nor as against such defendant is it necessary to enter an order confirming the report.⁸⁴ Where more than one person is liable personally for the payment of the mortgage debt, some as principal and others as sureties, the judgment should provide for execution against the defendants in the order in which they are liable.⁸⁵

Q. Correction of judgment as to deficiency.

A judgment in foreclosure cannot be amended after the sale by inserting a deficiency clause.⁸⁶ If a defendant is not liable for a deficiency, upon the facts alleged in the complaint, and he has not assumed the mortgage, he should move to vacate so much of the interlocutory judgment as holds him so liable, but the court may correct such an error by refusing to confirm the referee's report, and refusing judgment and execution against such defendant.⁸⁷ Where the judgment of foreclosure does not provide that a certain defendant shall be liable for a deficiency, an order upon the referee's report of sale directing such judgment is irregular.⁸⁸

80. *Thorne v. Newly*, 59 How. Pr. 120; *Equitable Life Ins. Co. v. Stevens*, 63 N. Y. 341; *Scofield v. Doscher*, 72 N. Y. 491.

81. *French v. French*, 107 App. Div. 107, 94 N. Y. Supp. 1026; appeal dismissed, 185 N. Y. 532.

82. *Brown v. Faile*, 112 App. Div. 302, 98 N. Y. Supp. 420.

83. *Hawley v. Whalen*, 46 St. Rep. 512, 19 N. Y. Supp. 521.

84. *Taylor v. Derrick*, 46 St. Rep. 583, 19 N. Y. Supp. 785.

85. *Curtis v. Tyler*, 9 Paige, 435; *Luce v. Hinds*, *Clarke's Ch.* 453; *Weed v. Calkins*, 24 Hun, 582.

86. See, *supra*, Art. VIII-M, Amendment of Judgment.

87. *Argall v. Pitts*, 78 N. Y. 239.

88. *Day v. Johnson*, 5 Wkly. Dig. 237.

ARTICLE XII.**PROCEEDINGS WHEN DEBT NOT ALL DUE.****A. Civil Practice Act, § 1081. When complaint to be dismissed on payment of sum due.**

Where an action is brought to foreclose a mortgage upon real property upon which a portion of the principal or interest is due, and another portion of either is to become due, the complaint must be dismissed, without costs against the plaintiff, upon the defendant paying into court, at any time before a final judgment directing a sale is rendered, the sum due and the plaintiff's costs.

B. Civil Practice Act, § 1084. Payment after judgment; when proceedings to be stayed.

Where an action is brought to foreclose a mortgage upon real property upon which a portion of the principal or interest is due and another portion of either is to become due, if, after a final judgment directing a sale is rendered, but before the sale is made, the defendant pays into court the amount due for principal and interest and the costs of the action, together with the expenses of the proceedings to sell, if any, all proceedings upon the judgment must be stayed; but, upon a subsequent default in the payment of principal or interest, the court may make an order directing the enforcement of the judgment for the purpose of collecting the sum then due.

C. Civil Practice Act, § 1086. Sale where mortgage debt is not all due.

Where the mortgage debt is not all due,

1. If the mortgaged property is so circumstanced that it can be sold in parcels without injury to the interests of the parties, the final judgment must direct that no more of the property be sold in the first place than is sufficient to satisfy the sum then due, with the costs of the action and expenses of the sale; and that upon a subsequent default in the payment of principal or interest, the plaintiff may apply for an order directing the sale of the residue, or of so much thereof as is necessary to satisfy the amount then due, with the costs of the application and the expenses of the sale. The plaintiff may apply for and obtain such an order as often as a default happens.

2. If it appears that the mortgaged property is so circumstanced that a sale of the whole will be most beneficial to the parties, the final judgment must direct that the whole property be sold; that the proceeds of the sale, after deducting the costs of the action and the expenses of the sale, be either applied to the satisfaction of the whole sum secured by the mortgage, with such a rebate of interest as justice requires; or be first applied to the payment of the sum due, and the balance, or so much thereof as is necessary, be invested at interest for the benefit of the plaintiff, to be paid to him from time to time as any part of the principal or interest becomes due.

D. Judgment.

Where, pending a foreclosure for interest, the principal becomes due, and recovery for the whole is allowed, the judgment should be drawn in conformity with the provisions regulating cases in which suit is brought for an installment,

and the principal becomes payable, while the action is pending, as under section 1086.⁸⁹ Where an action is commenced for the foreclosure of three mortgages upon the same property, only two of which are due at the time the action is brought, and the third becomes due before the trial, it may be included in the judgment of foreclosure where the allegations of the complaint and the evidence so warrant, as the right to judgment in equitable cases is not limited to the facts as they existed at the commencement of the action, but the relief administered is such as the nature of the case and the facts as they exist at the time of the trial demand.⁹⁰

On foreclosure of a mortgage given as indemnity against liability as indorser, a recovery may be had not only for notes, as to which the indorser's liability was fixed before the action, but for all notes covered by the mortgage which became due before the judgment.⁹¹

A judgment in foreclosure brought for an unpaid installment of interest alone which orders a sale subject to the whole mortgage debt is irregular; but cannot be attacked collaterally.⁹²

89. *Sidenberg v. Ely*, 1 Law Bull. 70.

Irregular proceedings.—In an action to foreclose where all the principal was not due, the decree stated the sum due and to become due. The mortgagor paid the sum due and costs, which was accepted by the mortgagee, and the next installment was also paid. After the last installment fell due, the plaintiff, without notice to defendants, applied, by petition, for leave to proceed and sell the mortgaged premises, which was granted on the petition; the original decree did not contain any provision for permission to proceed thereon and sell the premises in case of a default in payment of future installments. *Held*, that the proceedings were irregular and void, and must be set aside; that plaintiff, by accepting payments, waived making the payment in court, and taking the decree in the usual form, if subsequent installments should fall due, the provisions of the statute should be strictly observed. *Long v. Lyons*, 54 How. Pr. 129,

Deficiency.—In an action to foreclose a mortgage, only a portion of which was due, the judgment provided for a sale and the application of the proceeds to the satisfaction of the whole sum secured, that in case of deficiency in the proceeds to pay the amount reported as actually due, the defendants liable therefor should pay such deficiency, and that in case of a deficiency in the proceeds to pay the amount reported as secured and unpaid, that plaintiff might apply for execution at any time when such deficiency should become due, according to the conditions of the bond; it was held that the judgment was correct and that no amendment thereof was necessary. *Brewer v. Longnecker*, 15 N. Y. Supp. 937, 40 St. Rep. 614.

90. *Sherman v. Foster*, 158 N. Y. 587.

91. *Miller v. Miller Knitting Co.*, 23 Misc. 404, 52 N. Y. Supp. 184.

92. *Stuyvesant v. Weil*, 26 Misc. 445, 57 N. Y. Supp. 592; *rev'd*, 41 App. Div. 551, 58 N. Y. Supp. 697, in turn reversed, 167 N. Y. 421.

Where the property covered by mortgage upon foreclosure is sold under a judgment containing no provisions appropriate to a case where part only of the mortgage debt was due, the mortgagee has no lien by virtue of the judgment for the payment of any sums that may, after such judgment, come due under the terms of the mortgage.⁹³

A plaintiff, in a suit for the foreclosure of a mortgage, who stipulates before answer to discontinue if the defendant pay all accrued interest and taxable costs before a certain date, but reserves the right to proceed without notice upon failure of the defendant to pay said interests and costs, may proceed with the suit where the defendant has merely paid the interest. It seems that such a stipulation is without consideration and invalid, but whether valid or invalid, its force and effect can only be determined by answer and a trial of the issues.⁹⁴

E. When sale of entire premises will be ordered.

Where the mortgaged premises are in a city and are laid out in lots, and only part of the amount secured is due, running through a period of fourteen years, and the plaintiff tenders a stipulation to bid on the sale, in one parcel, the whole amount due, and to become due, and costs, so as to leave no deficiency, the case comes within the statute and it is the duty of the court to decree a sale of the whole premises in one parcel as most beneficial to all parties.⁹⁵ If the premises cannot be divided, the decree should provide for the payment of the money to the mortgagee in payment of the mortgage debt, unless some safe course more beneficial to the mortgagor exists.⁹⁶

F. Mortgage for support.

The provisions relating to foreclosure and sale for installments not due at commencement of suit do not apply to an action for breach of a covenant for support accompanied by a mortgage; they apply only to mortgages conditioned for the payment of money.⁹⁷

93. *Powell v. Harrison*, 88 App. Div. 228, 85 N. Y. Supp. 452; appeal dismissed, 178 N. Y. 567.

94. *Burkard v. Stephen Bldg., etc., Co.*, 160 App. Div. 50, 144 N. Y. Supp. 775.

95. *Gregory v. Campbell*, 16 How. Pr. 417.

96. *Knapp v. Burnham*, 11 Paige, 330.

97. *Ferguson v. Ferguson*, 2 N. Y. 360.

G. Supplemental complaint to set up subsequent default.

Where the mortgage contains a clause authorizing the mortgagee, upon non-payment of interest, to elect that the whole amount shall become due, and he has so elected, he cannot be compelled to waive the agreement. Nor is he estopped from asserting his right of election by the commencement of a suit prior to the thirty days, by setting up simply default in payment, or by receiving an installment of the principal. He has a right to file an amended and supplemental complaint and proceed in the action.⁹⁸

H. Form of petition to sell balance of mortgaged premises.**SUPREME COURT — ULSTER COUNTY.**

JACOB P. HENDRICKS, IN HIS OWN RIGHT
AND AS THE GENERAL GUARDIAN OF
JANE MARGARET DUBOIS, AN INFANT,

agst.

LORENZO DUBOIS AND CHRISTINA DUBOIS,
HIS WIFE; MOSES W. SCHEPMOES AND
ANNA E., HIS WIFE; ELIJAH ELLS-
WORTH AND SARAH, HIS WIFE; TEUNIS
H. SCHEPMOES, ANDREW J. STORY
ET AL.

To the Supreme Court of the State of New York:

The petition of Jacob P. Hendricks, in his own right and as the general guardian of Jane Margaret DuBois, the above plaintiff, respectfully shows that a judgment of foreclosure and sale was entered in this action in the office of the clerk of Ulster county on the 6th day of April, 1905, on the report of the referee therein, whereby it appears that the sum of \$999.22 was due on the bond and mortgage, mentioned in the complaint, on April 3, 1905, and that the amount secured and not due was \$2,213.67; that such proceedings were thereupon had upon such judgment, that under and by virtue thereof a portion of the premises, described in said judgment and in the complaint herein, sufficient for the payment of the amount reported due on said bond and mortgage and interest thereon, together with the costs and disbursements as settled by the clerk of Ulster county and entered in said judgment, was sold and brought the sum of \$3,100, which said amount paid the costs and expenses on said foreclosure and a portion of the principal sum secured on said mortgage, having left unpaid on said mortgage the sum of \$460.06 with interest thereon from March 1, 1905; that the premises so sold was the lot firstly described in said judgment and complaint and was the whole of the premises described therein except the lot lastly described therein, which said lot so remaining unsold is bounded and described

98. *Malcolm v. Allen*, 49 N. Y. 448.

as follows: (Here insert description.) That under and by virtue of the terms of said mortgage the interest thereon was payable March 1 and September 1 of each year; that the interest due on the amount unpaid on said mortgage became due and payable September 1, 1905, and remains due and unpaid; that no person has appeared in said action except the defendants De Graff & Busted, who have appeared by their counsel, J. M. Van Wageningen as their attorney; that none of the defendants are infants or absentees. Wherefore your petitioner prays that an order may be allowed in this action founded on said judgment directing a further sale of the lot hereinbefore described, under and pursuant in all respects to the said judgment, as will be sufficient to satisfy the amount due the said plaintiff with the costs of this petition and proceeding, and as said lot is not capable of division, this petitioner prays that the whole of said lot may be sold and the proceeds be applied to the payment of such costs and so forth, and that the balance be applied to the payment of the mortgage of the said plaintiff to the extent of such mortgage.

Dated, September 14, 1905.

(Signature.)

I. Form of order.

(Caption, usual form.)

(Title as before.)

On reading and filing the petition of Jacob P. Hendricks, the above plaintiff, by which it appears, among other things, that the sum of \$460.06 remains unpaid on the decree of foreclosure in the above action with interest thereon from March 1, 1905, after the application of all the proceeds of the sale of the premises sold under said decree, that interest on said sum of \$460.06, from March 1, 1875, became due and payable on September 1, 1905, and still remains in default and unpaid; that all the premises described in said complaint and decree have been sold except a single lot, which said lot would be sold more advantageously by being sold in one parcel. Now, on motion of R. Bernard, plaintiff's attorney, ordered that the residue of said mortgaged premises described in said complaint and judgment in this action, remaining unsold, be sold under the direction of the referee heretofore appointed, for the payment of the amount remaining unpaid on said mortgage, to wit, the sum of \$460.06 and interest from March 1, 1905, together with the costs of these proceedings, \$35, under and pursuant in all respects and according to the terms of and direction for sale contained in said judgment.

And it is further ordered that the said defendants and all persons claiming under them, or either of them, after the filing of the notice of the pendency of this action, be forever barred and foreclosed of all right, title and interest and equity of redemption of or in the said mortgaged premises so sold, or any part thereof.

SAMUEL EDWARDS,

Justice Supreme Court.

ARTICLE XIII.**SURPLUS PROCEEDINGS.****A. Rules of Civil Practice, Rule 261. Disposition of surplus.**

All surplus moneys arising from the sale of mortgaged premises under any judgment shall be paid by the sheriff or referee making the sale, within five days after the same shall be received and be ascertainable, in the city of New York to the chamberlain of the said city, and in other counties to the treasurer thereof, unless otherwise specially directed, subject to the further order of the court; and every judgment in foreclosure shall contain such directions, except where other provisions are made specially by the court. No report of a sale shall be filed or confirmed unless accompanied with a proper voucher for the surplus moneys and showing that they have been paid over, deposited or disposed of in pursuance of the judgment. If any part of the surplus moneys remain in court for the period of three months, the court, if no application has been made therefor, must, and, if an application therefor is pending, may direct it to be invested at interest for the benefit of the person or persons entitled thereto, to be paid on the direction of the court.

B. Rules of Civil Practice, Rule 262. Application for surplus moneys; reference.

Any person claiming the surplus moneys arising upon the sale of mortgaged premises, or any part thereof, either in his own name, or by his attorney, at any time before the confirmation of the report of sale, may file with the clerk in whose office the report of the sale is filed, a written notice of such claim, stating therein the nature and extent of his claim, and the address of himself or his attorney. The party moving for confirmation of the report of sale shall present with his motion papers a certificate of the clerk specifying the notices of claim to the surplus moneys, if any, so filed with him, and an affidavit showing any other unsatisfied lien on the property. On the motion of confirmation, or at any time within three months thereafter, on notice to all parties who have appeared in the action or filed claims, any party to the action, or any person who has filed a notice of claim on the surplus moneys, may apply for an order of reference to ascertain and report the amount due to him or any other person who has a lien on such surplus moneys, and to ascertain the priority of the several liens thereon; to the end that on the coming in and confirmation of the report on such reference, such further order may be made for the distribution of such surplus moneys as may be just. The only costs which can be allowed to the party moving for the reference are motion costs of the motion for reference and of the motion to confirm the report, together with necessary disbursements.

C. Rules of Civil Practice, Rule 263. Proceedings before referee.

The owner of the equity of redemption, or any party who has appeared in the action or any person who has filed a notice of claim with the clerk previous to the entry of the order of reference, or who shall thereafter file such notice with the clerk and serve a certified copy thereof on the referee, shall be entitled to a notice to attend on such reference and to the usual notices of subsequent proceedings relative to such surplus. If such owner, party or claimant, has not appeared nor made his claim by an attorney, the

notice may be served by depositing the same in the post office, directed to the claimant at his place of residence as stated in his notice of claim and on the owner in such manner as the court may direct. Notice of the hearing before the referee shall be given to any person having or appearing to have an unsatisfied lien on the moneys in such manner as the court shall direct.

D. Rules of Civil Practice, Rule 264. When surplus to be paid into Surrogate's Court.

If real property or an interest in real property which is liable to be disposed of as prescribed in article thirteen of the surrogate's court act, be sold to satisfy a mortgage or other lien thereon, which mortgage or lien accrued during the decedent's lifetime, the surplus money must be paid into the surrogate's court having jurisdiction to issue letters testamentary or of administration upon the estate of the decedent, in the following cases:

1. If eighteen months have not elapsed since the date when letters testamentary or of administration were first issued.
2. If a proceeding for a judicial settlement of the accounts of such executor or administrator has been commenced within eighteen months from the date of the issue of such letters and is still pending.
3. If no such letters have been issued and two years have not elapsed since the death of the decedent.

E. Right to surplus.

1. In general.

The proceeds of the sale, after the satisfaction of the mortgage debt, stand in the place of the equity of redemption.⁹⁹ If there is a surplus, it must be paid into court and the question of who is entitled to it becomes the subject of a subsequent special proceeding in which all the parties to the action and all other persons having liens are entitled to be heard.¹ The mortgagee, if he holds the surplus, is regarded as a trustee for the persons entitled thereto.² Rights of the parties in the fund are not affected by the sale, and the court will apply the money according to the rights of the parties as they existed before the sale.³ In general, the surplus moneys belong to the parties having interests in the land in the order of the priority of such interests.⁴ The liens on the land become specific liens on the fund.⁵ The

99. *Clarkson v. Skidmore*, 46 N. Y. 297; *Livingston v. Mildrum*, 19 N. Y. 440; *Elmendorf v. Lockwood*, 4 Lans. 393; *De la Field v. White*, 19 Abb. N. C. 104.

1. *North River Savings Bank v. Buckley*, 130 N. Y. Supp. 787.

2. *Beecker v. Graham*, 2 Edw. 647; *People v. Ulster Common Pleas*, 18 Wend. 628.

3. *Astor v. Miller*, 2 Paige, 68.

4. *Wilkinson v. Paddock*, 57 Hun, 191, 11 N. Y. Supp. 442, 32 St. Rep. 535; *aff'd*, 125 N. Y. 748.

5. *Livingston v. Mildrum*, 19 N. Y. 440; *Snyder v. Stafford*, 11 Paige, 71; *Clarkson v. Skidmore*, 46 N. Y. 297; *Matthews v. Duryea*, 45 Barb. 69; *aff'd*, 4 Keyes, 525; *Blydenburgh v. Northrup*, 13 How. Pr. 289; *Elmendorf v. Lockwood*, 4 Lans. 396; *Fliess v. Buckley*, 22 Hun, 551, 90 N. Y. 236.

rights of claimants to surplus moneys are generally fixed as of the date of sale and adjusted accordingly.⁶ The rights and equities of the lienholders or claimants are before the court, and are as much the object of its care as the rights of the owners of the mortgage.⁷

2. Mortgagor or owner of redemption.

The surplus moneys derived from a sale under foreclosure, after making the payments demanded in the judgment, belong to the mortgagor or owner of the equity of redemption, and not to the purchaser on the foreclosure sale.⁸ They belong to the owner of the equity of redemption, unless claims are filed and they are paid under those claims.⁹

3. Dowress.

A widow or wife is not entitled to a gross sum in lieu of her annuity, as a matter of right, upon distribution of surplus moneys by the surrogate.¹⁰ A wife is, however, entitled to dower in surplus, after paying incumbrances, to which she is bound to contribute. If the husband is living, one-third must be invested for her during their joint lives; if dead, she is entitled to the income of one-third for life.¹¹ The claim

6. *Elsworth v. Woolsey*, 19 App. Div. 385, 46 N. Y. Supp. 486; *aff'd*, 154 N. Y. 748.

7. *DeForest v. Farley*, 62 N. Y. 628; *Beekman v. Gibbs*, 8 Paige, 511; *Tator v. Adams*, 20 Hun, 131; *Livingston v. Mildrum*, 19 N. Y. 440. *Contra*, *Meller v. Dooley*, 1 Law Bull. 50; *Union Dime Savings Bank v. Osley*, 4 Hun, 657.

8. *Day v. Town of New Lots*, 11 St. Rep. 361.

Fraudulent conveyance.—It appeared that the owner of the property before his death conveyed to his housekeeper in order to protect it from judgment creditors, whereupon she made a will leaving the property to a person whom the grantor had appointed as his executor. After the death of the grantor, the executor told the grantee that the conveyance was made solely to protect the property and induced her to deed it to him individually rather than as executor of the grantor in pursuance of the original plan to protect the property from

creditors. *Held*, that as the executor by taking the conveyance in his individual name was seeking to carry out the original fraud of his testator, a court of equity would not award him the surplus left after a foreclosure of a mortgage on the lands, and that the testator's grantee was entitled thereto. *Greason v. Holcomb*, 131 App. Div. 868, 116 N. Y. Supp. 336; *aff'd*, 196 N. Y. 571.

Life tenant.—Right of life tenant to share of surplus, arising from the foreclosure of a mortgage made by such tenant and remaindermen. *Fosdick v. Lyons*, 38 App. Div. 608, 56 N. Y. Supp. 942.

9. *Horn v. Town of New Lots*, 83 N. Y. 100; *Day v. Town of New Lots*, 107 N. Y. 148.

10. *Matter of Zahrt*, 94 N. Y. 605; *Citizens' Savings Bank v. Mooney*, 26 Misc. 67, 56 N. Y. Supp. 548.

11. *Denton v. Nanny*, 8 Barb. 618; *Vartie v. Underwood*, 18 Barb. 561; *Matthews v. Duryee*, 4 Keyes, 525.

of a wife of a mortgagor, who joined in the execution of the mortgage, for the value of her right of dower in the surplus, is superior to claims of the judgment creditors of the mortgagor, notwithstanding a provision in the mortgage for the return of the surplus, if any, to the mortgagor, his heirs or assigns.¹² The widow of the owner of the equity of redemption is entitled to dower in the surplus the same as in the land before the sale.¹³ If she united in the mortgage, she will be entitled to dower only in the surplus after payment of the mortgage.¹⁴

The widow of a mortgagor who has continued in the possession of the mortgaged premises during the period between the expiration of her quarantine and the delivery of the referee's deed is chargeable with only two-thirds of the value of such use and occupation, although she could acquire no estate until her dower had been assigned to her.¹⁵

Where the wife was separated from the husband, the mortgagor, by judgment of the court, it was held that the surplus on foreclosure should not be paid to him upon the execution of a bond, it being a matter in the discretion of the court.¹⁶

4. Purchaser.

Where a purchaser under foreclosure buys under the belief that the mortgage was a first lien, and it is afterwards discovered that there was a prior mortgage, the surplus moneys, after satisfying the mortgage debt, may be recovered back by the purchaser, by a suit in equity.¹⁷

Where an officer of a company, without authority, used its moneys in payment of a bid made by him at foreclosure sale, but did not complete the sale and such bid is abandoned and a resale made for a lower sum, but sufficient to pay the mortgage, the moneys so paid form no part of the surplus moneys as between the company and the owner of the equity of redemption, and a receiver of the company is entitled to recover the same.¹⁸

12. *N. Y. Life Ins. Co. v. Mayer*, 19 Abb. N. C. 92, *citing* *Mills v. Van Voorhies*, 20 N. Y. 412; *Simar v. Canaday*, 53 N. Y. 298; *Aikman v. Harrell*, 98 N. Y. 186; *Moore v. Mayor, Aldermen, etc., of New York*, 8 N. Y. 110.

13. *Elmendorf v. Lockwood*, 4 Lans. 393; *Denton v. Nanny*, 8 Barb. 618; *Titus v. Neilson*, 5 Johns. Ch. 458.

14. *Smith v. Jackson*, 2 Edw. Ch. 28; *Titus v. Neilson*, 5 Johns. Ch.

458; *Hawley v. Bradford*, 9 Paige Ch. 300.

15. *Shueler v. Levy*, 73 Misc. 25, 130 N. Y. Supp. 600.

16. *Emigrant Industrial Savings Bank v. Regan*, 41 App. Div. 523, 58 N. Y. Supp. 693.

17. *Muehlberger v. Schilling*, 3 N. Y. Supp. 705.

18. *Phelan v. Downs*, 31 Misc. 518, 64 N. Y. Supp. 737; *aff'd*, 59 App. Div. 282, 69 N. Y. Supp. 375; *aff'd*, 173 N. Y. 619.

Where, on the foreclosure of a mortgage given by the defendant's testator to the plaintiff, the plaintiff became the purchaser, and subsequently the decree and sale were vacated; it was held that plaintiff was entitled to the expenditures made by him for repairs and taxes, while in possession as a charge against the balance in his hands, the amount due on the mortgage having been reduced by rents.¹⁹

5. Lienors and incumbrancers.

If there are any liens or incumbrances upon the property, they are to be satisfied before the owner of the equity of redemption is entitled to any part of the surplus moneys.²⁰ If the surplus consists of rents collected by a receiver appointed for that purpose, they should be paid to a junior mortgagee rather than to the owner of the equity of redemption. This is true, although the junior mortgagee did not extend the receivership for the benefit of her mortgage.²¹ In general, the moneys are to be applied on the subsequent liens in the order of their priority.²² It is proper for the plaintiff to prove any lien subsequent to the mortgage foreclosed.²³ One who has taken a mortgage after the *lis pendens* was filed has a right to be heard, although he is not a party.²⁴

19. Wood v. Kroll, 21 St. Rep. 764, 4 N. Y. Supp. 678.

20. Eddy v. Smith, 13 Wend. 488.

Mortgage by life tenant.—In a proceeding to reach surplus moneys paid into court, the assignees of a mortgage given by life tenants and which was a lien thereon were held entitled to receive a gross sum in lieu of the income for life. Jermain v. Sharpe, 29 Misc. 258, 61 N. Y. Supp. 790.

Subrogation.—Where the debtor of a bank delivers to it a deed of realty as collateral to a specific debt, and, subsequently, the bank, at the debtor's request, pays, in order to prevent foreclosure of a mortgage affecting the realty described in the deed, the amount of such mortgage, taking the debtor's note therefor, the bank, under the rule that one who redeems a security is entitled to be subrogated thereto, whether or not a special agreement is made to that effect, has a right to repayment of the moneys so advanced out of the moneys arising on a subsequent foreclosure sale of the property. Louis v. Bauer, 33 App.

Div. 287, 53 N. Y. Supp. 985.

The lien of an attorney on a fund will be protected. Atlantic Savings Bank v. Hiler, 3 Hun, 209; Atlantic Savings Bank v. Hetterick, 5 T. & C. 239.

21. Vogel v. Nachemson, 137 App. Div. 200, 121 N. Y. Supp. 927; *aff'd*, 199 N. Y. 535.

22. Haines v. Beach, 3 Johns. Ch. 459; Savings Bank of Utica v. Wood, 17 Hun, 133; Averill v. Loucks, 6 Barb. 470; Peabody v. Roberts, 47 Barb. 91; Freeman v. Schroeder, 43 Barb. 618; People v. Bergen, 53 N. Y. 404.

Liens of same date.—See Eleventh Ward Savings Bank v. Hay, 55 How. Pr. 444; Barber v. Cary, 11 Barb. 549.

23. Field v. Hawxhurst, 9 How. Pr. 75; Beekman Fire Ins. Co. v. First M. E. Church, 29 Barb. 658; Mutual Life Ins. Co. v. Fruchtnicht, 3 Abb. N. C. 135.

24. Koch v. Purcell, 45 Super. Ct. 162.

The right of the subsequent mortgagee to the surplus moneys arising on foreclosure of the first mortgage is not affected by a judgment rendered in an action to which such mortgagee was not a party against the person who gave a second mortgage.²⁵

The rule that a creditor makes such application as he chooses of payments made to him generally by the debtor, if the latter gave no directions in respect thereto, does not apply to payments received by the creditor through foreclosure action or other legal proceedings, but that in such cases the court must make the application and apply the same *pro rata* upon each of the debts secured by liens upon the premises from the sale of which the moneys are derived.²⁶

Where a transfer is set aside as fraudulent, as against creditors, a mortgage given by the fraudulent transferee in consideration of the transfer, and assigned to a *bona fide* purchaser for value, is, as between the parties to the fraud and the creditors, chargeable wholly to the former; and on its foreclosure, the creditors are entitled to the whole surplus.²⁷

6. Priority of liens.

The mortgage first recorded is presumptively the prior lien; but this presumption may be overcome by parol proof.²⁸ A subsequent judgment will not be preferred over a prior unrecorded mortgage, given to secure future advances or liabilities, unless there has been a fraudulent intent on the part of the mortgagee in withholding his mortgage from

25. *Mechanics' Savings Bank v. Selye*, 83 Hun, 282, 31 N. Y. Supp. 921, 64 St. Rep. 728.

26. *Matter of Georgi*, 21 Misc. 419, 47 N. Y. Supp. 1061.

27. *Smart v. Bement*, 4 Abb. Ct. App. Dec. 253. See *Warden v. Brown*, 12 Hun, 497.

28. *Freeman v. Schroeder*, 43 Barb. 618.

Complicated priority.—Where the order of lien is as follows: The first mortgagor having the right of priority over the second, but not over the third, the second having right of priority over the third, but not over the first, and the third having right of priority over the first, but not over the second, set apart the amount due on the first, from the remainder pay the sec-

ond, apply the portion set apart as due on the first in payment of the third, and if this is not sufficient to satisfy it, from any remainder there may be, if still there is a remainder, apply it in payment of the first. *Bacon v. Van Schoonhoven*, 19 Hun, 158; *aff'd*, 87 N. Y. 446.

An error as to date of an accommodation note, to secure the indorser of which a mortgage was given, does not invalidate the mortgage, where the note was intended to be secured is the only one in existence between the parties, and does not entitle subsequent mortgages, who took with notice, to the surplus moneys arising on foreclosure of the prior mortgage. *St. Lawrence University v. Farmer*, 32 Misc. 410, 66 N. Y. Supp. 584.

record.²⁹ And it is said that the general liens of judgment creditors of a mortgagor cannot, in equity, prevail against prior equitable claims upon the specific fund as unpaid purchase money.³⁰

A judgment creditor, who has purchased under his judgment, is entitled to the surplus arising from a sale, under a prior mortgage, in preference to a junior judgment creditor.³¹ A general lien on the mortgaged premises will be preferred to a subsequent specific one, where the holder of the former has no other fund to resort to.³² A mortgage to secure future indorsements, if recorded, has a preference over subsequent judgments against the mortgagor, as well for indorsements made before the judgments as after.³³ In case a mortgage is given on property, while a judgment is marked reversed on appeal, on which it would otherwise be a lien, and such judgment is thereafter restored as a lien, the mortgage is entitled to priority of payment out of the surplus money.³⁴

A judgment in favor of a wife against her husband for a divorce and alimony, payable thereafter in monthly installments, is prior to that of money judgments subsequently recovered and docketed; and it is entitled to priority of payment out of the surplus moneys.³⁵

7. Marshaling assets.

The party having the first lien upon the fund cannot be deprived of it on the application of subsequent claimants upon the ground that his lien extends to other property which is sufficient to satisfy his entire claim. The right to have securities marshaled in such case cannot be enforced in the surplus money proceedings, but only in an action where all the parties and the entire funds are before the court.³⁶ On foreclosure of a mortgage of part of a tract, portions of which have been sold to different purchasers, after a release of one of the lots by the mortgagee of the whole tract he is

29. *Thomas v. Kelsey*, 30 Barb. 268. As to when second mortgages have priority over judgment creditors whose judgments are prior in date of docket, see *Tallman v. Farley*, 1 Barb. 280; *Cook v. Kraft*, 3 Lans. 515; *Ray v. Adams*, 4 Hun, 332. See, also, *Oppenheimer v. Walker*, 3 Hun, 30.

30. *White v. Carpenter*, 2 Barb. 217; *Arnold v. Patrick*, 6 Barb. 310; *Sweet v. Jacobs*, 6 Barb. 355.

31. *Shepard v. O'Neil*, 4 Barb. 125; *Snyder v. Stafford*, 11 Paige, 71.

32. *Mechanics' Bank v. Edwards*, 2

Barb. 545.

33. *Ackerman v. Hunsiker*, 85 N. Y. 43.

34. *Union Dime Savings Institution v. Duryea*, 3 Hun, 210.

35. *Buffalo Savings Bank v. Hunt*, 64 Misc. 643, 118 N. Y. Supp. 1021.

Alimony.—Distribution of surplus arising on a mortgage given to secure installments of alimony is considered in *Lapham v. Lapham*, 63 App. Div. 597, 71 N. Y. Supp. 666.

36. *Quackenbush v. O'Hare*, 129 N. Y. 485.

not entitled to the surplus arising on the sale, and in the absence of a litigation of the question of apportionment in the foreclosure suit, that question is not determined in the surplus proceedings.³⁷

Where a mortgage was made for the benefit of a brother on two tracts of land, one owned by himself and his sisters as tenants in common, the other owned by himself, individually, and a judgment was afterward obtained against him, and subsequently the sisters mortgaged their interest, it was held, that on the foreclosure of the first mortgage, the mortgage executed by the sisters was entitled to priority in the surplus money over the judgment.³⁸

8. Liens not affected by foreclosure.

The owner of a lien who is not a party to the suit and who is not cut off by a foreclosure cannot generally claim any part of the surplus.³⁹ Where persons holding prior liens or mortgages are not made parties, and no provision is made as to them in the judgment, the sale must be subject to such mortgages, and no portion of the proceeds can be applied in payment thereof.⁴⁰

9. Mechanics' liens.

The holder of a mechanic's lien is entitled to share in surplus moneys,⁴¹ even though the year during which such a lien remains in force against the real estate has expired.⁴² Even the inchoate rights of mechanics and materialmen in some cases have been regarded as in the nature of liens.⁴³ When the owner of lands under course of improvement executes a trust mortgage for the benefit of creditors, persons filing mechanics' liens after the execution of the mortgage for material furnished before its execution who do not elect to take under the mortgage are entitled to a preference in the surplus on foreclosure.⁴⁴ But lienors who

37. *Fancher v. Bonfils*, 44 App. Div. 637, 60 N. Y. Supp. 837.

38. *Savings Bank of Utica v. Wood*, 17 Hun, 133.

39. *Winslow v. McCall*, 32 Barb. 241; *Bache v. Doscher*, 67 N. Y. 429; *Emigrant Industrial Savings Bank v. Goldman*, 75 N. Y. 127.

40. *Bache v. Doscher*, 67 N. Y. 429.

41. See chapter on Mechanics' Liens, Volume 3.

42. *Emigrant Industrial, etc., Bank v. Goldman*, 75 N. Y. 127.

43. *Livingston v. Mildrum*, 19 N. Y. 440.

Equitable Lien.—As to when lands became charged with an equitable lien in favor of mechanics and materialmen, so as to have such lien attach to the surplus moneys, see *Crombie v. Rosenstock*, 19 Abb. N. C. 312.

44. *American Mortgage Co. v. Merrick Construction Co.*, 120 App. Div. 150, 104 N. Y. Supp. 900; *aff'd*, 190 N. Y. 526.

by an agreement among themselves have accepted payment by virtue of such an agreement are barred from sharing in the surplus moneys.⁴⁵

10. Partnership liens.

In a proceeding to ascertain the priority of liens to a surplus, the rule of equity as to the application of partnership and individual property among firm and individual creditors does not apply, but the rule of law applies which gives a judgment creditor of the firm, who has acquired a lien by judgment upon lands of a partner, a claim upon the surplus superior to the claim of a junior judgment creditor of the partner.⁴⁶ A judgment confessed by two members of a firm of three, for a partnership debt, has a priority over a subsequent judgment recovered against all three parties.⁴⁷ But, as between the trustee in bankruptcy of a surviving partner and the creditors of the firm, the surplus on the foreclosure of a mortgage given by a partnership should be paid to the firm creditors.⁴⁸

11. Creditors not having liens.

To enable a creditor to enforce his claim on the surplus moneys he must have a lien on the land; the moneys stand in the place of the land for purposes of distribution among persons having vested interests or liens upon the land. A simple contract debtor cannot, as a general rule, claim any portion of the fund.⁴⁹ No claimant can successfully assert right to surplus moneys unless he establishes the existence in his favor of a lien upon the land which he could have enforced against it. The mere fact of filing a notice of pendency, where no complaint in the action is filed, does not create a lien upon the land described in the *lis pendens*.⁵⁰ Thus a lien on surplus moneys is not created by the commencement of an action to set aside a fraudulent conveyance of the premises.⁵¹ A judgment recovered against the owner of the equity prior to a sale may be a lien, but not if it is not

45. *Taylor v. Dutcher*, 60 App. Div. 531, 69 N. Y. Supp. 951.

46. *N. Y. Life Ins. Co. v. Mayer*, 19 Abb. N. C. 92.

47. *Stevens v. Bank of Central N. Y.*, 31 Barb. 290.

48. *Moses v. Pond*, 32 Misc. 406, 66 N. Y. Supp. 600.

49. *Delafield v. White*, 19 Abb. N. C. 104. See *Short v. Bacon*, 99 N. Y. 275; *Dunning v. Ocean National Bank*, 61 N. Y. 497.

50. *Albro v. Blume*, 5 App. Div. 309, 39 N. Y. Supp. 215.

51. *Swart v. Oakley*, 22 Abb. N. C. 125.

perfected until after the sale is made, although docketed before the surplus moneys are distributed.⁵²

Only liens in existence at the time of the sale and conveyance are transferred to the surplus moneys arising thereon, and if at that time no lien exists there is nothing which can be transferred to the fund. If at the time of sale in an action to which a junior judgment lienor was a party, ten years have elapsed since such judgment became a lien, it is not payable out of the surplus, even though the ten years had not elapsed at the time of the entry of the judgment in foreclosure.⁵³ But a judgment creditor, whose lien on real estate has not been lost by the expiration of ten years from the time of docketing his judgment at the time such real estate is sold, is entitled to share in the surplus moneys, although the ten years expire before the proceeding to distribute the surplus is commenced.⁵⁴

A judgment against executors for work done under a contract made with them for improvements on property of the estate other than that foreclosed is not a lien upon and is not payable out of the surplus money.⁵⁵

Judgment creditors are entitled to payment in order of their priority; but if the persons against whom the judgments were acquired had only an equitable interest in the property, they acquire no lien and no priority.⁵⁶

Where the judgment debtor acquired title to real property through the death of the owner, it was held that the judgment creditor's lien upon the surplus arising upon the foreclosure of the mortgage of the lands was an equitable one, and that judgment creditors should be paid upon the basis of equality, the debtor not having had title to the property at the time the judgments were obtained against him, and that until the property became vested in the debtor by the death of the prior owner, no lien could attach thereon.⁵⁷

A judgment creditor, whose lien has been suspended on appeal, does not lose all interest in surplus moneys derived from lands on which the judgment was a lien.⁵⁸ In surplus proceedings on the foreclosure of a corporate mortgage, expenses incurred by a reorganization committee may be

52. *Sweet v. Jacocks*, 6 Paige, 355; *Denham v. Cornell*, 67 N. Y. 556; *Hull v. Spratt*, 1 Hun, 298.

53. *Nutt v. Cuming*, 155 N. Y. 309; *Floyd v. Clark*, 16 Daly, 528, 17 N. Y. Supp. 848; *Floyd v. Clark*, 2 Law Bull. 36.

54. *Terry v. Fuller*, 60 Misc. 562,

112 N. Y. Supp. 450.

55. *Mander v. Low*, 12 Misc. 316, 33 N. Y. Supp. 719, 67 St. Rep. 544, 24 Civ. Pro. 368.

56. *Purdy v. Doyle*, 1 Paige, 558.

57. *Goetz v. Mott*, 15 Civ. Pro. 11.

58. *Emigrant Industrial Savings Bank v. Lynch*, 2 St. Rep. 124.

adjusted, and a claim to a lien therefor determined and enforced.⁵⁹

12. Guarantor.

A guarantor of a first mortgage by paying interest on the mortgage debt does not acquire a preference to the extent of such payment in a surplus arising on foreclosure as against the holder of a second mortgage.⁶⁰ Where the mortgagors severally own separate undivided shares in the property, and one is simply surety for the other, the surety has a right to have the share of the principal sold first, if enough can in that way be made to pay the debt, or if the whole has been sold, and a surplus produced, to have such surplus, to the extent of his undivided interest, paid to him.⁶¹

13. Creditors of deceased.

In case of surplus moneys arising on the sale of lands of a decedent, they should be distributed ratably among all the general and judgment creditors of the deceased, and in such case a general creditor has a right to be heard.⁶² Where the owner of mortgaged property has died, surplus money is to be treated as real estate subject to the lien of his creditors, and liable for the payment of such debts as remain after exhausting the personalty, and a creditor of the decedent may follow such moneys and enforce his lien through appropriate proceeding.⁶³ A mortgagee recovering a deficiency judgment against a mortgagor's administrators cannot maintain an action to have his claim declared a lien on surplus moneys, on foreclosure of mortgage on other lands given by the same mortgagor to another mortgagee; his remedy, aside from that against the personal estate of the decedent, is by action against the mortgagors, heirs or devisees, and if they are insolvent, the court may direct the surplus to be held and applied to the judgment.⁶⁴ The remedy of parties having a lien on a surplus is by motion and not by action, and except where the surplus is distributed by the Surrogate's Court, contract creditors are not in a position to assert any further equitable lien against moneys

59. *Raht v. Attrill*, 106 N. Y. 423.

60. *North Side Bank of Brooklyn v. Queens Home Realty & Constr. Co.*, 162 App. Div. 156, 147 N. Y. Supp. 243; *aff'd*, 212 N. Y. 556.

61. *Erie Co. Savings Bank v. Roop*, 80 N. Y. 591.

62. *German Savings Bank v. Sharer*,

25 Hun, 409; *Loucks v. Van Allen*, 11 Abb. (N. S.) 427. And creditors must be paid before legatees. *Clark's Case*, 15 Abb. 227.

63. *Felts v. Martin*, 20 App. Div. 60, 46 N. Y. Supp. 741.

64. *Fliess v. Buckley*, 24 Hun, 514, 90 N. Y. 286.

arising from sale of a decedent's real estate than they would have been if he were living.⁶⁵

14. Heirs or representatives of deceased.

Where one dies seized of real estate, incumbered by a mortgage, which is thereafter foreclosed and the lands sold, any surplus arising on the sale is to be regarded as realty, and goes to the heirs or devisees and not to an administrator, and an administrator cannot maintain an action to recover the same, and this is so although the mortgage provides the surplus shall be paid to the mortgagor, his executors or administrators.⁶⁶ The devisees of the mortgagor are entitled to the whole of the surplus money accruing to their respective interests under the will, subject to other legal claims which were or have become liens.⁶⁷ Where the heir pleads the statute of limitation, a creditor cannot reach the moneys more than eighteen months after the letters of administration have issued and ten years after the debt accrued.⁶⁸

15. Contract vendee.

A vendee having knowledge that the property has been adjudged to be sold under foreclosure is not entitled, after the property has been purchased by a third person and surplus realized thereon, to a lien upon such surplus, upon the theory that he is entitled to a specific performance of the contract, although the parties to the surplus money proceeding, in which such specific performance is claimed, have stipulated that "the referee may determine who is entitled to the surplus money herein, as between them, as fully as could be done for a suit brought for that purpose."⁶⁹ But a vendee of land who, in an action of specific performance, has recovered a judgment for the purchase money paid, which is adjudged to be a lien on the surplus arising on a sale on prior mortgage, from the time of filing his *lis pendens*, is entitled to priority of payment of his judgment out of such surplus, as against a judgment creditor whose judgment was recovered after the filing of such *lis pendens*, but he is not entitled to interest thereon from the time of such filing.⁷⁰

65. *Delafield v. White*, 7 St. Rep. 301.

66. *Dunning v. Ocean National Bank*, 61 N. Y. 497. See *Fliess v. Buckley*, 22 Hun, 551; *American Life, etc., Co. v. Van Eps*, 56 N. Y. 601.

67. *Delafield v. White*, 7 St. Rep.

301. 68. *Matter of Knapp*, 25 Misc. 133, 54 N. Y. Supp. 927.

69. *Ellis v. Salomon*, 57 App. Div. 118, 67 N. Y. Supp. 1025.

70. *Hull v. Spratt*, 1 Hun, 298.

16. Tenants.

A tenant for years has an equitable interest in the surplus fund.⁷¹ A lessee of the equity in mortgaged premises, with covenants, has a right to share in the surplus in preference to the lessor; this right is an incumbrance on the land to the extent of the lessor's interest.⁷² But a judgment cuts off the title of a tenant holding under a lease, without covenants made subsequent to the mortgage, and he is not entitled to share in the surplus.⁷³ A lessee of mortgaged premises, as between him and the owner, is entitled to any surplus arising out of foreclosure sale, up to the loss resulting to him from the extinguishment of the lease, which is the value of the use of the premises for the remainder of his time, less the rents reserved.⁷⁴ Rents in arrears may be ordered paid from the proceeds.⁷⁵ Thus, on the sale of a lease under foreclosure, ground rent in arrear should be paid out of the proceeds; but rents that become due after the sale should be paid by the purchaser.⁷⁶

17. Easement.

A person whose easement in mortgaged premises is foreclosed is entitled to share in the surplus to the extent of her interest in the premises. The surplus moneys represent the entire estate in the land including the interest or ownership of both the dominant and servient estates.⁷⁷

18. Assignor of mortgage.

Where a bond and mortgage are assigned as collateral for a loan, with an agreement, on the part of the lender, that he will, on payment of the mortgage, pay to the former all the excess of the principal over and above the amount of the loan, and without any agreement as to a foreclosure, and the mortgage is foreclosed by the lender without making the borrower a party thereto, or to any other proceeding to foreclose him, and the mortgaged premises are bid in by the lender, the equitable interest which the borrower had in the mortgage attaches to the land, and he is entitled to surplus in case of sale thereof by the lender for more than the amount of his claim.⁷⁸

71. *Clarkson v. Skidmore*, 46 N. Y. 297.

72. *Clarkson v. Skidmore*, 46 N. Y. 297; *Douglass v. Woodworth*, 51 Barb. 79.

73. *Burr v. Stenton*, 43 N. Y. 462.

74. *Larkin v. Misland*, 100 N. Y.

212. See also, *Ely v. Collins*, 45 Misc. 255, 92 N. Y. Supp. 160.

75. *Catlin v. Grissler*, 57 N. Y. 363.

76. *Holden v. Sackett*, 12 Abb. 473.

77. *Winthrop v. Welling*, 2 App. Div. 229, 37 N. Y. Supp. 729.

78. *Dalton v. Smith*, 86 N. Y. 176.

19. Assignee of surplus rights.

The right to surplus moneys may be affected by agreement between the parties.⁷⁹ Where it appears that the intent in executing written instruments was to assign shares of surplus moneys, though express words of assignment are not used, such instruments will be held to be equitable assignments; and the referee may report directly in favor of the equitable assignee.⁸⁰

F. Procedure.

1. In general.

It is the duty of the court to distribute the surplus in the action.⁸¹ All surplus moneys must be paid into court, and their distribution is regulated by rules of the Supreme Court.⁸² Where a surplus arises upon foreclosure of a first mortgage in a county court, the claims thereon of a second mortgage, and of judgment creditors, for deficiency on foreclosure of other mortgages by the same mortgagor, may be determined in county court before the referee, and an action cannot be maintained for that purpose.⁸³ Although a subsequent mortgagee demands by answer that his mortgage be next payable from the surplus, a service is necessary on all defendants who have appeared and have failed to take issue upon it; he can obtain no relief until a referee has been appointed, sale had, and surplus proceedings taken.⁸⁴ So long as surplus moneys remain under the control of the court it has power over the entire proceeding, which it will not hesitate to exercise in order to enforce the legal rights of the parties.⁸⁵

79. *People's Trust Co. v. Harmon*, 43 App. Div. 348, 60 N. Y. Supp. 178; *Velleman v. Rohrig*, 127 App. Div. 692, 111 N. Y. Supp. 736, *aff'd*, 193 N. Y. 439.

80. *Bowen v. Kaughran*, 1 St. Rep. 121.

81. *Mutual L. Ins. Co. v. Bowen*, 47 Barb. 618.

82. *Raht v. Attrill*, 106 N. Y. 423; *Matter of Bernstein*, 58 Misc. 115, 110 N. Y. Supp. 473.

Amendment to judgment.—The practice of providing for the distribution of surplus moneys by amendments to the judgment in foreclosure after the sale is disapproved. *Kempf v. Biers*, 176 App. Div. 269, 162 N. Y. Supp. 780, *aff'd*, 227 N. Y. 620.

83. *Fliess v. Buckley*, 90 N. Y. 286.

84. *Cromwell v. Foster*, 27 Misc. 121, 57 N. Y. Supp. 362.

85. *Mutual Life Ins. Co. v. Cockerill*, 150 App. Div. 411, 134 N. Y. Supp. 1109.

Where surplus moneys have been invested pursuant to the order of the court, until the death of a certain person named, and upon her death to await the further order of the court, it was held that a party entitled thereto, after the death of such life tenant, could apply in the action in which the order directing the investment was made for a distribution of the surplus. *Velten v. Vogt*, 17 St. Rep. 112, 1 N. Y. Supp. 644.

Wrongful payment.—Where sur-

On the failure of an attorney to pay over surplus moneys received by him, an attachment may issue, and the burden of proving that he has paid them to the county treasurer rests on him.⁸⁶

Where no issue has been raised in the pleadings and by the proceedings in foreclosure as to the equities of subsequent incumbrances, they are not to be determined by a decree of foreclosure and sale, and if there is a surplus after the sale they may be adjusted in that proceeding.⁸⁷

The reference as to liens as to surplus moneys in a foreclosure suit is not a mere collateral reference, but is a direct issue necessarily to be determined before the court can finally and completely administer the fund arising from the sale of the mortgaged premises.⁸⁸ It is a special proceeding.⁸⁹

2. Presentation of claims.

All liens upon or interests in the mortgaged premises, which are inferior to the mortgage foreclosed, are transferred to the surplus, and all persons owning such liens or interests are entitled to participate in its distribution.⁹⁰ A person who claims a share of the surplus moneys may file his claim with the clerk before the confirmation of the report of sale; or if a referee is appointed to determine the disposition of the surplus, he may present his claim to such referee.⁹¹ The claims must be verified.⁹² It is the duty of a person having a lien to go before the referee and present or establish his claim, and when he neglects to do so without any excuse the court will not settle his right to surplus moneys on petition.⁹³ Every party who has appeared in the action, or filed a notice of claim to surplus moneys, is entitled

plus moneys had been paid over to the chamberlain in the city of New York, by him deposited with the defendant, and thereafter by an order duly made, countersigned and served, the defendant was required to pay such moneys to certain persons and did so, held, that plaintiff, representing parties in fact entitled to such moneys, could not maintain action against defendant therefor. The remedy of plaintiff was to apply for an order staying proceedings of defendant upon the payment. *Swart v. Central Trust Co.*, 27 St. Rep. 113, 7 N. Y. Supp. 558.

86. *Matter of Silvernail*, 45 Hun, 575.

87. *Burchell v. Osborne*, 119 N. Y. 486.

88. *Mutual Life Ins. Co. v. Bowen*, 47 Barb. 618.

89. *Mutual Life Ins. Co. v. Anthony*, 23 Wkly. Dig. 427.

90. *Averill v. Loucks*, 6 Barb. 470; *Blydenburg v. Northrup*, 13 How. Pr. 289; *Mut. Life Ins. Co. v. Truchnicht*, 3 Abb. N. C. 135.

91. *De Ruyter v. Trustees of St. Peter's Church*, 2 Barb. Ch. 555; *Hurlburt v. McKay*, 8 Paige, 651.

92. *Hurlburt v. McKay*, 8 Paige, 651.

93. *De Ruyter v. St. Peter's Church*, 2 Barb. Ch. 555.

to a notice of the reference, and it is necessary to give notice to such parties of application for confirmation of the referee's report, although it has been filed and notice of the filing has been given.⁹⁴

Where, after a motion for a reference for surplus moneys, a new claim is filed, the order of reference cannot be signed until notice is given to the plaintiff, but such notice may be given *nunc pro tunc*.⁹⁵ The appearance of the defendant in surplus proceedings, and his acquiescence in the application of the surplus, waives any irregularity or defect in the judgment arising from a mistake as to his Christian name.⁹⁶ The claim of the mortgagor's wife to dower in surplus moneys can be entertained in surplus proceedings.⁹⁷

3. Power of referee.

The authority which the referee is entitled to exercise for the hearing and disposition of the claims is as extensive as the claims themselves and the legal and equitable objections that can be made to their allowance.⁹⁸ The referee has authority to inquire into and determine all questions of law and fact, usury, fraud and every question tending to show the equities of the claimants, and to decide on the merits to whom such surplus moneys belong.⁹⁹ The court

94. *Van Voast v. Cushing*, 32 App. Div. 116, 52 N. Y. Supp. 934.

95. *Schieck v. Donohue*, 44 Misc. 425, 90 N. Y. Supp. 36.

96. *Stuyvesant v. Weil*, 26 Misc. 445, 57 N. Y. Supp. 592, reversed 41 App. Div. 557, 58 N. Y. Supp. 697, in turn reversed, 167 N. Y. 421.

97. *N. Y. Life Ins. Co. v. Mayer*, 12 St. Rep. 119, aff'd, 108 N. Y. 655.

98. *Kingsland v. Chetwood*, 39 Hun, 602; *Bowen v. Kaughran*, 1 St. Rep. 121; *Snedeker v. Snedecker*, 18 Hun, 355.

Statutory foreclosure.—Where there are surplus moneys in hands of mortgagee, arising from a statutory foreclosure, and two actions have been brought by judgment creditors of the mortgagor to obtain such surplus, and a reference has been ordered and neither party appeals, it will be treated as a reference under the rule. *Kirby v. Fitzgerald*, 31 N. Y. 417.

Prior action as bar.—After an interlocutory judgment had been entered

declaring a deed to be a mortgage and an accounting ordered, the plaintiff died and the action was not revived, *held*, that it was not a bar to proceedings to distribute the surplus money in an action afterward brought to foreclose a prior mortgage and that the referee therein could determine the claims of all parties to the surplus. *Baker v. Baker*, 70 Hun, 95, 53 St. Rep. 442, 23 N. Y. Supp. 1083.

99. *Wilcox v. Drought*, 36 Misc. 351, 73 N. Y. Supp. 587, aff'd, 71 App. Div. 402, 75 N. Y. Supp. 960.

Subsequent mortgage.—In surplus money proceedings the court has power to investigate and determine the rights of the parties under a subsequent mortgage. *Rochester Savings Bank v. Whitmore*, 25 App. Div. 491, 49 N. Y. Supp. 862.

Attack on liens.—A lien may be attacked on the ground of fraud, and it matters not whether the action is partition or foreclosure; that this is the most convenient method for the

adjusts the equities between the subsequent lienors whenever they can be established.¹ The power of the referee, in determining the validity of a claim, is not confined to so much thereof as will exhaust the surplus, but his determination thereon is conclusive on all the parties.² The referee may examine the claimants on oath.³ He should take the oath required by Rule 171, and the testimony of the witnesses should be signed under Rule 170.

The general rules of evidence which govern the court on the trial of an action apply to a hearing upon a reference in surplus money proceedings, and the established rules of evidence cannot be changed by an order of the court unless in the case where such authority may be specially given or the change relates to some matter which rests in the discretion of the court.⁴ The referee should ascertain, by the proper certificate and other evidence, that all the claimants and other parties have been notified or summoned to appear before him on such reference, and the fact that such certificate and other evidence was produced before him should be stated in this report.⁵ The party prosecuting the reference must produce a certificate of the clerk with whom the report is filed, and the surplus moneys deposited, showing that no notice of claim to such surplus was annexed to the report of sale, and that no claim to the same has been filed, previous to the order of reference, or if claims have been filed, stating the names of the claimants and of their solicitors, if any, and of their place of residence.⁶

disposition of claims in such cases. *Bergen v. Carman*, 79 N. Y. 146. But the validity of a judgment cannot be attacked collaterally in the proceeding, except on grounds of jurisdiction. *White v. Bell*, 73 N. Y. 256. Where an administrator recovers judgment upon a former judgment of his decedent, it is no answer to his claim for surplus that the judgment was sued without leave of the court. *German Savings Bank v. Carrington*, 14 Wkly. Dig. 475, aff'd, 89 N. Y. 632. Where it was sought to have the claim of a second mortgagee asking for surplus reduced by the amount of an uncollected policy of insurance on buildings on premises on the ground that failure to collect said policy resulted because the mortgagee had not filed due proof

of loss, it was held, that the determination of the referee was *res adjudicata* as to the amount to be collected upon the mortgage, and the question was not open for further litigation. *McRoberts v. Pooley*, 12 Civ. Pro. 139.

1. *Oppenheimer v. Walker*, 3 Hun, 30; *James v. Hubbard*, 1 Paige Ch. 228; *Snyder v. Stafford*, 1 Paige Ch. 71; *New York Life Ins. & Trust Co. v. Vanderbilt*, 12 Abb. Pr. 458; *Savings Bank of Utica v. Wood*, 17 Hun, 133.

2. *McRoberts v. Pooley*, 12 Civ. Pro. 139.

3. *Hurlburt v. McKay*, 8 Paige, 651.

4. *Mutual Life Ins. Co. v. Anthony*, 50 Hun, 101, 4 N. Y. Supp. 501.

5. *Hurlburt v. McKay*, 8 Paige, 651.

6. *Hurlburt v. McKay*, 8 Paige, 651.

Surplus proceedings will not be delayed to await the determination of a pending action to set aside the deed on the ground of fraud, where all questions as to the fraudulent character of the conveyance can be tried in such proceeding.⁷

4. Decision of referee.

The provisions in a judgment of foreclosure directing the order in which the different parcels shall be sold are not conclusive on the application to distribute the surplus.⁸ It is the duty of the referee to incorporate in his decision all the facts found by him including those found at the request of any party to the proceedings.⁹ The report should show that the parties attended, or that evidence was produced to him that they were duly summoned, and show the whole amount of the surplus moneys and who is entitled thereto, so that upon his report the court may dispose of the whole fund.¹⁰

5. Confirmation of referee's report.

On the distribution among rival claimants of the surplus moneys in special proceedings, the reference is one to hear and determine, subject to confirmation by the court, which has ample power to confirm, set aside or refer back the report, but the court is not authorized to make new findings or change those already made.¹¹ His report will not be set aside simply on account of an irregularity in receiving or considering the claims which were not filed with the county clerk.¹² Where a general creditor, who had no notice of the proceedings to distribute the surplus until after the entry of the order confirming the report of the referee, applies to be made a party, his application should be granted.¹³ The report of the referee, upon confirmation by the court, becomes a valid and binding judgment.¹⁴

6. Surrogate's Court.

Under Rule 264 the surplus moneys are paid into the Surrogate's Court for distribution in case one entitled to a share is deceased and his creditors, therefore, have a claim against

7. *Wolfers v. Duffield*, 72 Hun, 637, 55 St. Rep. 485, 25 N. Y. Supp. 374.

8. *Burchell v. Osborne*, 19 St. Rep. 52; s. c., 5 N. Y. Supp. 404, aff'd, 119 N. Y. 486.

9. *Bigelow v. Doying*, 36 St. Rep. 636, 13 N. Y. Supp. 362.

10. *Franklin v. Van Cott*, 11 Paige, 129.

11. *Mutual Life Ins. Co. v. Anthony*, 105 N. Y. 57; *Mutual Life Ins. Co. v. Salem*, 3 Hun, 117.

12. *Kingsland v. Chetwood*, 39 Hun, 602.

13. *German Savings Bank v. Sharer*, 25 Hun, 409.

14. *McRoberts v. Pooley*, 12 Civ. Pro. 139.

such surplus.¹⁵ Such court may constitutionally be invested with the power to distribute the surplus.¹⁶ Where the real estate of the decedent is subject to the payment of debts, the surplus money on foreclosure should be paid into the Surrogate's Court under Rule 264, and the Supreme Court will not make a distribution of the fund among the general creditors.¹⁷ It is thought that the moneys are to be paid to the county treasurer or other officer pursuant to Rule 261 before they will be distributed by the Surrogate's Court.¹⁸

Surplus moneys arising out of foreclosure of a mortgage on property which was subject to a valid, imperative power of sale for the payment of debts and funeral expenses should be retained in the Supreme Court, and not paid into the Surrogate's Court, as that court has no power to distribute such moneys.¹⁹

The transfer of surplus moneys from the county treasurer to the Surrogate's Court, the mortgagor being dead, will not be ordered at the instance of a creditor not a party to the foreclosure without notice to the parties to the foreclosure suit.²⁰ Where a claim to surplus has been rejected in a proceeding to distribute, the claimant cannot afterward insist that the moneys shall be paid into Surrogate's Court.²¹

15. *Coe v. Cobb*, 50 App. Div. 80, 63 N. Y. Supp. 439; *Matter of Stillwell*, 68 Hun, 406, 23 N. Y. Supp. 65, aff'd, 139 N. Y. 337.

Attack on jurisdiction of surrogate.—Where a party claiming surplus moneys was also interested in an action of ejectment relative to the mortgaged premises and he had been a party to the foreclosure, it was held the claim on which the ejectment suit was founded was cut off by a decree, and whatever rights he had must be pursued in the proceedings concerning the distribution, and that where surplus moneys were paid to the surrogate without objection, the jurisdiction of the surrogate could not be questioned in a subsequent proceeding before him. *Matter of Stilwell*, 68 Hun, 406, 52 St. Rep. 689, 23 N. Y. Supp. 65, 54 St. Rep. 491; aff'd, 139 N. Y. 337; *Matter of Equitable Relief Fund Life Assn.*, 131 N. Y. 377.

Subsequent petition.—It was held under the former statutes that the Surrogate's Court has power to enter-

tain a creditor's petition for the distribution of surplus money, arising on the foreclosure of a mortgage, filed after the expiration of three years from the time of the granting of letters of administration, although the statute requires that the petition for the disposition of the real property of a decedent for the payment of debts and funeral expenses must be made within that period. *Matter of Bernstein*, 58 Misc. 115, 110 N. Y. Supp. 473.

16. *Matter of Ellis*, 110 Misc. 192, 179 N. Y. Supp. 873.

17. *Di Lorenzo v. Dragone*, 25 Misc. 26, 54 N. Y. Supp. 420.

18. *Powell v. Harrison*, 88 App. Div. 228, 85 N. Y. Supp. 452; appeal dismissed, 178 N. Y. 567.

19. *Matter of Coutant*, 24 Misc. 350, 53 N. Y. Supp. 713.

20. *Washington Life Ins. Co. v. Clark*, 79 App. Div. 160, 79 N. Y. Supp. 610.

21. *Comey v. Clark*, 4 N. Y. Supp. 850.

7. Costs.

On an application for surplus in foreclosure, no costs can be allowed except motion fees and the fees of the referee; the hearing before the referee is not a trial, and no extra allowance can be made.²² Where the surplus is small, and unsuccessful claimants have caused unnecessary expense, they may be charged with costs.²³ The parties to the proceeding have no power to enter into a stipulation depriving the court of its discretion over the payment of disbursements out of the fund.²⁴

8. Appeal.

The remedy of a party aggrieved by a decision in surplus proceedings is by appeal.²⁵ An order of the Appellate Division reversing an order of the special term which confirmed the report of a referee appointed to determine as to conflicting claims to surplus money arising on a foreclosure sale and ordering a new hearing before a referee is not reviewable in Court of Appeals.²⁶ But it has been held that, where an order of the Appellate Division, reversing an order of the special term, which directed as to the disposition of surplus moneys in a foreclosure suit and sending back the case to a referee, imposes costs absolutely, in this respect it is a final decision and an appeal can be taken to the Court of Appeals.²⁷

22. *American Mort. Co. v. Butler*, 36 Misc. 253, 73 N. Y. Supp. 334; *Bemus v. Thrall*, 35 Misc. 137, 70 N. Y. Supp. 463; *Syracuse Savings Bank v. Stokes*, 71 Misc. 508, 130 N. Y. Supp. 596; *McDermott v. Hennessy*, 9 Hun, 59; *Wellington v. Ulster Co. Ice Co.*, 5 Wkly. Dig. 104; *Matter of Gibbs*, 58 How. 502; *Borley v. Alleond*, 8 Daly, 126; *German Savings Bank v. Sharer*, 25 Hun, 409; *Elwell v. Robbins*, 43 How. (N. Y.) 108; *Dudgeon v. Smith*, 23 Wkly. Dig. 400.

Foreclosure costs.—On foreclosure and sale under a senior mortgage, the court in surplus proceedings refused to allow the junior mortgagee the costs and allowance awarded her in an action she had brought for the foreclosure of her mortgage, and which was charged upon the premises on the

ground that she was not entitled to a lien therefor. This was held error. *Bushwick Savings Bank v. Traum*, 26 App. Div. 532, 50 N. Y. Supp. 542; re-argument denied, 30 App. Div. 622, 51 N. Y. Supp. 555; aff'd on opinion below, 158 N. Y. 668.

23. *Bevier v. Schoonmaker*, 29 How. (N. Y.) 411; *Lawton v. Sager*, 11 Barb. 349. One litigating in good faith will not be so charged. *Norton v. Whiting*, 1 Paige, 78; *Farmers' Loan and Trust Co. v. Millard*, 9 Paige, 620.

24. *Cowen v. King*, 54 App. Div. 331, 66 N. Y. Supp. 621.

25. *McRoberts v. Pooley*, 12 Civ. Pro. 139.

26. *Mutual Life Ins. Co. v. Anthony*, 105 N. Y. 57.

27. *Bergen v. Carman*, 79 N. Y. 146.

9. Form of notice of claim to surplus.

MUTUAL LIFE INSURANCE COMPANY, PLAINTIFF, <i>agst.</i> THOMAS H. ANTHONY, IMPEADED, ET AL.	}	105 N. Y. 57.
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Take notice that the undersigned is entitled to the surplus or a part thereof arising on the sale made in this action on the 5th day of April, 1903, as follows:

The undersigned recovered a judgment in this court against the said Thomas H. Anthony on the 28th day of December, 1902, and while he was the owner of the equity of redemption in the premises described in the judgment in this action for \$3,360 damages, and \$18.21 costs, which was duly docketed in Jefferson county clerk's office on that day, that being prior to the commencement of this action, and the said premises being situated in said county, and said claimant is still the owner and holder of said judgment which remains wholly unpaid, and there is now due and owing thereon the full amount of damages and costs with interest from December 28th, 1902, and the undersigned thereby acquired a lien on said mortgaged premises for the amount of said judgment and interest, which attaches to such surplus, after the plaintiff's mortgage and such other claims and liens as may be duly ascertained to be prior thereto pursuant to the course and practice of this court.

Dated, April 11, 1903,

H. C. ANTHONY,
 DORWIN & BROWN,
Claimant's Attorneys.

To F. WADDINGHAM,
Clerk.
 (Caption.)

10. Form of order of reference.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK <i>agst.</i> THOMAS H. ANTHONY AND OTHERS.	}	105 N. Y. 57.
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The report of sale having been filed in this action and the same having been confirmed, from which it appears that there is a surplus in court arising from said sale, on reading and filing affidavit of John Lansing, and notice of claim of the National Bank & Loan Company of Watertown, to such surplus money or some portion of it by virtue of a lien thereon under several judgments recovered in this court against the said defendant Thomas H. Anthony, while he was the owner of the equity of redemption and also was the owner of the equity of redemption by virtue of a deed from the said Thomas H. Anthony to the said National Bank & Loan Company of Watertown, the certifi-

cate of the county treasurer showing amount of surplus moneys in his hands, and notice of motion for the appointment of a referee with due proof of service of the same on the defendants who have appeared in this action, and those parties who have filed claims for said surplus money.

Now, on motion of C. L. Adams, of counsel for the said National Bank & Loan Company of Watertown, on consent of Dorwin & Brown, attorneys for claimants H. C. Anthony and Paul W. Anthony, ordered, that it be referred to Charles D. Adams, of the city of Utica, N. Y., as referee to ascertain and report the amount due the said National Bank & Loan Company of Watertown, or to any other person, which is a lien upon such surplus money, and to ascertain the priorities of the several liens thereon, and it is further ordered, that such referee summon before him on the reference every party who has appeared in this action and every person who has delivered written notice of his claim to such surplus moneys, and that he cause them to have the usual notice of all subsequent proceedings and report thereon with all convenient speed.

H. HAREFORD,
Deputy Clerk.

11. Form of report of referee.

(Title.)

To the Supreme Court of the State of New York:

The subscriber, a referee in the above-entitled action, appointed under and by virtue of an order made and entered therein on the 14th day of May, 1905, whereby said action was referred to me to ascertain and report the amount due Johannis Van Buren, who claimed a lien upon the mortgaged premises sold in the above action, and also the amount due any other person having such a lien, which are now liens upon the surplus funds arising upon such sale, and also to ascertain and report the priority of such liens in their order, would respectfully report as follows: That the certificate of the treasurer of Ulster county, the county in which the mortgaged premises are situated, shows that there is in his hands, to the credit of this action, the sum of \$800, the amount of the surplus money on the sale aforesaid, as paid by the referee, and all interest on the same, which certificate is hereto annexed as schedule A; that on the 24th day of July, 1905, I was attended by all the parties who had appeared in the action, or who had filed notice of claim upon such surplus moneys, pursuant to notice given June 14, 1888, proof of service of which said notice is hereto annexed and marked schedule B; and that on said day I was attended by William T. Holt, attorney for claimant Johannis Van Buren, and by Severyn B. Sharpe, who appeared for claimant Mary Van Dyne, and upon such examination I took the evidence and proofs offered by the several parties, which same are hereto annexed. I find the following facts as proven herein, viz.: That the claimant Johannis Van Buren is the owner of a certain judgment, in the sum of \$300, obtained by the said Johannis Van Buren against the said Frank L. DeGraw, July 17, 1904, and docketed the same day in Ulster county clerk's office, and on which there is now due the sum of \$300, together with interest thereon from July 17, 1904; that the claimant Mary Van Dyne is the owner of a certain judgment in the sum of \$465, obtained by the said Mary Van Dyne

against the said Frank L. DeGraw, June 20, 1904, and duly docketed in Ulster county clerk's office, June 26, 1904, and on which there is now due the sum of \$465, and interest from June 20, 1904. From the facts above stated, I find and report that the amount of the surplus funds herein which shall remain after the payment of the costs and disbursements of this proceeding, as far as the same shall extend, should be distributed as follows:

1. To Johannis Van Buren, in payment of the judgment above mentioned, and interest from July 17, 1904, upon his canceling said judgment of record.

2. To Mary Van Dyne, in payment of the judgment above named, and interest from June 20, 1904, upon her satisfying said judgment.

All of which is respectfully submitted.

Dated, August 1, 1905.

A. W. COOPER,
Referee.

12. Form of notice of motion to confirm report.

(Title.)

Take notice that the referee's report as to the surplus moneys in this cause, with a copy of which you have heretofore been served, will be presented to this court at a Special Term thereof, to be held at the court house in Kingston city, Ulster county, New York, on the 15th day of August, 1905, at the opening of the court on that day, or as soon thereafter as counsel can be heard, and a motion will then and there be made for an order confirming said report, and that the treasurer of the county of Ulster pay to the defendant Johannis Van Buren the sum of \$300, and interest thereon from July 17, 1904, and for such other or further relief as may be just, with costs.

(Signature.)

13. Form of order of confirmation.

(Caption.)

(Title.)

On reading and filing the report of the referee herein, duly appointed, by order of this court, to take proof of the liens of the various claimants to the surplus funds in the foreclosure proceedings above entitled, and upon due proof that all of the parties having claims to said moneys have been brought into court, and after hearing William T. Holt, attorney for Johannis Van Buren, Severyn B. Sharpe, attorney for the claimant Mary Van Dyne, and on the certificate of the county treasurer, by which it appears that there is in his hands the sum of \$800 to the credit of this action, it is ordered,

1. That the report of the said referee be and the same is hereby in all things confirmed.

2. That the county treasurer pay first to William T. Holt and to Severyn B. Sharpe each the sum of \$20 as costs of this proceeding.

3. That he pay to A. W. Cooper the sum of \$15, being his fees as referee herein.

4. That he pay to Johannis Van Buren the sum of \$300 and interest from July 17, 1904.

5. That he pay to Mary Van Dyne the balance on her judgment for \$465.

A. B. PARKER,
J. S. C.

ARTICLE XIII.

PRECEDENTS FOR FORECLOSURE OF MORTGAGE TO SECURE CORPORATE BONDS.

A. Complaint.

SUPREME COURT — ULSTER COUNTY.

CHARLES A. SPALDING, AS TRUSTEE FOR
THE BENEFIT OF THE HOLDERS OF THE
BONDS SECURED BY A MORTGAGE OR
DEED OF TRUST EXECUTED BY THE
SHEFFIELD MANUFACTURING COMPANY,
PLAINTIFF,

agst.

SHEFFIELD MANUFACTURING COMPANY,
DEFENDANT.

The plaintiff, on behalf of all the holders of the bonds secured by a certain mortgage hereinafter mentioned, complains and avers:

1. That the defendant, the Sheffield Manufacturing Company, now is and was at all the times hereinafter named a domestic corporation, duly organized and incorporated under and by virtue of the laws of the State of New York, and especially under the provisions of chapter 193 of the Laws of New York, passed April 6, 1890.

2. That upon the 30th day of August, in the year 1904, the said Sheffield Manufacturing Company was duly indebted in the sum of four hundred and fifty thousand (\$450,000) dollars, by reason of debts contracted and obligations assumed by it in the business for which it was incorporated, and under and pursuant to its plan and agreement of incorporation aforesaid, and the statute hereinbefore referred to, under which it was incorporated, and that for the purpose of securing the payment of the said debt and obligations so contracted by it, the said Sheffield Manufacturing Company duly determined and resolved to, and it did issue its bonds in denominations of fifty (50), one hundred (100), five hundred (500), and one thousand (1,000) dollars, with interest coupons thereto attached, in all not exceeding the sum of four hundred and fifty thousand dollars; that each of said bonds were in words and figures following, subject only to necessary variations as to distinguishing numbers thereof, as follows: (Here insert copy bond.)

Plaintiff further, on information and belief, avers that thereafter and on or about the 30th day of August, 1904, the said the Sheffield Manufacturing Company duly made and caused to be executed by its officers, and authenticated by plaintiff as trustee, its several bonds in denominations as above set forth, amounting in the aggregate to the principal sum of \$450,000; all of the said bonds being in the words and figures of the bond hereinbefore set forth; subject only to the necessary variations as to the distinguishing amounts and numbers thereof. The said bonds were duly issued and delivered to various persons and corporations for value, and are outstanding obligations held by various persons and corporations to plaintiff unknown, in the sum and amount of \$450,000.

3. That to secure the payment of the said bonds, with the interest thereon, the said Sheffield Manufacturing Company did duly, and in accordance with its articles of incorporation, and having been thereunto duly authorized, made and caused to be executed by its officers and delivered to this plaintiff, its certain mortgage or deed of trust, bearing date the said 30th day of August, in the year 1890, wherein and whereby it duly granted, bargained, sold, assigned, and conveyed to the plaintiff herein and to his successor, successors and assigns forever, in trust, all the right, title and interest of the said Sheffield Manufacturing Company in and to its charter and its corporate powers, rights, privileges and franchises, together with certain lands and premises situated, lying and being on the south side of Esopus creek, in the village of Saugerties, town of Saugerties, Ulster county, New York, together with all the factories, dwellings, buildings, store houses, machine shops, docks and wharves thereon; also the right to use the waters of the said creek for all the purposes of power used in manufacturing, milling and other purposes, which were in the mortgage or deed of trust herein referred to, more specifically set forth and described; also all boilers, engines, fixtures, machinery, mill gearing, shafting, pulleys, belts and appurtenances, either then or theretofore in use, to drive machines, either fixed or movable; all movable machines, all calenders, rolls, ruling machines, tables and shelving, all tools and implements, including the tools and machines in the machine, pipe and carpenter shops; all printing and cutting presses, type, stereotype plates, castings, machinery, tools, tables, cases and furniture connected with printing; all paper box machinery and tools; all envelope machines, machinery, tools for the manufacture of envelopes; all machinery, tools and fixtures for the manufacture of blank books; all office furniture; also all boilers, engines, machinery, tools and fixtures which might thereafter be acquired for use in the manufacturing business carried on by the said Sheffield Manufacturing Company.

That the said mortgage duly covered and affected, and there was duly described therein, in addition to the property hereinbefore referred to, certain real estate and appurtenances, with water and other rights, all of which were owned and possessed by said the Sheffield Manufacturing Company. That all of its real estate, appurtenances, water rights and property, other than its personal property and franchises, were covered and affected by other mortgages prior in lien to the mortgage in this complaint referred to, and as plaintiff, on information and belief, avers, such proceedings have been had under said prior mortgages and otherwise, that the said defendant, the Sheffield Manufacturing Company, now has, owns and possesses no property subject to the mortgage herein referred to, excepting the personal property, together with its franchises hereinabove referred to.

4. That the said mortgage or deed of trust contained the following trusts, covenants and conditions, that is to say: That the property, rights, privileges and franchises were conveyed to this plaintiff as trustee, nevertheless for the equal and pro rata benefit and security of the several persons or corporations, who and which might be or become the holder of any of the bonds thereby secured, and further upon the following express conditions, in said mortgage, and especially in article 2 thereof contained, and set forth:

If coupons for the payment of semi-annual interest on the bonds

are presented for payment at the place where they are payable when due, or at any time when they are due, and payment of the coupons so presented shall be refused and neglected for a period of six months thereafter at the place where they are payable, then, at the option of the party of the second part hereto (of this plaintiff), his successor or successors, the whole of the principal of the bonds hereby secured, and the accrued interest shall become immediately due, payable and collectible, anything in the said bonds or herein to the contrary notwithstanding.

And the said party of the second part hereto (the plaintiff), his successor or successors, may thereupon immediately proceed and cause the said premises to be subjected to the payment of the said debt in the manner hereinafter provided.

And the said mortgage further provided that in case default should be made in payment of the coupons attached to the said bond, or any of them when due, and payment refused or neglected for six months after demand of payment duly made, that it should be lawful for the plaintiff, its successor and successors, to foreclose the said mortgage and to sell or procure the property to be sold and the moneys received from such sale, after deducting all costs and expenses appertaining thereto, including taxes, assessments, insurance and repairs as well as a just compensation to this plaintiff and his attorneys for his and their services, to apply the balance, or so much thereof as may be necessary, of the proceeds of the said sale to the payment of the coupons and interest then due and the principal of said bonds, but if said moneys should be insufficient to make such payment in full, then to pay the same ratably and proportionately to the respective owners or holders of said coupons and bonds, and if any balance remained, then to pay the same over to the Sheffield Manufacturing Company, or to whomsoever shall be equitably or lawfully entitled to the same or as some court of competent jurisdiction shall direct.

And it was in and by said mortgage further provided, that if the sale thereunder was made, pursuant to the judgment or decree of any court in an action for the foreclosure thereof, the sale to be made in such manner and upon such terms as the court may in its discretion adjudge in and by said judgment.

5. And it was in and by the said mortgage duly covenanted on the part of the defendant, the Sheffield Manufacturing Company, that it would well and truly pay or cause to be paid to the respective holders of coupons and bonds, the principal of each of the said bonds secured thereby, together with interest thereon as the same should, from time to time, become due and payable, according to the tenor of said bonds and the coupons accompanying the said bonds respectively.

6. It was further in and by said mortgage provided, that the said mortgagor, the Sheffield Manufacturing Company, should have the right, from time to time, in its discretion, to dispose of such portion or portions of its mill, boilers, engines, tools, implements, furniture and fixtures at any time held or acquired for use in its manufacturing business as may become unfit for use, replacing the same by new, more suitable and improved machinery which shall then become subject to the operation of said mortgage; plaintiff, upon information and belief, alleges that since the making of said mortgage, and pursuant to the clause above referred to, the Sheffield Manufacturing Company has disposed of certain of said property, replacing the

same by new, more suitable and improved machinery, and that the same and all of its present owned machinery, tools and fixtures are covered and affected by the said mortgage.

7. That plaintiff duly accepted the trust created in and by the said deed of trust, and the said deed of trust or mortgage, together with the acceptance thereof, was duly recorded in the office of the clerk of the county of Ulster, on the 30th day of August, in the year 1904, in book No. 204, page 25.

8. That on the first day of August, in the year 1906, the interest warrants or coupons due upon the bonds aforesaid, and referred to in said mortgage, were duly presented to the defendant for payment, and payment then and there demanded, which was refused.

That the same have remained unpaid for a period of six months thereafter and after the said demands.

That the plaintiff has and does elect that the whole sum owing under and upon the said bonds, and secured by the said mortgage or deed of trust, be and become due and payable forthwith, and that thereby and by the provisions of the said bond and mortgage the whole principal thereof became due and payable before the commencement of this action; and that the defendant, the Sheffield Manufacturing Company, has failed to comply with the terms and provisions of the said bonds and mortgage by neglecting to pay the interest coupons or warrants due as aforesaid, and the principal sum and amount due on the mortgage aforesaid.

9. That there is due and owing on the said bonds and mortgage to the various persons and corporations owning, holding and representing the same the sum of \$450,000 of principal, together with the interest thereon from the 1st day of February, 1906, no part of which has been paid.

10. Plaintiff further shows that no proceedings have been had at law or otherwise, and that no other action has been brought for the recovery of said sums required to be paid in and by said bonds, and secured to be paid by the said mortgage or deed of trust heretofore set forth, or any part thereof.

Wherefore, the plaintiff demands judgment against the defendant:

1. That the defendant in this action and all persons and parties claiming or to claim under it, subsequent to the commencement of this action and the filing of the notice of the pendency of this action, may be barred and foreclosed of and from all right, title, claim, lien, interest, benefit or equity of redemption in or to the said mortgage property, or any part thereof.

2. That a referee be appointed to take all proofs and accountings herein, and to find and report such facts as to the owners, holders and representatives of said bonds and coupons, together with the amounts due, owing or unpaid thereon, and such other facts as may be necessary.

3. That the said mortgaged property covered by and described in said mortgage or deed of trust, may be adjudged and decreed to be sold according to law and the practice of this court.

That the moneys to be derived from the sale be disposed of in accordance with the order of this court; that out of the moneys there first be paid all taxes or assessments which are or may be a lien upon the said premises; that next there may be paid the costs, allowances and expenses of this action, and the costs and expenses of the sale of the mortgaged property under a judgment which may be given in

this action; that there next be paid the fees, commissions and necessary disbursements of the plaintiff, the trustee, and the receiver in this action, if one should be appointed; that the balance of the moneys may be applied to the payment of the amounts owing to the bondholders of the bonds and coupons which are attached to said bonds, and if there shall not be sufficient to pay them in full, then that they may be paid pro rata and proportionately as far as the moneys will go; and if there shall be any surplus after paying said bonds, coupons and interest in full, then that such surplus be paid over to the defendant, the Sheffield Manufacturing Company, or to whomsoever it shall equitably and lawfully belong as may be directed by this court; and further that the defendant, the Sheffield Manufacturing Company, may be adjudged to pay any deficiency which may remain after applying all of the moneys applicable to the payments aforesaid. That the plaintiff may have such other or further relief as to the court may seem proper in the premises, together with the costs in this action.

ROSENDALE & HESSBERG,
Attorneys for Plaintiff.

B. Evidence before referee.

SUPREME COURT — ULSTER COUNTY.

CHARLES A. SPALDING, AS TRUSTEE FOR
THE BENEFIT OF THE HOLDERS OF THE
BONDS SECURED BY A MORTGAGE OR
DEED OF TRUST EXECUTED BY THE
SHEFFIELD MANUFACTURING COMPANY,

agst.

SHEFFIELD MANUFACTURING COMPANY.

Hearing before E. A. Haines, Esq., who was appointed referee pursuant to an order made at Special Term of the Supreme Court, held at the city hall, in the city of Albany, on the 29th day of March, 1907.

Statutory oath taken by referee and hereto annexed.

Appearances:

Rosendale & Hessberg, attorneys for plaintiff.

Howard Gillespy, being duly sworn, testifies as follows: I reside in the village of Saugerties, county of Ulster and State of New York.

I have kept an account for the plaintiff and also for the defendant of all of the bonds issued under the mortgage set forth in the complaint herein.

The defendant is a domestic corporation and was organized and incorporated under the provision of chapter 193 of the Laws of 1890. The defendant's predecessor, J. B. Sheffield & Son, was also a corporation and was found to be insolvent and wound up, and the present corporation was formed by a reorganization committee pursuant to the act of the legislature which I have just referred to.

(Mortgage shown witness.)

This mortgage, dated the 30th day of August, 1904, made by the Sheffield Manufacturing Company to Charles A. Spalding as trustee for the benefit of the holders of the bonds secured by said mortgage, was executed by the defendant, and the bonds provided for in and by the terms of said mortgage, were duly issued and delivered to various persons and corporations in consideration of the outstanding obligations held by such persons and corporations of said corporation known as J. B. Sheffield & Son.

Mortgage dated August 30, 1904, and recorded in the Ulster county clerk's office on the 30th day of August, 1904, in book 204 of mortgages at page 25, offered and received in evidence, and marked exhibit "A."

All of the fixtures and property described in the complaint herein are in the factories, building, store houses and shops referred to in the complaint, with the exception of some machines which have been sold, and the proceeds of such sale, however, were paid over to the plaintiff as trustee to be applied towards discharging the bonds issued under the mortgage. The total sum so paid out of the proceeds of said sales amount to five thousand six hundred and six 25/100 dollars.

The bonds outstanding are as follows:

132 bonds of \$50 each amounting to.....	\$6, 600
319 bonds of \$100 each amounting to.....	31, 900
47 bonds of \$500 each amounting to.....	23, 500
384 bonds of \$1,000 each amounting to.....	384, 000
<hr/>	
Total	\$446, 000
<hr/>	

Six hundred and fifty dollars of the bonds originally issued were surrendered and canceled for old machinery delivered, and \$3,350 of said bonds were surrendered for cancellation by the owners, they having received dividends from debtors of the Sheffield & Son corporation sufficient to pay such bonds, said bonds having been issued to them conditionally under the reorganization plan. Hence only bonds amounting in the aggregate to \$446,000 are now outstanding. The coupons or interest warrants annexed to all of said bonds which became due on the 1st day of August, 1906, are in default and were not paid when they became due and still remain unpaid. Payment was duly demanded of defendant and refused. The interest warrants or coupons remained unpaid for six months after they became due. Mr. Spalding thereupon some time subsequent to February 1, 1904, elected that the whole sum owing upon and under said bonds, and secured by the mortgage described in the complaint, should be deemed due and payable.

The defendant failed to pay any part of the principal so falling due under the plaintiff's election, and the only payments which have been made upon the mortgage are those above stated, being the proceeds of the sale of machinery, which was not required by the defendant.

There is due the various persons and corporations owning and holding the bonds issued as aforesaid, the sum of four hundred and forty-six thousand dollars (\$446,000) of principal. The interest due thereon under the warrants or coupons remaining unpaid from the 1st day of February, 1904, to the date hereof, at five per cent amounts

to \$26,016.66, making the total sum due of principal and interest \$472,016.66.

From this sum should be deducted the payments of \$5,606.25 above referred to, leaving a balance due of \$466,410.41.

No proceedings having been had at law, or otherwise, to my knowledge, and no action has been brought for the recovery of the sums required to be paid in and by the bonds secured to be paid by the mortgage or deed of trust referred to in the complaint.

The real estate covered by the mortgage referred to in the complaint, and water rights and property, other than the personal property, were covered and affected by other mortgages prior in lien to the mortgage in the complaint referred to, and such proceedings have been had under said prior mortgages and otherwise that the defendant now has, owns and possesses substantially no real property subject to the mortgage referred to in the complaint.

H. GILLESPY.

Read over, subscribed and sworn to before }
me, this 30th day of March, 1906. }

E. A. HAINES,
Referee.

C. Report of referee.

SUPREME COURT — ULSTER COUNTY.

CHARLES A. SPALDING, AS TRUSTEE FOR
THE BENEFIT OF THE HOLDERS OF THE
BONDS SECURED BY A MORTGAGE OR
DEED OF TRUST EXECUTED BY THE
SHEFFIELD MANUFACTURING COMPANY,

agst.

SHEFFIELD MANUFACTURING COMPANY.

To the Supreme Court:

In pursuance of an order of this court made in the above entitled action, on the 30th day of March, 1906, by which it was referred to the undersigned, referee, to ascertain and compute the amount due to the plaintiff upon and by virtue of the bonds, interest, warrants or coupons and the mortgage mentioned and set forth in the complaint herein, which is filed in this action, and also to take proof of the facts and circumstances stated in the complaint, I do report that I took the oath required by the rules and practice of this court which is hereto annexed; that I was attended by Rosendale & Hëssberg, the attorneys for the plaintiff herein; that I took proof of the facts and circumstances as required by the order appointing me, which are hereto annexed and form a part of my report; that I have computed and ascertained the amount due to the plaintiff as aforesaid upon the bonds, interest, warrants or coupons and mortgage set forth and referred to in the complaint, and I find and accordingly report that there is due to the plaintiff for principal and interest on said interest, warrants or coupons under the said bonds and mortgage, at the date of this my report, the sum of four hundred and sixty-six thousand, four hundred and ten and 41/100 dollars (\$466,410.41).

Schedule "A," hereto annexed, shows a statement of the amount due for principal and interest respectively, the period of computation of the interest, and its rate.

I further report that the interest, warrants or coupons annexed to the bonds issued under the mortgage set forth in the complaint, which became due and payable on the 1st day of August, 1904, all remain unpaid, and that they remained unpaid and in arrear for a period of six months from the said 1st day of August, 1904, at the time of the commencement of the action for the foreclosure of the mortgage set forth in the complaint. That demand was duly made for the payment of the said interest, warrants or coupons due upon the said 1st day of August, 1904, at the office of the defendant at Saugerties, New York, and that payment was refused.

And I further find and report that the said plaintiff, as trustee under the mortgage or deed of trust in the complaint referred to, and according to the terms and provisions of the said mortgage, exercised his option and declared the whole amount of all the bonds referred to in the complaint to be due and payable, by reason of the default upon the interest, warrants or coupons payable on said 1st day of August, 1904, and by reason of the continuance of said default for a period of more than six months after said 1st day of August, 1904.

And I further find and report that the facts and circumstances stated in said complaint are in all respects true; the schedule hereto annexed shows the payments which have been made on account of the demands mentioned in the complaint and which ought to be credited thereon.

Dated April 1, 1906.

E. A. HAINES.

Referee.

(Attach schedule.)

D. Order appointing referee to sell.

At a Special Term of the Supreme Court of the State of New York, held at the city hall, in the city of Albany, on the 1st day of April, 1906.

Present — Hon. D. Cady Herrick, *Justice*.

SUPREME COURT — ULSTER COUNTY.

CHARLES A. SPALDING, AS TRUSTEE FOR
THE BENEFIT OF THE HOLDERS OF THE
BONDS SECURED BY A MORTGAGE OR
DEED OF TRUST EXECUTED BY THE
SHEFFIELD MANUFACTURING COMPANY,

agst.

SHEFFIELD MANUFACTURING COMPANY.

The summons and complaint in this action having been served on the defendant more than twenty days since, and the defendant not having appeared, answered or demurred herein:

Now, on reading and filing the affidavit of W. V. Cooke, the managing clerk for the attorneys for the plaintiff herein, proving that

the complaint in this action and due notice of the pendency of this action were duly filed in the office of the clerk of the county of Ulster, on the 8th day of February, 1907. That there are no infants or absentees. That the defendant is in default and has failed to appear herein. And an order of reference having been made to compute the amount due to the plaintiff, upon the bonds and mortgage set forth and referred to in the complaint.

On reading and filing the report of the referee named in the order of reference, by which report bearing date the 1st day of April, 1907, it appears that the interest warrants or coupons due upon the bonds referred to in the said mortgage and in the complaint herein, and which according to the said warrants or coupons became due and payable on the 1st day of August, 1904, were all unpaid, and that all of the said interest warrants or coupons which became due and payable upon the 1st day of August, 1904, remained unpaid and in arrears for a period of six months from the said 1st day of August, 1904. That demand was duly made for the payment of the said interest warrants or coupons due upon the said 1st day of August, 1904, at the office of the defendant at Saugerties, New York, which payment was then and there refused, but the same remain wholly unpaid.

And it further appearing by the report of said referee that the said plaintiff herein, as trustee under the mortgage or deed of trust in the complaint referred to, and according to the terms and provisions thereof has exercised his option and declared the whole amount of all the bonds referred to in the complaint to be due and payable by reason of the default upon the interest warrants or coupons payable on the said 1st day of August, 1904, and a continuance of said default for a period of six months, and that no part of the principal of the said bonds has been paid, except the sum of \$5,606.25, and that the whole amount of said bonds became due and payable on said 1st day of February, 1904, except said sum of \$5,606.25.

And it further appearing by the report of the said referee that the facts set forth in the complaint herein are true, and that there is due of principal, secured by the said mortgage or deed of trust, the sum of four hundred and forty-six thousand dollars (\$446,000) of principal (less said sum of \$5,606.25) with interest thereon from the 1st day of February, 1904, making in all the sum of \$466,410.41.

Now, on motion of Rosendale & Hessberg, the attorneys for the plaintiff herein,

It is adjudged that the mortgaged property described in the complaint in this action (insert description) be sold at public auction in the village of Saugerties, county of Ulster and State of New York, by or under the direction of John W. Searing, Esq., of Kingston, Ulster county, New York, who is hereby appointed referee for that purpose; that the said referee give public notice of the time and place of such sale according to law and the practice of this court; that the plaintiff, or any other party, may become a purchaser on such sale; that the said referee execute to the purchaser or purchasers a certificate or bill of sale or other instrument which may be proper or necessary to convey the title of the property so to be sold; that out of the moneys arising from such sale, after deducting the amount of his fees and expenses on such sale, the said referee pay to the plaintiff, or his attorneys, the sum of \$100.30, adjudged to the plaintiff for costs and charges in this action, and also the sum of \$200, which is hereby

allowed and adjudged to the plaintiff as and for an extra allowance in addition to said costs, making together the sum \$300.30, with interest from the date hereof; and also the amount so reported due as aforesaid, together with legal interest thereon from the date of the said report, or so much thereof as the purchase money of the mortgaged property will pay of the same, take a receipt therefor and file it with his report of sale; that he pay over the surplus moneys arising from the sale, if any there should be, to the treasurer of the county of Ulster, within five days after the same be received and ascertainable, subject to the further order of the court; that he make a report of such sale and file it with the clerk of this court with all convenient speed; that if the proceeds of such sale be insufficient to pay the amount so reported to be due the plaintiff, with interest and costs aforesaid, the said referee specify the amount of such deficiency in the report of sale, and that the defendant, the Sheffield Manufacturing Company, pay to the plaintiff the residue of the debt remaining unsatisfied after a sale of the mortgaged property and the application of the proceeds pursuant to the directions contained herein, and that the plaintiff have execution therefor; and that the purchaser or purchasers at such sale be given the possession of said property on production of the referee's certificate or bill of sale or other instruments which may be executed by said referee pursuant to his decree and the production of a certified copy of the order of this court confirming the report of said sale.

It is further adjudged that the defendant and all persons claiming under it, after the filing of such notice of the pendency of this action, be forever barred and foreclosed of all right, title, interest and equity of redemption in the said mortgaged property, or any part thereof.

It is further adjudged that the said referee may accept in lieu of cash upon said sale (after receiving a sum sufficient to pay the costs, charges and disbursements hereinbefore directed to be made), the voucher, receipt or acquittance of any bond or bondholders or any committee or trustee of all or any of the bondholders representing the bonds referred to in the mortgage described in the complaint herein and referred to in the judgment, for such sum or sums as would be represented by the said bond or bonds upon a distribution of the proceeds of said sale ratably and proportionately among all of the bondholders after deducting the costs, charges and expenses hereinbefore referred to. The said receipt, voucher or acquittance to stand and be in lieu of a similar cash amount which would be distributed or be paid as a dividend upon and to such bond by the plaintiff or otherwise as trustee for said bondholders upon a sale of the property, and the amount of such receipt or voucher is to be charged to each of said bonds as a payment to that amount received thereon.

It is further adjudged and decreed that the said plaintiff, or said referee, or their successors, or any person in their behalf, after the confirmation of the sale aforesaid, may at the foot of this decree apply to the court for such other or further order or supplemental judgment as may be deemed proper and necessary for the purpose of ascertaining the names of the owners, holders and representatives of said bonds and coupons, together with the amount due, owing and unpaid thereon, and for the purpose of ascertaining the names of the persons and corporations who are entitled to share in the distribution of the said proceeds of the sale hereinbefore directed

to be made, or who are entitled to be paid the sum due and owing with accrued interest to the date of said payment upon the respective bonds issued and outstanding in the mortgages referred to in the complaint and judgment herein, or for such other or further order in the premises as may be or become necessary from time to time.

Clerk of the county of Ulster will enter.

D. CADY HERRICK,
Justice Supreme Court.

E. Order appointing referee to take proof of ownership of bonds.

At a Special Term of the Supreme Court, held at the city hall, in the city of Albany, on the 25th day of June, 1907.

Present — Hon. D. Cady Herrick, *Justice.*

SUPREME COURT — ULSTER COUNTY.

CHARLES A. SPALDING, AS TRUSTEE FOR
THE BENEFIT OF THE HOLDERS OF THE
BONDS SECURED BY A MORTGAGE OR
DEED OF TRUST EXECUTED BY THE
SHEFFIELD MANUFACTURING COMPANY,

agst.

SHEFFIELD MANUFACTURING COMPANY.

On reading and filing the report of John W. Searing, Esq., the referee heretofore appointed herein, dated the 24th day of April, 1904, of the sale of the mortgaged property mentioned and described in the complaint in this action, and on motion of Rosendale & Hessberg, the attorneys for the plaintiff,

It is ordered, that the said report be, and the same hereby is, in all things confirmed.

And it appearing from the report of Henry A. Peckham, Esq., appointed referee to compute the amount due the plaintiff by the order of this court, made on the 29th day of March, 1904, and entered in the Ulster county clerk's office on the 2d day of April, 1904, that the plaintiff herein has in his possession and that there has been paid to him the sum of five thousand, six hundred and six dollars and twenty-five cents (\$5,606.25), being the proceeds of the property sold by the defendant and covered by the mortgage described in the complaint and judgment herein.

And it further appearing that it was adjudged and decreed by the judgment herein, entered in the Ulster county clerk's office on the 2d day of April, 1904, that the plaintiff herein, or any person in his behalf, after the confirmation of the sale aforesaid, might at the foot of the said decree, apply to the court for such other, further, or supplemental judgment as might be deemed proper and necessary in the premises.

It is hereby further ordered, that the said Charles A. Spalding, as trustee for the benefit of the holders of the bonds secured by the mortgage referred in the complaint herein, be, and he hereby is, ordered and directed to transfer and pay to John W. Searing, Esq., the referee designated to sell the property described in the judgment herein, the said sum of five thousand, six hundred and six dollars

and twenty-five cents (\$5,606.25), and that said referee hold the same for distribution among the bondholders entitled thereto ratably and proportionately and in the same manner that the moneys realized upon the sale of the property described in said judgment is to be distributed.

It is further ordered, that upon the payment so directed to be made by said Charles A. Spalding, as trustee as aforesaid, he be discharged from all claims, demands and liabilities whatsoever to the bondholders, or either of them, for whose benefit said mortgage was executed to the plaintiff, or from any claims, demands or liabilities arising or which might arise out of his trusteeship under said mortgage described in the complaint herein.

It is further ordered, that said John W. Searing, as such referee as aforesaid, give notice to the owners and holders of the bonds issued under the mortgage described in the complaint herein, that they make proof before him at the office of the plaintiff's attorneys, in the city of Albany, on the 24th day of July, 1907, at ten o'clock in the forenoon of that day, of their ownership of said bonds; that said notice shall be given by mailing a copy thereof to each bondholder whose name appears on the books of the defendant as the owner or holder of any of said bonds at least twenty-one days prior to said date of hearing, and by publishing such notice in the Saugerties Post and the New York Commercial Advertiser once a week for three successive weeks immediately preceding the date of said hearing.

It is further ordered, that the said referee proceed at the time and place stated in said notice to take proof of the ownership of said bonds, and each of them, and that after the payment of the attorneys and counsel fees and the costs, charges and expenses herein, he distribute the balance of the moneys in his hands ratably and proportionately among all of the bondholders of the said corporation, in accordance with the amount of bonds held by each of said persons based upon the par value of said bonds and that he take a voucher for each payment made.

It is further ordered, that the notice herein required to be given and the payment hereby directed to be made, shall be given and the payment shall be made to the committee for sundry bondholders which represent bondholders, a list of whose names with a statement of the amount of their bonds, is attached to the schedule annexed to the report of the referee, dated the 24th day of April, 1895, instead of the bondholders represented by said committee, and that the voucher of said committee, or a majority of them, shall be deemed and hereby is deemed a proper payment to and on behalf of such bondholders who are represented by said committee as aforesaid.

It is further ordered, that the said referee be, and he hereby is, required to make a report of his proceedings to the court, and that upon the confirmation thereof he be discharged from all claims, demands and liabilities whatsoever to any or all of said bondholders of said corporation.

It is further ordered, that in the event of any bondholder failing to make proof of ownership as herein required, and who may be or become entitled to any dividend herein, that said referee be, and he hereby is, ordered and directed to deposit the dividend or payment so to be made to said bondholders with the treasurer of the county of Ulster, to the credit of said bondholder or bondholders entitled to the same, subject to the further order of the court in the premises.

It is further ordered, that the plaintiff herein, or said referee, or their successors, or any person in their behalf, may apply to the court for such other or further order in the premises as may be or become necessary from time to time.

Enter in Ulster county.

JAS. D. WALSH,
Clerk.

F. Notice to bondholders.

SUPREME COURT — ULSTER COUNTY.

CHARLES A. SPALDING, AS TRUSTEE FOR
THE BENEFIT OF THE HOLDERS OF THE
BONDS SECURED BY A MORTGAGE OR
DEED OF TRUST EXECUTED BY THE
SHEFFIELD MANUFACTURING COMPANY,
agst.

SHEFFIELD MANUFACTURING COMPANY.

Pursuant to an order of the Supreme Court granted at a Special Term thereof, held at the city hall, in the city of Albany, on the 25th day of June, 1907, and entered in the Ulster county clerk's office on the 27th day of June, 1907, notice is hereby given, that all persons holding bonds of the Sheffield Manufacturing Company are hereby required to come in and present their bonds for proof before me, at the office of Rosendale & Hessberg, 91 State street, in the city of Albany, on the 24th day of July, 1907, at ten o'clock in the forenoon of that day.

Dated June 27, 1907.

J. W. SEARING,
Referee.

ROSENDALE & HESSBERG,
Plaintiff's Attorneys.

G. Referee's report as to ownership of bonds.

SUPREME COURT — ULSTER COUNTY.

CHARLES A. SPALDING, AS TRUSTEE FOR
THE BENEFIT OF THE HOLDERS OF THE
BONDS SECURED BY A MORTGAGE OR
DEED OF TRUST EXECUTED BY THE
SHEFFIELD MANUFACTURING COMPANY,
agst.

SHEFFIELD MANUFACTURING COMPANY.

The undersigned, the referee duly appointed herein, by the judgment granted on the 1st day of April, 1907, and entered in the Ulster county clerk's office on the second day of April, 1907, and who duly made a report of sale herein, dated the 24th day of April, 1907, and which was duly confirmed by an order of this court granted on the 25th day of June, 1907, and entered in the Ulster county clerk's office

on the 27th day of June, 1907; and who in and by the terms of the said order of confirmation was continued as referee, for the purposes in said order set forth, respectfully reports as follows:

I. That pursuant to the terms and provisions of the said order made herein, at a Special Term of the Supreme Court, held at the city hall, in the city of Albany, on the 25th day of June, 1907, and entered in the Ulster county clerk's office on the 27th day of June, 1907, he gave notice to the owners and holders of the bonds issued under the mortgage described in the complaint therein, that they would be required to present their bonds for proof before the undersigned, at the office of Rosendale & Hessberg, No. 91 State street, in the city of Albany, on the 24th day of July, 1907, at ten o'clock in the forenoon of that day; that said notice was given by mailing a copy to each bondholder, whose name appeared on the books of the Sheffield Manufacturing Company, the defendant herein, as the owner or holder of any of said bonds at least twenty-one days prior to the said date of hearing and by publishing said notice in the *Saugerties Post* and *New York Commercial Advertiser*, once a week for three successive weeks immediately preceding the date of said hearing; that proof of mailing and proofs of publication are hereto annexed and form a part of this report.

II. That at the time and place set forth in said notice, the undersigned duly appeared and took the oath required by law, which is hereto annexed and forms a part of this report.

That I was attended on said hearing by Messrs. Rosendale & Hessberg, the attorneys for plaintiff; by Charles Davis, attorney for L. Newman; by S. W. Brown, attorney for John Kissock & Company, and by Mrs. Benjamin Harmore in person; the parties so appearing herein doing so only to make proof of bonds held by them, or their clients, and waiving the service of all future and further notices herein.

That I proceeded to take documentary evidence and oral proofs presented by the said parties in interest, and that the testimony so taken by me is hereto annexed and forms a part of this my report.

That schedule "I," hereto annexed and which forms a part hereof, shows a list of the owners of bonds with their last known place of residence, and the amount of bonds respectively issued to each holder.

That the total par or face value of the bonds so proved as aforesaid is the sum of four hundred and forty-one thousand, two hundred and fifty dollars (\$441,250).

That schedule "B," hereto annexed and which forms a part of this my report, sets forth the names of the holders of the bonds and their last known place of residence, and the amount of bonds held by each, as appears from the books of the company; such bondholders not having made the proof of ownership thereof, but who claim to be the present owners of such outstanding bonds, so far as the undersigned has been able to ascertain; that the total par or face value of said bonds is the sum of four thousand seven hundred and fifty dollars (\$4,750).

That the total par or face value of the bonds issued under the mortgage set forth in the complaint, and referred to in the judgment herein, is the sum of four hundred and forty-six thousand dollars (\$446,000). All of which is respectfully submitted.

April 16, 1908.

JOHN W. SEARING,
Referee.

(Attach schedule.)

H. Order to pay dividend.

At a Special Term of the Supreme Court of the State of New York, held at chambers in the city of Albany, on the 17th day of April, 1908.

Present — Hon. Alden Chester, *Justice*.

SUPREME COURT — ULSTER COUNTY.

CHARLES A. SPALDING, AS TRUSTEE FOR
THE BENEFIT OF THE HOLDERS OF THE
BONDS SECURED BY A MORTGAGE OR
DEED OF TRUST EXECUTED BY THE
SHEFFIELD MANUFACTURING COMPANY,

agst.

SHEFFIELD MANUFACTURING COMPANY.

On reading and filing the report of John W. Searing, Esq., the referee heretofore duly appointed herein, dated the 16th day of April, 1908, and on motion of Rosendale & Hessberg, the attorneys for plaintiff; it is

Ordered, that said report be and the same is hereby in all things confirmed.

(Here insert allowance to counsel for services on reference and provide for disbursements.)

It is further ordered, that said referee be and he hereby is directed and empowered to pay a first and final dividend of 32 $\frac{1}{4}$ per centum to the bondholders of said corporation, and that said dividend be paid to the persons and in the amount set forth in the schedule hereto annexed and marked "A" and forming part of this order.

It is further ordered that said dividend as aforesaid be paid to the said bondholders or said committee only upon their giving said referee a proper voucher therefor, and upon their surrendering the bonds issued under the mortgage described in the judgment herein.

It is further ordered, that in the event of any bondholder failing to surrender the bond or bonds held by him, that said referee be and he hereby is ordered and directed to deposit the dividend or payment so to be made to said bondholder with the treasurer of the county of Ulster, to the credit of said bondholder or bondholders entitled to the same, subject to the further order of the court in the premises.

It is further ordered, that said referee file a further report showing his compliance with the terms and provisions of this order, and that upon the filing of his vouchers and the confirmation of his report, the said referee be discharged from all further demands, claims or liens to any, either or all of said bondholders of said corporation.

It is further ordered, that the plaintiff herein, or the referee, or their successors, or any person in their behalf, may apply to this court for such other or further order in the premises as may be deemed proper or necessary from time to time.

The clerk of Ulster county will enter.

ALDEN CHESTER,
Jus. Sup. Ct.

I. Final report of referee.

SUPREME COURT — ULSTER COUNTY.

CHARLES A. SPALDING, AS TRUSTEE FOR
THE BENEFIT OF THE HOLDERS OF THE
BONDS SECURED BY A MORTGAGE OR
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SHEFFIELD MANUFACTURING COMPANY,
agst.
SHEFFIELD MANUFACTURING COMPANY.

To the Supreme Court:

The undersigned, the referee in the above-entitled action, respectfully reports, that pursuant to the final order made herein at a Special Term of the Supreme Court of the State of New York, held at chambers, in the city of Albany, on the 17th day of April, 1908, and entered in the Ulster county clerk's office on the 20th day of April, 1908, he proceeded to make a full and final distribution of all the moneys in his hands as such referee.

That he duly paid a dividend of 32 ⁸⁶/₁₀₀, per centum to the bondholders of said corporation, except those hereinafter mentioned, and that he has taken a proper voucher therefor; that all of said bondholders who have accepted said dividend have surrendered to the undersigned their bonds which were held by them; that the sum so paid, and the bondholders to whom paid, are as follows, viz.:

That the only bondholders who failed to take the dividend ordered and directed to be paid to them, are as follows, viz.:

NAME.	DIVIDEND.
M. Fitzgibbon	\$32 98
James A. Townsend	32 98
	<hr/>
	\$65 96
	<hr/>

and to cover said dividend I have deposited with George Deyo, as treasurer of the county of Ulster, the sum of \$65.96, and to the credit of said bondholders, and have taken his voucher therefor; said deposit having been made subject to the further order and direction of the court in the premises.

That all of the moneys so deposited and distributed by me amount to the sum of \$147,108.77.

That herewith I return and duly file all the vouchers taken by me as aforesaid.

That I have now fully and entirely distributed all of the moneys and assets in my hands. And the undersigned makes this report pursuant to the terms and provisions of the order aforesaid, for the purpose of duly filing the same in the Ulster county clerk's office.

Dated at Kingston, May 29, 1908.

JOHN W. SEARING,
Referee.

(Add verification.)

FORECLOSURE BY ADVERTISEMENT.*

ARTICLE I.

When mortgage may be foreclosed by advertisement.

- A. Real Property Law, § 540. When mortgage may be foreclosed.
- B. Real Property Law, § 563. Application of this article to mortgages of the State.
- C. Objections to use of proceeding.
- D. Property outside of State.
- E. Necessity of power of sale.
- F. Necessity of recording.
- G. Discharge of mortgage.
- H. By whom maintained.
- I. Mortgage barred by statute of limitations.
- J. Strict following of statute essential.

ARTICLE II.

Notice of sale.

- A. Contents.
 - 1. Real Property Law, § 544. Contents of notice of sale.
 - 2. General contents of notice.
 - 3. Description of mortgage.
 - 4. Time and place of sale.
 - 5. Statement of amount due.
 - 6. Description of premises.
 - 7. Form of notice of sale.
- B. Publication, filing and service.
 - 1. Real Property Law, § 541. Notice of sale; how given.
 - 2. Real Property Law, § 542. Notice of sale; how served.
 - 3. Real Property Law, § 543. Duty of county clerk.
 - 4. Publication.
 - 5. Posting.
 - 6. Service on interested parties.

ARTICLE III.

The sale.

- A. Conduct of sale.
 - 1. Real Property Law, § 545. Sale; how postponed.
 - 2. Real Property Law, § 546. Sale; how conducted.
 - 3. Real Property Law, § 547. Mortgagee or successor in interest may purchase.
 - 4. Postponement of sale.
 - 5. Sale in parcels.
 - 6. Form of notice of postponement.

* For a further discussion of the matters treated in this chapter, see Weed's Practical Real Estate Law; Aron's Gist of Real Property Law; Thomas on Mortgages; B., C. & G. Consolidated Laws.

B. Affidavits of sale.

1. Real Property Law, § 549. Affidavits on sale.
2. Real Property Law, § 550. When one affidavit suffices; printed notice to be annexed.
3. Real Property Law, § 551. Affidavits may be filed and recorded.
4. Real Property Law, § 552. Note upon record of mortgage.
5. Affidavit of publication and posting.
6. Necessity of affidavits.
7. Form of affidavit of affixing by clerk.
8. Form of affidavit of auctioneer.
9. Form of affidavit of affixing on courthouse door.
10. Form of affidavit of publication.
11. Form of affidavit of service of notice.

C. Effect of sale.

1. Real Property Law, § 548. Effect of sale.
2. Real Property Law, § 553. Deed not necessary. When affidavits not necessary; but purchaser may require them.
3. Real Property Law, § 562. Delivery of certain affidavits to purchaser.
4. Rights foreclosed.
5. Purchaser as mortgagee in possession.
6. Ineffective mortgage.

ARTICLE IV.**Costs.**

- A. Real Property Law, § 554. Cost allowed.
- B. Real Property Law, § 555. Expenses allowed.
- C. Real Property Law, § 556. Taxation of costs and expenses.
- D. Items of costs and expenses.
- E. Form of bill of costs.

ARTICLE V.**Surplus moneys.**

- A. Real Property Law, § 557. Surplus moneys to be paid into Supreme Court.
- B. Real Property Law, § 558. Petition for surplus.
- C. Real Property Law, § 559. Proceedings on petition.
- D. Real Property Law, § 560. Order for distribution.
- E. Real Property Law, § 561. Limitation of last four sections.
- F. Who entitled to surplus.
- G. Liability of mortgagee.
- H. Attack on regularity of proceeding.
- I. Form of petition for payment of surplus moneys.
- J. Form of notice of motion.
- K. Form of order of reference.
- L. Form of report of referee.
- M. Form of order upon report of referee.

ARTICLE I.**WHEN MORTGAGE MAY BE FORECLOSED BY ADVERTISEMENT.****A. Real Property Law, § 540. When mortgage may be foreclosed.**

A mortgage upon real property, situated within the state, containing therein a power to the mortgagee, or any other person, to sell the mortgaged property, upon default being made in a condition of the mortgage, may be foreclosed in the manner prescribed in this article, where the following requisites concur:

1. Default has been made in a condition of the mortgage, whereby the power to sell has become operative.

2. An action has not been brought to recover the debt secured by the mortgage, or any part thereof; or, if such an action has been brought, it has been discontinued, or final judgment has been rendered therein against the plaintiff, or an execution, issued upon a judgment rendered therein in favor of the plaintiff has been returned wholly or partly unsatisfied.

3. The mortgage has been recorded in the proper book for recording mortgages, in the county wherein the property is situated.

4. The first notice required by subdivision one of the next section is published within the time in which an action could be maintained to foreclose such mortgage.

B. Real Property Law, § 563. Application of this article to mortgages of the State.

This article does not affect any provision of law, inconsistent therewith, especially relating to the foreclosure of mortgages to the people of the State, or to the commissioners for loaning certain moneys of the United States.

C. Objections to use of proceeding.

This method of foreclosure is usually resorted to by reason of its economy as compared with foreclosure by action in cases where the mortgaged premises are not of sufficient value to bear the expenses of a sale in addition to the amount due. The principal objections are the fact that the proceedings are very strictly construed, and hence an error is fatal to the title, and that the writ of assistance does not issue to put the purchaser in possession as in an action. The remedy by summary proceedings has, however, been so adapted to obtaining possession by purchaser after sale that this is of comparatively little weight, but the fact that no amendment can be made to the proceedings, together with the inadequacy of the costs allowed, has great weight with the profession, and it will be rarely used where there is sufficient property to pay all of the expenses of suit.¹

D. Property outside of State.

The statutes of this State regulating the foreclosure of mortgages by advertisement do not apply to mortgages on real estate without the State.² But where a mortgage was executed upon lands without the State, authorizing a sale

1. A history of the proceedings to foreclose by advertisement in this State is given by Judge Andrews in *Mowry v. Sanborn*, 68 N. Y. 153. The same case is reported in 65 N. Y. 581,

and 72 N. Y. 534; also 7 Hun, 380, 62 Barb. 223, 11 Hun, 545.

2. *Elliott v. Wood*, 45 N. Y. 71; *Mead v. Brockner*, 82 App. Div. 480, 81 N. Y. Supp. 594.

after certain specified notices in this State, it was held that, in the absence of any statutory regulation, the parties had the power to agree upon the manner of sale; that while the statutes of this State in reference to the sale of mortgaged premises had reference only to real estate in this State, yet there being no proof that the sale provided for was illegal according to the laws of the State where the land was situated, there was no ground for equitable interference.³

E. Necessity of power of sale.

A mortgage cannot be foreclosed by advertisement unless it contains a power of sale.⁴ Under subdivision 3 of section 254 of the Real Property Law, a covenant by the mortgagor to pay the indebtedness is to be construed to give a power of sale.

F. Necessity of recording.

It is a jurisdictional requirement of the statute that the mortgage shall have been recorded in the county where the property is located.⁵

G. Discharge of mortgage.

The payment of a mortgage extinguishes the power of sale contained in it, and if a sale is thereafter had, even a *bona fide* purchaser takes no title.⁶ A tender to the mortgagee or his assignee of the whole amount of the debt and interest, with the costs and charges, will render a subsequent sale on the mortgage irregular and void.⁷ But the mortgage is not extinguished where the assignee takes a quitclaim deed of one-half of the mortgaged premises; at most this can only operate as an extinguishment of a portion of the mortgage debt, leaving the assignee at liberty to foreclose for the residue.⁸

H. By whom maintained.

The foreclosure must be made in the name of the real party in interest.⁹ A purchaser at a sale, under a foreclosure by advertisement of a mortgage given to secure several notes, one of which has been transferred to a bank to which

3. *Carpenter v. Black Hawk Co.*, 65 N. Y. 43; *Central G. M. Co. v. Platt*, 3 Daly, 263.

4. *Cowdry v. Turner*, 85 Hun, 451, 32 N. Y. Supp. 889, 66 St. Rep. 207.

5. *Wells v. Wells*, 47 Barb. 416; *Cowdrey v. Turner*, 85 Hun, 451, 32 N. Y. Supp. 889, 66 St. Rep. 207.

6. *Cameron v. Erwin*, 5 Hill, 272.

See also, *Warner v. Blakeman*, 36 Barb. 501; *aff'd*, 4 Keyes, 487.

7. *Burnet v. Denniston*, 5 Johns. Ch. 35.

8. *Klock v. Cronkhite*, 1 Hill, 107.

9. *Cohoes Co. v. Goss*, 13 Barb. 137; *Slee v. Manhat. Co.*, 1 Paige, 48. See *Wilson v. Troup*, 2 Cow. 195.

an assignment (unrecorded) of the mortgage, absolute in form, but shown by oral evidence to be as collateral only, has been made, cannot maintain summary proceedings to obtain possession of the mortgaged premises where the foreclosure proceedings are instituted and carried on in the name of the mortgagees only, and no mention is made therein of the assignment.¹⁰ A surviving executor may foreclose by statute,¹¹ as may also a foreign executor or administrator.¹²

I. Mortgage barred by Statute of Limitations.

Before the addition of subdivision 4 to the statute, it was held that a court of equity will not, on the ground that the Statute of Limitations has run against a mortgage, restrain, as a cloud upon title, a sale under a power of sale contained in the mortgage, in the absence of any allegation in the complaint or finding by the court that the bond and mortgage have been paid.¹³

J. Strict following of statute essential.

A compliance with the statutory requirements is a condition precedent to a valid sale under the power contained in the mortgage, and a person claiming title under such a foreclosure assumes the burden of showing that the statutory requirements were complied with. It has been said that every requirement of the statute must be strictly complied with.¹⁴ The proceeding is a statutory proceeding and the statute must be followed with precision.¹⁵ But it has been said that the statutory proofs of foreclosure and sale are to be liberally construed, and are only required to be certain to a common intent, and if they are so, though technically defective, they are sufficient.¹⁶ It is not a proceeding in court, and the court is not authorized to supply omissions or remedy defects in the affidavits.¹⁷ But, if the affidavits are defective, amended affidavits, it seems, may be filed accord-

10. *Weir v. Birdsall*, 27 App. Div. 404, 50 N. Y. Supp. 275.

11. *Demarest v. Wynkoop*, 3 Johns. Ch. 129.

12. *Doolittle v. Lewis*, 7 Johns. Ch. 45; *Averill v. Taylor*, 5 How. Pr. 476.

13. *House v. Carr*, 185 N. Y. 453.

14. *Weir v. Birdsall*, 27 App. Div. 404, 50 N. Y. Supp. 275. See also, *Layman v. Whiting*, 20 Barb. 559; *Bryan v. Butts*, 27 Barb. 503.

Unliquidated damages.—It is said

in *Ferguson v. Kimball*, 3 Barb. 616, that a mortgage given to secure unliquidated damages cannot be foreclosed under the statute. In *Mowry v. Sanborn*, 68 N. Y. 153, the question is suggested but not passed upon.

15. *Deutsch v. Haab*, 135 App. Div. 756, 119 N. Y. Supp. 911.

16. *Mowry v. Sanborn*, 72 N. Y. 534.

17. *Dwight v. Phillips*, 48 Barb. 116.

ing to the fact, and, at least, as to the mortgagor, they may be filed at any time, or other proof given.¹⁸ The remedy is solely and exclusively the creature of the statute, and hence all of the statutory requirements must be strictly complied with, and a failure so to do renders the proceedings void.¹⁹ If a mortgage has already been foreclosed by action as to part and the decree provides for subsequent default, a sale cannot be made under the statute.²⁰

ARTICLE II.

NOTICE OF SALE.

A. Contents.

1. Real Property Law, § 544. Contents of notice of sale.

The notice of sale must specify:

1. The names of the mortgagor, of the mortgagee and of each assignee of the mortgage.
2. The date of the mortgage, and the time when, and the place where, it is recorded.
3. The sum claimed to be due upon the mortgage, at the time of the first publication of the notice; and, if any sum secured by the mortgage is not then due, the amount to become due thereupon.
4. A description of the mortgaged property, conforming substantially to that contained in the mortgage.

2. General contents of notice.

It is not necessary to state in the notice of sale fully the authority by virtue of which the subscriber forecloses.²¹ But it is essential to state that the mortgage will be foreclosed by sale; and a mere notice of sale, without declaring it to be for the purposes of foreclosure or in execution of the power of sale contained in the mortgage, is insufficient.²² It is not necessary that the terms of the sale should be included in the notice.²³ It is surplusage to state that the premises are subject to a lease, and the omission to state how long the

18. *Bunce v. Reed*, 16 Barb. 352; *Mowry v. Sanborn*, 72 N. Y. 534; *Story v. Hamilton*, 86 N. Y. 428. Compare *Dwight v. Phillips*, 48 Barb. 116.

19. *Van Slyke v. Sheldon*, 9 Barb. 278; *King v. Dantz*, 11 Barb. 191; *Cohoes v. Goss*, 13 Barb. 137; *Cole v. Moffit*, 20 Barb. 18; *St. John v. Bumpstead*, 17 Barb. 100; *Low v. Purdy*, 2 Lans. 422.

20. *Cox v. Wheeler*, 7 Paige, 250. See *Grosvenor v. Day*, *Clarke's Ch.* 109.

21. *People v. Prescott*, 3 Hun, 419.

Date of notice.—A notice of sale, as filed in the clerk's office and published for the first four weeks was, by mistake, dated April 23, 1858, instead of 1868; held, that the mistake was obvious on inspection and could not have misled, and did not invalidate the proceedings. *Mowry v. Sanborn*, 68 N. Y. 153.

22. *Judd v. O'Brien*, 21 N. Y. 186.

23. *Story v. Hamilton*, 86 N. Y. 428.

lease mentioned in a notice has to run does not affect the sale.²⁴ Where the notice of sale states that the premises are to be sold under three mortgages instead of two, it is irregular and void.²⁵ But this is not so as to a mistake, a correction of which is published with the notice before it can be presumed to have influenced persons desiring to bid, as where, by mistake, the notice of sale stated a prior incumbrance upon the mortgaged property at twice its actual amount, but a correction was published with the notice two weeks before the sale.²⁶

3. Description of mortgage.

The notice sufficiently specifies where the mortgage is recorded by stating the clerk's office and date of record, though the number of the book is erroneously given.²⁷ Where the name of the mortgagee was omitted from the description of the mortgage contained in the notice of sale, but was subscribed to the notice, the requirements of the statute were held to have been substantially complied with.²⁸

4. Time and place of sale.

If the notice of sale does not state the place of sale, the equity of redemption will not be barred.²⁹ Notice for sale at the "City Hall" is sufficient.³⁰ It has been held that where the notice of sale was for Sunday, the mortgagee might before the day postpone to another day and make a valid sale under the notice.³¹

5. Statement of amount due.

It is said that claiming more than the amount actually due does not vitiate where no fraud is shown.³² A sale subject to payment of future instalments, without specifying the amount of such instalments in the notice of sale, is void.³³

24. *Hubbell v. Sibley*, 5 *Lans.* 51; *aff'd*, 50 *N. Y.* 468.

25. *Burnet v. Denniston*, 5 *Johns.* 35.

26. *Hubbell v. Sibley*, 5 *Lans.* 51; *aff'd*, 50 *N. Y.* 468. See *Bunce v. Reed*, 16 *Barb.* 347.

27. *Judd v. O'Brien*, 21 *N. Y.* 186.

28. *Candee v. Burke*, 1 *Hun.* 546.

29. *Burnet v. Denniston*, 5 *Johns.* 35.

30. *Hornby v. Cramer*, 12 *How. Pr.* 490.

31. *Westgate v. Handline*, 7 *How. Pr.* 372.

32. *Mowry v. Sanborn*, 62 *Barb.* 223; *rev'd* on another point, 65 *N. Y.* 581. See *s. c.*, 68 *N. Y.* 153, 72 *N. Y.* 634.

33. *Jenks v. Alexander*, 11 *Paige*, 619.

6. Description of premises.

A statutory foreclosure is void if the description in the notice does not conform substantially to that in the mortgage.³⁴

7. Form of notice of sale.

WHEREAS, Default has been made in the payment of the money secured by a certain mortgage, bearing date the 29th day of January, 1903, made and executed by John Joseph, of the town of Hardenburgh, Ulster county, N. Y., as mortgagor to Fred W. Wells, of Claryville, Sullivan county, N. Y., which said mortgage was given as collateral security for the payment of a portion of the purchase money of the premises described in said mortgage, and was duly recorded in the Ulster county clerk's office, in book No. 166 of mortgages, page 61, on the 2d day of August, 1903, at 1.30 P. M., and no suit or proceeding having been begun or instituted at law to recover the debt secured by said mortgage, or any part thereof; and,

WHEREAS, Said mortgage was duly assigned by Fred W. Wells, said mortgagee in said mortgage, to James Wilson, of the city of New York, which said assignment was dated April 30, 1906, and recorded in Ulster county clerk's office, April 30, 1886, book of mortgages 178, page 345; and,

WHEREAS, The amount claimed to be due on the said mortgage, at the first publication of this notice, is the sum of two thousand two hundred and ten dollars and eighty-nine cents (\$2,210.89), namely, two thousand one hundred and fifty dollars (\$2,150) principal, and sixty dollars and eighty-nine cents (\$60.89) interest, and that the whole amount remaining unpaid is the sum of two thousand two hundred and ten dollars and eighty-nine cents (\$2,210.89);

NOW, THEREFORE, Notice is hereby given according to statute in such case made and provided, that by virtue of the power of sale contained in said mortgage, duly recorded therewith as aforesaid, the said mortgage will be foreclosed by a sale of the premises herein described by the subscriber, the mortgage assignee therein, at public auction, on the 11th day of March, 1911, at 12 o'clock noon of that day, at the front door of the court house, in the city of Kingston, Ulster county, N. Y.

The following is a description of the mortgaged premises, so as aforesaid to be sold, as they are contained in the said mortgage: (Here insert description.)

Dated at Kingston, December 14, 1910.

JAMES WILSON,
Mortgage Assignee.

FRANK HOWARD,
Assignee's Attorney.

B. Publication, filing and service.**1. Real Property Law, § 541. Notice of sale; how given.**

The person entitled to execute the power of sale, must give notice, in the following manner, that the mortgage will be foreclosed, by a sale of the mortgaged property, or a part thereof, at a time and place specified in the notice:

³⁴ Rathbone v. Clarke, 9 Abb. Pr. 66, n.

1. A copy of the notice must be published, at least once in each of the twelve weeks, immediately preceding the day of sale, in a newspaper published in the county or in a municipal corporation a part of which is within the county in which the property to be sold, or a part thereof, is situated.

2. A copy of the notice must be fastened up, at least, eighty-four days before the day of sale, in a conspicuous place, at or near the entrance of the building, where the county court of each county, wherein the property to be sold is situated, is directed to be held; or, if there are two or more such buildings in the same county, then in a like place, at or near the entrance of the building nearest to the property; or, in the city and county of New York, in like place, at or near the entrance of the building where the trial and special terms of the supreme court of the first judicial district are directed by law to be held.

3. A copy of the notice must be delivered, at least eighty-four days before the day of sale, to the clerk of each county, wherein the mortgaged property, or any part thereof, is situated.

4. A copy of the notice must be served, as prescribed in the next section, upon the mortgagor, or, if he is dead, upon his executor or administrator, if an executor or administrator has been appointed, and also upon his heirs, providing he died the owner of the mortgaged premises. A copy of the notice may also be served in a like manner upon a subsequent grantee or mortgagee of the property whose conveyance was recorded, in the proper office for recording it in the county, at the time of the first publication of the notice of sale; upon the wife or widow of the mortgagor, and the wife or widow of each subsequent grantee whose conveyance was so recorded, then having an inchoate or vested right of dower, or an estate in dower, subordinate to the lien of the mortgagee; or in the event of the death of the subsequent grantee, who was at the time of his death the owner of the mortgaged premises, then upon his heirs or upon any person, then having a lien upon the property, subsequent to the mortgage by virtue of a judgment or decree duly docketed in the county clerk's office and constituting a specific or general lien upon the property. The notice, specified in this section, must be subscribed by the person entitled to execute the power of sale, unless his name distinctly appears in the body of the notice, in which case it may be subscribed by his attorney or agent.

2. Real Property Law, § 542. Notice of sale; how served.

Service of notice of the sale, as prescribed in subdivision fourth of the last section, must be made as follows:

1. Upon the mortgagor, his wife, widow, executor, or administrator, or a subsequent grantee of the property, whose conveyance is upon record, or his wife or widow; by delivering a copy of the notice, as prescribed by law for delivery of a copy of a summons in a civil action in a court of record, in order to make personal service thereof upon the person to be served; or by leaving a copy of such notice, addressed to the person to be served, at his dwelling-house, with a person of suitable age and discretion at least fourteen days before the day of sale. If said mortgagor is a foreign corporation, or being a natural person, he, or his wife, widow, executor, or administrator, or a subsequent grantee of the property whose conveyance is upon record, or his wife or widow, is not a resident of or within the State, then service thereof may be made upon them in like manner without the State, at least twenty-eight days prior to the day of sale.

2. Upon any other person, either in the same method, or by depositing a copy of the notice in the postoffice, properly inclosed in a postpaid wrapper, directed to the person to be served, at his place of residence, at least twenty-eight days before the day of sale.

3. Real Property Law, § 543. Duty of county clerk.

A county clerk, to whom a copy of a notice of sale is delivered, as prescribed in subdivision third of the last section but one, must forthwith affix it in a book kept in his office for that purpose; must make and subscribe a minute, at the bottom of the copy, of the time when he received and affixed it; and must index the notice to the name of the mortgagor.

4. Publication.

It is sufficient if the notice is published once in each week for twelve weeks successively, although all the publications are made within seventy-eight days, provided the first is eighty-four days prior to the date of sale, excluding the day on which the sale is made.³⁵ But the first publication must be at least eighty-four days before the day of sale, one day being excluded and the other included.³⁶ If the original notice of sale is defective, a republication with the several notices of postponement for the required period is a substantial compliance with the statute.³⁷ The validity of the sale is not affected by the fact that the paper in which notice was published was not calculated to give general information.³⁸ In computing the time for the publication, posting, and service of notices, the first day is to be excluded and the last included.³⁹

5. Posting.

It is only required that the notice should be affixed to the door of the building where County Courts are held; it is not necessary the person affixing it should afterward see it there.⁴⁰ Where the land lies in several counties the notice must be posted in each county, and a copy delivered to the clerk of each county.⁴¹

6. Service on interested parties.

Where in proceedings for the foreclosure by advertisement notice is not served on the owner of the equity of redemption, the sale is void and the purchaser stands merely as assignee and owner of the mortgage.⁴² If service of notice is not made upon a party entitled thereto his claim is not

35. *Howard v. Hatch*, 29 Barb. 297;
Cole v. Moffit, 20 Barb. 148; *Anonymous*, 1 Wend. 90.

36. *Bunce v. Reed*, 16 Barb. 347.

37. *Cole v. Moffit*, 20 Barb. 18.

38. *Wake v. Hart*, 12 How. Pr. 444;
Jencks v. Alexander, 11 Paige, 624.

39. *Westgate v. Handlin*, 7 How. Pr.

372; *Hornby v. Cramer*, 12 How. Pr. 493; *Bunce v. Reed*, 16 Barb. 347.

40. *Merritt v. Bowen*, 7 Cow. 13;
Hornby v. Cramer, 12 How. Pr. 490.

41. *Wells v. Wells*, 47 Barb. 416.

42. *Kellogg v. Dennis*, 38 Misc. 82,
77 N. Y. Supp. 172; *Dwight v. Phillips*, 48 Barb. 116.

barred or foreclosed, or his rights affected by the sale, and the assignee of a subsequent incumbrance stands in place of the original owner; actual notice of sale is insufficient.⁴³

The personal representatives of a deceased mortgagor must be served.⁴⁴ But, if no representative has been appointed, the proceedings are necessarily barred.⁴⁵ But his heirs or devisees need not be. But his wife must be served if she joined in the mortgage.⁴⁶ The wife of a grantee of the premises should be served with notice in order to cut off her inchoate right of dower.⁴⁷ But an omission to serve her will not affect the validity of the sale as to other persons duly served.⁴⁸ A judgment creditor must be served in order to cut off his lien.⁴⁹ But only those mortgagees or assignees whose mortgages or assignments are recorded are entitled to notice.⁵⁰

A service by mail is ineffective, if it is addressed to the party at a place other than his residence.⁵¹ But it does not invalidate the sale if the notice is properly directed to an administratrix, simply omitting her title as such.⁵² In case of service by mail the time is counted from the deposit of the letter, not from the date of the postmark or the time of forwarding.⁵³

43. *Root v. Wheeler*, 12 Abb. 294; *Dwight v. Phillips*, 48 Barb. 116; *Winston v. McCall*, 32 Barb. 241; *Wetmore v. Roberts*, 10 How. Pr. 51; *Mowry v. Sanborn*, 65 N. Y. 581. See *Mickles v. Dillaye*, 15 Hun, 296.

44. *Cole v. Moffit*, 20 Barb. 18; *St. John v. Bumpstead*, 17 Barb. 100. Compare *Bond v. Bond*, 51 Hun, 507, 4 N. Y. Supp. 569.

45. *Jefferson v. Bangs*, 197 N. Y. 35. Compare *Mackenzie v. Alster*, 64 How. Pr. 388; *Van Schaack v. Sanders*, 32 Hun, 515.

No representative.—Service on the wife of the mortgagor, if there is no personal representative, is not a valid service. *Mackenzie v. Alster*, 64 How. Pr. 388. The spirit of the statute is that notice shall be given to those whose interests are to be affected. Thus, where the validity of foreclosure by advertisement is attacked because no copy of the notice of the mortgage to be foreclosed was served upon personal representatives, the court will assume that there were no personal representatives and that the notice was

served upon the other parties in interest. Where there are no personal representatives of a deceased mortgagor the foreclosure is valid against those upon whom service is made. The intent of the section is that notice shall be served upon those whose interests are to be affected, and if the spirit of the statute is followed, it is valid, though the letter of the law may not have been followed. *Bond v. Bond*, 51 Hun, 507, 21 St. Rep. 684, 4 N. Y. Supp. 569.

46. *Anderson v. Austin*, 34 Barb. 319; *Low v. Purdy*, 2 Lans. 422; *King v. Duntz*, 11 Barb. 191.

47. *Northrup v. Wheeler*, 43 How. Pr. 122.

48. *Hubbell v. Sibley*, 5 Lans. 51; *aff'd*, 50 N. Y. 468.

49. *Groff v. Morehouse*, 51 N. Y. 503.

50. *Decker v. Boice*, 19 Hun, 152; *aff'd*, 83 N. Y. 215.

51. *Robinson v. Ryan*, 25 N. Y. 320.

52. *George v. Arthur*, 2 Hun, 406.

53. *Hornby v. Cramer*, 12 How. Pr. 490.

ARTICLE III.**THE SALE.****A. Conduct of sale.****1. Real Property Law, § 545. Sale; how postponed.**

The sale may be postponed, from time to time. In that case a notice of the postponement must be published, as soon as practicable thereafter, in the newspaper in which the original notice was published; and the publication of the original notice and of each notice of postponement, must be continued, at least once in each week, until the time to which the sale is finally postponed.

2. Real Property Law, § 546. Sale; how conducted.

The sale must be at public auction, in the daytime, on a day other than Sunday or a public holiday, in a county in which the mortgaged property, or a part thereof, is situated; except that, where the mortgage is to the people of the State, the sale may be made at the Capitol. If the property consists of two or more distinct farms, tracts, or lots, they must be sold separately; and as many only of the distinct farms, tracts, or lots, shall be sold, as it is necessary to sell, in order to satisfy the amount due at the time of the sale, and the costs and expenses allowed by law. But where two or more buildings are situated upon the same city lot, and access to one is obtained through the other, they must be sold together.

3. Real Property Law, § 547. Mortgagee or successor in interest may purchase.

The mortgagee, or his assignee, or the legal representative of either, may, fairly and in good faith, purchase the mortgaged property, or any part thereof, at the sale.

4. Postponement of sale.

It is unnecessary to give personal notice of postponement of sale; publication is all that is necessary, and a postponement from Sunday may be sufficient.⁵⁴ The practice is to appear and adjourn the sale. Where public notice is given of postponement, but the sale is afterwards made on the original date fixed for the sale, it is void.⁵⁵ The same result follows where, on the day appointed for the sale, an adjournment is announced for a specified time to those present, but the notice subsequently published is for a different day.⁵⁶

5. Sale in parcels.

The requirements of section 546 that real property consisting of two or more lots must be sold separately, and only as many may be sold as shall satisfy the amount due

54. *Westgate v. Handlin*, 7 How. Pr. 372.

55. *Jackson v. Clark*, 7 Johns. 225.

56. *Miller v. Hull*, 4 Denio, 104.

at the time of the sale, with costs and expenses, are mandatory and absolute, and thus where the record does not show that the sale of the entire property, which consisted of several lots, was necessary, a purchaser cannot be required to accept a doubtful title.⁵⁷ But, when the premises do not consist of distinct farms, parcels, or lots, they need not be sold separately.⁵⁸

6. Form of notice of postponement.

The sale above noticed is hereby postponed to the 25th day of March, 1911, at the hour and place mentioned in the foregoing notice.

Dated, March 11, 1911.

JAMES WILSON,
Assignee of Mortgagee.

FRANK HOWARD,
Attorney for Assignee.

B. Affidavits of sale.

1. Real Property Law, § 549. Affidavits on sale.

An affidavit of the sale, stating the time when, and the place where, the sale was made; the sum bid for each distinct parcel, separately sold; the name of the purchaser of each distinct parcel; and the name of the person or persons, court officer or other officer, to whom the proceeds of the sale were paid, and the sums thereof must be made by the person who officiated as auctioneer upon the sale. An affidavit of the publication of the notice of sale, and of the notice or notices of postponement, if any, may be made by the publisher or printer of the newspaper in which they were published, or by his foreman or principal clerk. An affidavit of the affixing of a copy of the notice, at or near the entrance of the proper court house, may be made by the person who so affixed it, or by any person who saw it so affixed, at least eighty-four days before the day of sale. An affidavit of the affixing of a copy of the notice in the book, kept by the county clerk, may be made by the county clerk, or by any person who saw it so affixed, at least eighty-four days before the day of sale. An affidavit of the service of a copy of the notice upon the mortgagor or upon any other person, upon whom the notice must or may be served, may

57. *Hemmer v. Hustace*, 51 Hun, 457, 14 Civ. Pro. 260, 22 Abb. N. C. 419, 3 N. Y. Supp. 850.

58. *Holden v. Gilbert*, 7 Paige, 211; *Hadley v. Chapin*, 11 Paige, 248; *Bunce v. Reed*, 16 Barb. 350; *Anderson v. Austin*, 34 Barb. 319. *Ellsworth v. Lockwood*, 42 N. Y. 89, holds that equity will relieve against a sale in gross of property mortgaged in one tract where a prior incumbrancer offers to pay the whole amount due for one parcel, which could have been sold separately. On subsequent appeal (9 Hun, 548), the case is distinguished,

and the general principle reiterated, that it is not necessary where division has taken place since the mortgage. As to the effect of a sale of premises subject to instalments, see *Cox v. Wheeler*, 7 Paige, 250; *Jencks v. Alexander*, 11 Paige, 626. It was held in *Lamerson v. Marvin*, 8 Barb. 9, that when lands were mortgaged as one undivided lot or parcel, and are subsequently subdivided, that the mortgagee is not bound to sell in parcels, and the same rule is followed in *Hubbell v. Sibley*, 5 Lans. 51; *Ellsworth v. Lockwood*, 9 Hun, 548.

be made by the person who made the service. Where two or more distinct parcels are sold to different purchasers, separate affidavits may be made with respect to each parcel, or one set of affidavits may be made for all the parcels.

2. Real Property Law, § 550. When one affidavit suffices; printed notice to be annexed.

The matters required to be contained in any or all of the affidavits, specified in the last section, may be contained in one affidavit, where the same person deposes with respect to them. A printed copy of the notice of sale must be annexed to each affidavit; and a printed copy of each notice of postponement must be annexed to the affidavit of publication and to the affidavit of sale. But one copy of the notice suffices for two or more affidavits, where they all refer to it and are annexed to each other and filed and recorded together.

3. Real Property Law, § 551. Affidavits may be filed and recorded.

The affidavits specified in the last two sections, may be filed in the office for recording deeds and mortgages, in the county where the sale took place. They must be recorded at length by the officer with whom they are filed, in the proper book for recording deeds. The original affidavits, so filed, the record thereof, and a certified copy of the record, are presumptive evidence of the matters of fact therein stated, with respect to any property sold which is situated in that county. Where the property sold is situated in two or more counties, a copy of the affidavits, certified by the officer with whom the originals are filed, may be filed and recorded in each other county, wherein any of the property is situated. Thereupon the copy and the record thereof have the like effect, with respect to the property in that county, as if the originals were duly filed and recorded therein.

4. Real Property Law, § 552. Note upon record of mortgage.

A clerk or a register, who records any affidavits, or a certified copy thereof, filed with him, must make a note, upon the margin of the record of the mortgage, in his office, referring to the book and page, or the copy thereof, where the affidavits are recorded.

5. Affidavit of publication and posting.

The affidavits may be taken before a notary public, and one copy of the notice of sale, to which all the affidavits are annexed, is sufficient; it is not necessary to annex a separate copy to each affidavit. The affidavits are *prima facie* evidence of the facts stated, but may be controverted; the power to sell does not rest on the "proof" of publication, but on the "fact" of the publication, and this may be shown independent of the affidavit.⁵⁹ It is sufficient if the affidavit of publication is made by the publisher of the papers in which it was printed.⁶⁰ If the affidavit shows the notice was affixed twelve weeks before the sale, it is sufficient without

^{59.} Mowry v. Sanborn, 68 N. Y. 153;
Mowry v. Sanborn, 72 N. Y. 534.

^{60.} Bunce v. Reed, 16 Barb. 347.

showing that the party making the affidavit afterward saw it there.⁶¹

6. Necessity of affidavits.

The affidavits of publication, etc., now take the place of the conveyance formerly executed by the one having the power of sale.⁶² Where the foreclosure by advertisement was regularly made, the property was purchased by the mortgagee for more than the amount due on the mortgage, and the affidavits of sale were all made in due form, it does not affect the title of the mortgagee that the affidavits were not filed, it being his private concern whether he would preserve the evidence of his title.⁶³ If the purchaser be not the person authorized to execute the power of sale, he obtains a good title upon payment of the purchase money and on compliance with the terms of sale, without filing and recording the affidavits, though he is not bound to pay the purchase money until the affidavits are filed or delivered, or tendered to him for filing.⁶⁴

The mortgagee's deed is not sufficient to convey title unless the sale was at public auction after statutory notice; and this is so even though the mortgage gives power of sale, expressly authorizing the mortgagee, on default, to sell the premises at private sale.⁶⁵ Where the premises are purchased by the mortgagee, the foreclosure is not complete without the affidavits which stand in the place of the deed.⁶⁶ If no affidavits are made, and a person other than the mortgagor is the purchaser, common-law proof may be made of publication of notice.⁶⁷

The filing and recording of the affidavits is not necessary as against the mortgagor's equity of redemption, which is barred and foreclosed by the proceedings. Where there has been a sale pursuant to a power under the statute, the equity of redemption of the mortgaged premises is thereby foreclosed, though the affidavit of publication of notice of sale and of the posting thereof be not made and recorded as

61. *Hornby v. Cramer*, 12 How. Pr. 491.

62. *Ketcham v. Deutsch*, 211 N. Y. 85.

63. *Matter of Lawson*, 42 App. Div. 377, 59 N. Y. Supp. 152. Compare, *Cowdrey v. Turner*, 85 Hun, 451, 66 St. Rep. 207, 32 N. Y. Supp. 889.

64. *Cowdrey v. Turner*, 85 Hun, 451, 32 N. Y. Supp. 889, 66 St. Rep. 208.

65. *Lawrence v. Loan Co.*, 13 N. Y. 200.

66. *Arnot v. McClure*, 4 Denio, 41; *Cohoes Co. v. Goss*, 13 Barb. 138; *Layman v. Whiting*, 20 Barb. 559; *Bryan v. Butts*, 27 Barb. 503; *Howard v. Hatch*, 29 Barb. 297.

67. *Brewster v. Power*, 10 Paige, 563. See, also, *Chalmers v. Wright*, 5 Robt. 713.

required by statute for twenty years thereafter.⁶⁸ The affidavits required by statute are not conclusive as to the facts when the premises are purchased by the owner of the mortgage, and where the terms of sale are not stated therein, oral evidence is admissible to prove them.⁶⁹

The affidavits must show that the places to which the notices were mailed to the parties were the residences of such parties.⁷⁰ The affidavits must show that the proceedings were conducted according to the law in force when the foreclosure was commenced.⁷¹ The affidavits of sale and the service of notice thereof on the mortgagor must be made by the persons named in the statute. The fact that the statute reads that the affidavits "may" be made by the persons designated does not entitle other persons to make them.⁷²

7. Form of affidavit of affixing by clerk.

STATE OF NEW YORK, }
COUNTY OF ULSTER, } ss.:

PHILIP ROSS, deputy county clerk, of the city of Kingston, said county, being duly sworn, says that he is the deputy county clerk of said county of Ulster, the county in which the mortgaged premises described in the annexed printed notice of sale are situated; that on the 17th day of December, 1910, he did affix a printed copy of notice of sale, a copy whereof is also hereto annexed, in a book prepared and kept by the clerk of said county of Ulster for that purpose; and also immediately entered in said book, at the bottom of such notice, the time when he received and affixed it, and did also immediately index the same to the name of the mortgagor in said notice name. Deponent further says that the time when he did and performed said acts was at least eighty-four days prior to the time in said notice specified for the sale of the mortgaged premises therein described.

(Signature.)

(Jurat.)

68. *Tuthill v. Tracy*, 31 N. Y. 157. This case is cited in *Osborn v. Merwin*, 12 Hun, 332, and it is there held that a sale had under a foreclosure by advertisement pursuant to the statute bars the equity of redemption although no affidavits are made. The character of common-law evidence necessary is there pointed out, and *Hawley v. Bennett*, 5 Paige, 104, and *Guy v. Mead*, 22 N. Y. 462, are referred to as authority. The facts necessary to be proven by affidavit, the right to supply defects by parol, and the character

of parol evidence to show the facts are discussed in *Mowry v. Sanborn*, reported on three appeals to the Court of Appeals in 65 N. Y. 581, 68 N. Y. 153, and 72 N. Y. 534. Also, below, 62 Barb. 223, 7 Hun, 380, 11 Hun, 545, and the reported cases referred to and collated. See, also, *Story v. Hamilton*, 86 N. Y. 428, aff'g 20 Hun, 133.

69. *Story v. Hamilton*, 86 N. Y. 428.

70. *Dwight v. Phillips*, 48 Barb. 116.

71. *James v. Stull*, 9 Barb. 482.

72. *Deutsch v. Haab*, 135 App. Div. 756, 119 N. Y. Supp. 911.

8. Form of affidavit of auctioneer.

STATE OF NEW YORK, }
COUNTY OF ULSTER, } ss.:

FRANK HOWARD, of Kingston, in the county of Ulster, being duly sworn, doth depose and say that he is the person who officiated as auctioneer at the sale of the premises described in the annexed printed copy of the notice of sale by virtue of the mortgage therein mentioned, and pursuant to said notice, and that this deponent as such auctioneer, and at public auction on the 25th day of March, 1911, at 12.15 o'clock in the afternoon of that day, at the front door of the court house in the city of Kingston, county of Ulster, N. Y., by virtue of the power of sale contained in said mortgage, and pursuant to said notice, did sell to James Wilson, of the city and county of New York, upon the terms and subject to the reservations and conditions hereinafter mentioned, the lands and premises, a description whereof is contained in said mortgage, and set forth in said notice as follows: (Here insert description as in notice.)

Deponent further says that at said sale the said James Wilson purchased the said lands and premises above described at and for the price of \$1,500, he being the highest bidder therefor, and that being the highest sum bidden for the same. Deponent further says that such sale was in the daytime, and in all respects honestly and fairly and legally conducted, according to deponent's best knowledge and belief; that the premises, so far as the same consisted of distinct tracts, farms or lots, were sold separately, and no more tracts, farms or lots were sold than were necessary to satisfy the amount claimed to be due on said mortgage in said notice, at the day of the first publication thereof, and interest and costs and expenses allowed by law.

(Signature.)

(Jurat.)

9. Form of affidavit of affixing on courthouse door.

FRANK HOWARD, of the city of Kingston, in the county of Ulster and State of New York, being sworn, saith he did, on the 18th day of December, 1910, and at least eighty-four (84) days prior to the time specified in the annexed printed copy of notice for the sale of the mortgaged premises therein described, fasten up a copy of the annexed printed notice in a proper and substantial manner, in a conspicuous place at or near the entrance of the building where the County Court of said county of Ulster is directed to be held, to wit, on the outer side of the outward door of the court house or building in the city of Kingston, where the County Courts are directed and appointed to be held, in and for the county of Ulster, in which said mortgaged premises are situated, that being the court house or building where County Courts of said county are directed and appointed to be held, nearest to said mortgaged premises.

(Signature.)

(Jurat.)

10. Form of affidavit of publication.

STATE OF NEW YORK, }
COUNTY OF ULSTER, } ss.:

JOHN W. SEARING, of the city of Kingston, Ulster county, State of New York, being duly sworn, doth depose and say that he is, and during the time of the publication was, one of the publishers and proprietors of the newspaper called the *Kingston Weekly Leader*, a public newspaper printed and published in the city of Kingston, county of Ulster, that being the county where the premises described in the annexed printed notice of sale, or part thereof, are situated. Deponent further says that the notice of the mortgage sale, of which a printed copy is hereto annexed, was published in said newspaper at least once in each of the twelve (12) weeks immediately preceding the day of sale specified in said notice of sale; said publication having been commenced on the 17th day of December, 1910, and ending on the 11th day of March, 1911.

(Signature.)

(Jurat.)

11. Form of affidavit of service of notice.

STATE OF NEW YORK, }
COUNTY OF ULSTER, } ss.:

WILLIAM BUTTS, of the town of Hardenbergh, county of Ulster, State of New York, being duly sworn, says: That he resides in said town of Hardenbergh; that on the 18th day of December, 1910, this deponent served a copy of the said notice on each of the several persons next hereinafter named, by depositing a copy of the said notice in the post office hereinafter stated, properly inclosed in a postpaid wrapper, directed to the persons to be served, at their respective places of residence, to wit: To the several persons next hereinafter named, and at and to the post offices set opposite their names respectively, as hereinafter stated; that on the day last aforesaid this deponent deposited all of said notices so inclosed and directed as aforesaid, in the post office at Hardenbergh, where said deponent resided, and paid the full legal postage on each of them.

That at the time said notices were so deposited in the post office at Hardenbergh there was a regular communication by mail at least once in each week between said Hardenbergh post office and each of the other post offices to which said notices were directed, and that at the time each of the said persons resided at the respective places to which their said notices were so directed. That the names and the direction of said notices to them as aforesaid were respectively as follows, to wit: (Here insert names, direction.) Deponent further says that at the times and the places hereinafter named, he served personally a copy of said notice of foreclosure and sale on the following persons, viz.: (Here insert names, place of service, and date of service.) By delivering a copy of the same to each of said persons personally, and leaving the same with each of them.

(Signature.)

(Jurat.)

C. Effect of sale.**1. Real Property Law, § 548. Effect of sale.**

A sale, made and conducted as prescribed in this article, to a purchaser in good faith, is equivalent to a sale, pursuant to judgment in an action to foreclose the mortgage, so far only as to be an entire bar of all claim or equity of redemption, upon, or with respect to, the property sold, of each of the following persons:

1. The mortgagor, his heir, devisee, executor, or administrator.
2. Each person claiming under any of them, by virtue of a title or of a lien by judgment or decree, subsequent to the mortgage, upon whom the notice of sale was served, as prescribed in this article.
3. Each person so claiming, whose assignment, mortgage, or other conveyance was not duly recorded in the proper book for recording the same in the county, or whose judgment or decree was not duly docketed in the county clerk's office, at the time of the delivery of a copy of the notice of said sale to the clerk of the county; and the executor, administrator, or assignee of such a person.
4. Every other person, claiming under a statutory lien or incumbrance, created subsequent to the mortgage, attaching to the title or interest of any person, designated in either of the foregoing subdivisions of this section.
5. The wife or widow of the mortgagor, or of a subsequent grantee, upon whom notice of the sale was served as prescribed in this article, where the lien of the mortgage was superior to her contingent or vested right of dower, or her estate in dower.

2. Real Property Law, § 553. Deed not necessary. When affidavits not necessary; but purchaser may require them.

The purchaser of the mortgaged premises, upon a sale conducted as prescribed in this title, obtains title thereto, against all persons bound by the sale, without the execution of a conveyance. Except where he is the person authorized to execute the power of sale, such purchaser also obtains title, in like manner, upon payment of the purchase money, and compliance with the other terms of sale, if any, without the filing and recording of the affidavits, as prescribed in the last section but one. But he is not bound to pay the purchase money, until the affidavits, specified in that section, with respect to the property purchased by him, are filed, or delivered or tendered to him for filing.

3. Real Property Law, § 562. Delivery of certain affidavits to purchaser.

Each county clerk and register in this state, in whose office, affidavits in foreclosure of mortgages by advertisement, or the certified copies thereof, have been or shall be filed and recorded pursuant to the provisions of this article is hereby authorized to deliver the same to the purchaser of the mortgaged property on the foreclosure sale, and such purchaser shall be entitled to such delivery.

4. Rights foreclosed.

It is the policy of the statute that foreclosures and sales should in cases free from fraud or gross irregularity be held final and conclusive.⁷³ Courts of equity regard a mortgagee

⁷³ Jackson v. Henry, 10 Johns. 195; Ditmas, 4 Paige, 531; Wilson v. Doolittle v. Lewis, 7 Johns. 50; Slee v. Troup, 2 Cow. 195. Manhat. Co., 1 Paige, 70; Vroom v.

in the execution of the power of sale contained in the mortgage by statutory foreclosure as a trustee executing a power in trust, and bound to conduct the proceedings fairly and in good faith. Relief will be given by suit to set aside such proceedings in case of fraud or bad faith, upon much the same grounds as are sufficient for opening the sale where the foreclosure has been by action.⁷⁴ In order to cut off the rights of the mortgagor and of subsequent purchasers and incumbrancers, the requirements of the statute must be substantially complied with, and what is a substantial compliance is to be determined with regard to its objects. These objects being to relieve parties from the expense of a suit and to enable persons not learned in law to conduct the foreclosure, the construction of the statute should be liberal and not technical.⁷⁵ A regular foreclosure bars the claim of the mortgagor and all persons having liens subsequent to the mortgage.⁷⁶ Inchoate dower is barred, if notice of the sale is served on the wife.⁷⁷ And the omission to make the wife of the mortgagor a party, she having joined in the mortgage, merely leaves her the right of redemption; it does not render the foreclosure invalid as to the other parties properly served.⁷⁸ But the claim of a person not served is not barred, even though he had actual notice of the sale.⁷⁹ The interest of a tenant under a demise from the mortgagor made subsequent to the mortgage is extinguished by the sale.⁸⁰ A mortgagee who has acquired the actual possession of the premises is entitled to the crops sown by the lessee and growing on the land at the time of sale, and the same rule holds good as to fixtures.⁸¹ If the mortgagee purchases on a sale for an instalment his mortgage is merged but if a third person purchases, the mortgagor, if compelled to pay the balance of the debt by a suit on the bond, can have a reassignment of the mortgage, to enable him to secure repayment out of the land.⁸² The sale may be made

74. *Soule v. Ludlow*, 3 Hun, 503.

75. *Jackson v. Henry*, 10 Johns. 195; *Vroom v. Ditmas*, 4 Paige, 526; *Hubbell v. Sibley*, 5 Lans. 51.

76. *Hornby v. Cramer*, 12 How. Pr. 490.

77. *Brackett v. Baum*, 50 N. Y. 8.

78. *Candee v. Burke*, 1 Hun, 546.

79. *Root v. Wheeler*, 12 Abb. 294; *Van Slyke v. Selden*, 9 Barb. 284; *King v. Duntz*, 11 Barb. 193; *Stanton v. Kline*, 16 Barb. 9; *St. John v.*

Bumpstead, 17 Barb. 100; *Cole v. Moffit*, 20 Barb. 18; *Wetmore v. Roberts*, 10 How. Pr. 51; *Dwight v. Phillips*, 48 Barb. 116.

80. *Simers v. Saltus*, 3 Denio, 214.

81. *Lane v. King*, 8 Wend. 584; *Aldrich v. Reynolds*, 1 Barb. 613; *Shepherd v. Philbrick*, 2 Denio, 176; *Gillett v. Balcom*, 6 Barb. 370; *Gardner v. Finley*, 19 Barb. 317.

82. *Cox v. Wheeler*, 7 Paige, 248.

by the mortgagee or owner of the mortgage, and he may himself become the purchaser and make the affidavit which stands in place of the conveyance.⁸³

5. Purchaser as mortgagee in possession.

The failure to give notice of the sale to a material party does not necessarily render the sale void. It may be good as to persons regularly served with the notice of sale; and the purchaser becomes an assignee of the mortgage. If the purchaser enters into possession of the premises, he occupies, as against a party not properly served, the status of a mortgagee in possession.⁸⁴ Each subsequent grantee becomes in turn assignee of the mortgage.⁸⁵ Under such circumstances the party not served may have a right to redeem.⁸⁶ But, if the sale is void, for want of proof of the sale, the purchaser may be a trespasser, not a mortgagee in possession.⁸⁷

6. Ineffective mortgage.

If the mortgage is usurious, the sale does not convey a good title except to a *bona fide* purchaser at the sale.⁸⁸ But, even a *bona fide* purchaser at a sale under a paid mortgage acquires no title.⁸⁹ And a sale after a tender of the amount due by a subsequent lienor of the amount of the debt and interest is void where the purchaser has notice of that fact.⁹⁰

ARTICLE IV.

COSTS.

A. Real Property Law, § 554. Costs allowed.

The following costs, in addition to the expenses specified in the next section, are allowed in proceedings taken as prescribed in this article:

1. For drawing a notice of sale, a notice of the postponement of a sale, or an affidavit, made as prescribed in this article, for each folio, twenty-five cents; for making each necessary copy thereof, for each folio thirteen cents.

2. For serving each copy of the notice of sale, required or expressly permitted to be served by this article, and for affixing each copy thereof, required to be affixed upon the courthouse, as prescribed in this article, one dollar.

3. For superintending the sale, and attending to the execution of the necessary papers, ten dollars.

83. Hubbell v. Sibley, 5 Lans. 51.

84. Robinson v. Ryan, 25 N. Y. 320; Kellogg v. Dennis, 38 Misc. 82, 77 N. Y. Supp. 172.

85. Ketcham v. Deutsch, 211 N. Y. 85.

86. Limitation of action.—An action to redeem from a mortgage is to be brought within 20 years. Civil Practice Act, section 46. See, also, Hubbell v. Sibley, 50 N. Y. 468.

87. Deutsch v. Haab, 135 App. Div. 756, 119 N. Y. Supp. 911.

88. Jackson v. Dominick, 14 Johns. 435; Bissell v. Kellogg, 60 Barb. 617; aff'd, 65 N. Y. 432; Hyland v. Stafford, 10 Barb. 558; Dix v. Van Wyck, 2 Hill, 523.

89. Cameron v. Erwin, 5 Hill, 272; Warner v. Blakeman, 36 Barb. 501.

90. Burnet v. Denniston, 5 Johns. 35.

B. Real Property Law, § 555. Expenses allowed.

The sums actually paid for the following services, not exceeding the fees allowed by law for those services, are allowed in proceedings, taken as prescribed in this article:

1. For publishing the notice of sale, and the notice or notices of postponement, if any, for a period not exceeding twenty-four weeks.
2. For the services specified in section five hundred and forty-three of this chapter.
3. For recording the affidavits; and also, where the property sold is situated in two or more counties, for making and recording the necessary certified copies thereof.
4. For necessary postage and searches.

C. Real Property Law, § 556. Taxation of costs and expenses.

The costs and expenses must be taxed, upon notice, by the clerk of the county where the sale took place, upon the request and at the expense of any person interested in the payment thereof. Such costs and expenses shall be taxed, and such taxation may be reviewed, in the same manner as costs in a civil action in the supreme court.

D. Items of costs and expenses.

Services not mentioned in the statute cannot be taxed although actually necessary, but one who obtained an injunction restraining the sale but allowed the continuation of the notice of publication cannot on taxation object to the allowance of the whole expense of publication although it exceeded the statutory time.⁹¹ Where the mortgagee omitted to notify certain necessary parties, and for that reason postpones the sale, he cannot tax costs of the sale first attempted.⁹² In taxing costs in such proceeding, matter inserted in the notice, which was not required by the statute, should not be considered in determining the number of folios to be allowed, nor should a charge be allowed for serving notices on persons not required by the statute to be served. A charge for drawing notices and for a copy to keep is proper, as is also a copy for the printer, and printed copies may be charged for. As one printed notice is sufficient for two or more affidavits, under section 2397, there is no necessity for more than one, to which the several affidavits may be attached, and that one will be allowed, for a charge cannot be made for a copy served on the auctioneer, but it is proper to charge for thirteen weeks' publication. Devisees under the recorded will of a deceased mortgagor, and lessee under a recorded lease, may be deemed grantees, who should be served with notice, and where such devisees are minors under fourteen years of age, a notice is also properly

⁹¹ *Collins v. Standish*, 6 How. Pr. 493.

⁹² *Hornby v. Cramer*, 12 How. Pr. 490.

served on their guardian, which may be charged for.⁹³ One who claims the surplus as heir-at-law of the mortgagor, and has been recognized as such, is entitled to require taxation.⁹⁴

E. Form of bill of costs.

Notice of sale, ten folios, at 25 cents.....	\$2 50
Copy same, to keep, at 13 cents.....	1 30
Copy, notice for printer, at 13 cents.....	1 30
Copy for notice for posting on court-house door.....	1 30
Expense of posting	1 00
Affidavit of posting, two folios and copy, at 25 cents.....	50
Copy, notice annexed, at 13 cents.....	13
Clerk's fees on same.....	50
Affidavit of posting in clerk's office, two folios and copy, at 13 cents	52
Printer, publishing notice, thirteen insertions, ten folios...	43 50
Printer, publishing two postponements of sale, two folios...	3 00
Printer, publishing one additional insertion, notice of sale..	2 50
Affidavit of publication, two folios and a copy, at 13 cents..	52
Copying notice annexed, at 13 cents.....	1 30
Copy of notice to serve on mortgagor, at 13 cents.....	1 30
Serving ten notices.....	10 00
Affidavit of service, two folios, at 38 cents.....	76
Copying notice annexed, five folios, at 13 cents.....	1 30
Postage	50
Clerks' fees for search.....	8 00
Affidavit of circumstances of sale, four folios and copy, at 38 cents	3 04
Copy, printed notice annexed.....	1 35
Superintending sale	10 00
Recording affidavits	4 00
Oaths of five affidavits, at 10 cents.....	50

ULSTER COUNTY, ss.:

FRANK HOWARD, of the city of Kingston, said county, being duly sworn, says that he is attorney for James Wilson, the assignee of the mortgage executed by John Joseph to Fred W. Wells, and which has been foreclosed under the statute.

That according to the best of deponent's knowledge and belief, the several disbursements charged in the bill of costs hereto annexed have been actually and necessarily paid or incurred; that the copies of papers charged for therein were actually and necessarily used or obtained for use; that such bill of costs contains no charge for any draft or copy of any affidavit or other paper which has not been made, or for any other service which has not been performed, except such services as are allowed by law to be taxed prospectively, and that the number of folios contained in the draft or in the copies of said papers are not overcharged in such bill.

(Signature.)

(Jurat.)

93. *Ferguson v. Wooley*, 9 Civ. Pro. 236.

94. *Matter of Moss*, 6 Hun, 263.

ARTICLE V.**SURPLUS MONEYS.****A. Real Property Law, § 557. Surplus money to be paid into Supreme Court.**

An attorney or other person who receives any money arising upon a sale made as prescribed in this article, must, within ten days after he receives it, pay into the Supreme Court the surplus, exceeding the sum due and to become due upon the mortgage, and the costs and expenses of the foreclosure, in like manner and with like effect as if the proceedings to foreclose the mortgage were taken in an action brought in the Supreme Court, and triable in the county where the sale took place.

B. Real Property Law, § 558. Petition for surplus.

A person, who had, at the time of the sale, an interest in or lien upon the property sold, or a part thereof, may, at any time before an order is made, as prescribed in the next section but one, file in the office of the clerk of the county, where the sale took place, a petition stating the nature and extent of his claim, and praying for an order, directing the payment to him of the surplus money or part thereof.

C. Real Property Law, § 559. Proceedings on petition.

A person filing a petition, as prescribed in the last section, may, after the expiration of twenty days from the day of sale, apply to the Supreme Court, at a term held within the judicial district, embracing the county where his petition is filed, for an order, pursuant to the prayer of his petition. Notice of the application must be served, in the manner prescribed by law for the service of a paper upon an attorney in a civil action, in a court of record, upon each person, who has filed a like petition, at least eight days before the application; and also upon each person, upon whom a notice of sale was served, as shown in the affidavit of sale, or upon his executor or administrator. But, if it is shown to the court, by affidavit, that service upon any person, required to be served, cannot be so made with due diligence, notice may be given to him in any manner which the court directs.

D. Real Property Law, § 560. Order for distribution.

Upon the presentation of the petition, with due proof of notice for application, the court must make an order referring it to a suitable person to ascertain and report the amount due to the petitioner, and to each other person, which is a lien upon the surplus money; and the priorities of the several liens thereupon. Upon the coming in and confirmation of the referee's report, the court must make such an order, for the distribution of the surplus money, as justice requires.

E. Real Property Law, § 561. Limitation of last four sections.

The last four sections do not apply to surplus money, arising upon the sale of real property, of which a decedent died seized where letters testamentary or letters of administration, upon the decedent's estate, were, within two years before the sale, issued from a surrogate's court within the State, having jurisdiction to issue them.

F. Who entitled to surplus.

Where a mortgage, payable in instalments, is foreclosed for the amount due, subject to future instalments, the land becomes the primary fund for the future payments, and the mortgagor is entitled to the surplus on the sale.⁹⁵ A subsequent incumbrancer, with no notice of the foreclosure, has no claim to surplus moneys on the sale, his lien not having been affected, unless he releases to the purchaser all claim on the equity of redemption.⁹⁶ A judgment creditor whose judgment was not a lien has no right to share in the distribution of the proceeds of sale of decedent's real estate on foreclosure.⁹⁷

G. Liability of mortgagee.

After foreclosure the mortgagee is not liable, as trustee, to the holders of subsequent liens for the surplus, if he has received only the amount due him on the mortgage and the expenses of foreclosure, leaving the surplus in the hands of the purchaser who asserts a claim thereto. The mortgagee's liability is to the mortgagor and those who represent him, and a purchaser who claims and retains the surplus, as holder of the second mortgage lien, is liable to a subsequent judgment creditor for the balance of the surplus after deducting the amount of his own lien, but it is not liable for interest on such balance until after notice or demand by the party entitled to it.⁹⁸ It is a defense by a mortgagee who has sold under the statute, when sued for the surplus by the mortgagor's grantee, that the former had a lien on the land equal to the surplus.⁹⁹

H. Attack on regularity of proceeding.

If the sale is irregular the owner of the equity of redemption cannot attack it in an action to recover an alleged surplus arising thereon; he cannot affirm it without being bound by its terms. If dissatisfied the remedy of such owner is by motion to set the sale aside.¹

Where property has been sold upon terms stated publicly at the sale, though not included in the published notice, the mortgagor cannot affirm the sale as to the price bid when made upon the terms stated, and then repudiate the terms of sale and claim, as surplus money, which, by the terms of sale, was to be applied in payment of a former mortgage,

95. *Cox v. Wheeler*, 7 Paige, 248.

96. *Walker v. Harris*, 7 Paige, 167;

Winslow v. McCall, 32 Barb. 241.

97. *Davis v. Davis*, 4 Redf. 355.

98. *Russell v. Duffou*, 4 Lans. 399.

99. *Eddy v. Smith*, 13 Wend. 488.

1. *Story v. Hamilton*, 86 N. Y. 428.

as though no such terms controlled the action and bid of the mortgagee in bidding in the property.² Although the receipt by the mortgagor, or his representative, of the surplus moneys arising on the sale may not estop him from questioning the regularity of the proceedings, it would seem to be evidence to be considered in passing on the question.³

I. Form of petition for payment of surplus moneys.

To the Supreme Court:

The petition of Lewis Mayer, of the city of Kingston, respectfully shows that heretofore proceedings were taken by James Wilson, pursuant to article 17 of the Real Property Law for the sale of the real property described as follows, to wit: (describe the same), in foreclosure of a mortgage executed by John Joseph to Fred W. Wells, dated January 28, 1903, and recorded in Ulster county clerk's office on the 2d day of August, 1903, at 1.30 o'clock in the afternoon in book No. 166 of mortgages, at page 61, and a sale of said property was made in said proceedings on the 25th day of March, 1911.

That a surplus remained of the proceeds of said sale amounting to four hundred dollars (\$400) over and above the sum due, and to grow due upon said mortgage and the costs and expenses of the said foreclosure, and that on the 10th day of April, 1911, the attorney for the assignee of said mortgage, by whom said mortgage was foreclosed, paid into this court and to the county treasurer of Ulster county the said surplus.

And your petitioner further shows, that at the time of said sale he had an interest in, or lien upon, the said property, said interest or lien being by reason of (state nature of interest or lien); and your petitioner claims that he is entitled to said surplus moneys, by reason of his said interest in, or lien upon, said property. And your petitioner prays for an order of this court directing the payment to him of said surplus moneys, or of so much of said surplus moneys as may be necessary to satisfy his said interest or lien.

Dated,

(Signature.)

(Add verification.)

J. Form of notice of motion.

(Title.)

Sirs.—Take notice that the undersigned will apply at, etc., on, etc., for an order pursuant to the prayer of his petition, filed in the Ulster county clerk's office on the 20th day of May, 1911, directing the payment to him of the surplus moneys arising upon the sale of the property described in the said petition, a copy of which is herewith served upon you, and for such other and further relief as may be proper.

Dated,

Yours, etc.,

JOHN S. WILLIAMS,
Attorney for Petitioner.

To

² Story v. Hamilton, 20 Hun, 133;
aff'd, 86 N. Y. 428.

³ Candee v. Burke, 1 Hun, 546.

K. Form of order of reference.

(Caption, usual form.)

(Title.)

Upon the presentation of the petition of Lewis Mayer, dated May 10, 1911, which was filed in the Ulster county clerk's office on the 20th day of May, 1911, with proof of due service of notice of this application upon each person who has filed a like petition, and also upon each person upon whom a notice of sale was served, as was shown in the affidavit of sale, and on motion of John S. Williams, attorney for the said petitioner, and after hearing, etc., and on reading (name opposing papers).

It is hereby ordered, that S. F. Ward, Esq., of Kingston, counsellor-at-law, be and he hereby is appointed referee, to ascertain and report the amount due to the petitioner and to each other person, which is a lien upon the surplus money mentioned in said petition of Lewis Mayer and the priorities of the several liens thereupon.

JAMES A. BETTS,

Justice Supreme Court.

L. Form of report of referee.

(Title.)

I, the undersigned referee, appointed by order of this court, dated May 20, 1910, to ascertain and report the amount due to Lewis Mayer, the petitioner in this proceeding, and to each other person, which is a lien upon the surplus moneys arising upon the sale of the premises described in the said petition and the priority of the several liens thereupon, do respectfully report (proceed substantially as in report in foreclosure by suit, making necessary changes to suit the case).

Dated, June 12, 1911.

(Signature of referee.)

M. Form of order upon report of referee.

(Caption.)

(Title.)

On reading and filing the report, dated June 12, 1911, of S. F. Ward, Esq., referee, appointed herein by order of this court, dated May 20, 1911, from which it appears that Lewis Mayer is entitled to the whole of the surplus moneys arising upon the sale of the real property described in his petition, filed in the Ulster county clerk's office, on the 20th day of May, 1911, which surplus has been paid into court and to the county treasurer of Ulster county (or make other recitals according to the report), and it appearing that due notice of this motion has been given to (name parties served).

Now, on motion of John S. Williams, Esq., counsel for said petitioner, and after hearing, etc. (or no one appearing to oppose), and on reading (name any other motion papers).

It is hereby ordered that the said report be and the same is hereby confirmed, and that said county treasurer pay, etc. (here insert provisions for distribution as may be required).

JAMES A. BETTS,

Justice Supreme Court.

FORECLOSURE OF MECHANICS' LIENS.

See MECHANICS' LIENS.

FORECLOSURE OF LIENS ON CHATTELS.

See CHATTELS, FORECLOSURE OF LIENS ON.

GENERAL ASSIGNMENT FOR BENEFIT OF CREDITORS.

See DEBTOR AND CREDITOR LAW.

HABEAS CORPUS AND CERTIORARI TO INQUIRE INTO CAUSE OF DETENTION.*

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ARTICLE I.

WHEN REMEDY IS AVAILABLE.

A. Constitutional provisions.

Section 4 of Article I of the New York Constitution provides that the privilege of the writ of habeas corpus shall not be suspended, unless when in case of rebellion or invasion the public safety may require its suspension. The jurisdiction of the Supreme Court, of which the Appellate Division is a part, in habeas corpus is beyond the power of the Legislature to disturb.¹

B. Civil Practice Act.

Outside of special statutes authorizing the writ of habeas corpus in particular cases, the statutory provisions relating to the writ are now contained in article 77 of the Civil Practice Act. The numerous writs under the common law have been gradually eliminated from our practice. The Civil Practice Act abolished all State writs except the writ of habeas corpus and certiorari to inquire into the cause of detention. On account of the constitutional provision it was thought unwise to attempt to abolish the writ of habeas corpus. Except as otherwise expressly prescribed by statute, the provisions of article 77 apply to and regulate the proceedings upon every common law or statutory writ of habeas corpus, as far as they are applicable; and the authority of a court or a judge to grant such a writ, or to proceed thereupon, by statute or the common law, must be exercised in conformity to this article in any case therein provided for.²

1. *People ex rel. Patrick v. Frost*, 524.
 133 App. Div. 179, 117 N. Y. Supp. 2. Civil Practice Act, section 1282.

C. Nature of writ.

The writ of habeas corpus (*habeas corpus ad subjiciendum et recipiendum*) is a high prerogative writ known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause. It is defined to be a writ directed to the person detaining another and commanding him to produce the body of the prisoner at a certain time and place with the day and cause of his caption, to do, submit to, and receive whatsoever the court or judge awarding the writ shall consider in that behalf. Strictly speaking it is not an action or suit, but is a summary remedy open to the person detained. It is civil rather than criminal in its nature, and it is a legal and not an equitable remedy. It is in the nature of a writ of error to examine the legality of the commitment, but it cannot be made to perform the office of a writ of error. It is intended solely to free the petitioner from the illegal restraint, and not to punish the respondent, or to afford redress to the petitioner for the restraint; nor can it be used as a means of obtaining evidence of the whereabouts of the person detained.³

Habeas corpus is a common-law writ; its privilege is preserved by the organic law of the State of New York, and its legitimate purpose cannot be denied by statute. It is not available to inquire thereby into the mere legality or justice of a judgment or mandate, if the term "legality" or "justice" is not used so as to include questions of jurisdiction or power; but the want of jurisdiction of a tribunal to pronounce a judgment or mandate, by which a prisoner is placed and detained in custody, furnishes to him the right to resort to such writ for relief, and that is the subject of inquiry thereunder. If a party is held in custody only by virtue of a judgment pronounced when there is no jurisdiction to pronounce the same, either on account of want of jurisdiction or by reason of its being in excess of jurisdiction, the judgment is void, and he is not put to an appeal therefrom, but may be released by habeas corpus.⁴

The object of the writ is not to determine whether a person has committed a crime, but whether he is illegally

3. *People v. Walts*, 122 N. Y. 238; *How. Pr.* 247; *In re Larson*, 31 Hun, 539.
Ex parte Watkins, 3 Pet. (U. S.) 201;
Wales v. Whitney, 114 U. S. 571;
Church on Habeas Corpus, § 177;
Matter of Wright, 29 Hun, 357, 65
How. Pr. 119; *Matter of Barnett*, 53

4. *People ex rel. Young v. Stout*, 81 Hun, 336, 63 St. Rep. 155, 30 N. Y. Supp. 898; *aff'd* without opinion, 144 N. Y. 699.

imprisoned or restrained of his liberty.⁵ The writ of habeas corpus is not a writ of review; its sole function is to relieve from unlawful imprisonment, and the sole inquiry is whether the mandate or the judgment by virtue of which the prisoner is detained is void.⁶ A writ of habeas corpus to inquire into the detention of one confined in a prison under conviction and sentence is a civil, not a criminal, proceeding, and as a civil, special proceeding to enforce a civil right, although its purpose is to effect the release of the person from imprisonment or custody under a criminal prosecution.⁷

D. History of writ.

Relief from illegal imprisonment by means of this remedial writ is not the creature of any statute. The history of the writ is lost in antiquity. It was in use before *Magna Charta*, and came to us as part of our inheritance from the mother country, and exists as part of the common law of the State. It is intended and well adapted to effect the great object secured in England by *Magna Charta*, and made part of our Constitution that no person shall be deprived of his liberty "without due process of law." This writ cannot be abrogated or its efficiency curtailed by legislative action. Cases within the relief afforded by it at common law cannot, until the people voluntarily surrender the right to this the greatest of all writs by an amendment of the organic law, be placed beyond its reach and remedial action. The privilege of the writ cannot even be temporarily suspended except for the safety of the State in cases of rebellion or invasion. The provisions of the Constitution relative thereto are transcripts of the former Constitution.⁸

E. When granted on behalf of person imprisoned.

1. Civil Practice Act, § 1230. Persons entitled to writs.

A person imprisoned or restrained in his liberty, within the state, for any cause or upon any pretence, is entitled, except in one of the cases specified in

5. *People ex rel. Armstrong v. Quigley*, 75 Misc. 151, 134 N. Y. Supp. 953; *People ex rel. Edelstein v. Warden of City Prison*, 154 App. Div. 261, 138 N. Y. Supp. 1095.

6. *People ex rel. Hubert v. Kaiser*, 150 App. Div. 541, 135 N. Y. Supp. 274, *aff'd*, 206 N. Y. 46; *People ex rel. Price v. Hayes*, 151 App. Div. 561, 136 N. Y. Supp. 854; *People ex rel. Friedman v. Hayes*, 172 App. Div. 442, 158 N. Y. Supp. 949; *People ex rel. Olsen v. Sheriff of Erie County*, 174

App. Div. 281, 160 N. Y. Supp. 427; *aff'd*, 222 N. Y. 537; *People ex rel. Bullock v. Warden of City Prison*, 87 Misc. 595, 150 N. Y. Supp. 24; *aff'd*, 166 App. Div. 507, 151 N. Y. Supp. 1075; *People v. Lucas*, 159 N. Y. Supp. 218.

7. *People ex rel. Curtis v. Kidney*, 225 N. Y. 299. See, also, *Matter of Barnett*, 52 How. Pr. 73.

8. *People ex rel. Tweed v. Liscomb*, 60 N. Y. 559.

the next section, to a writ of habeas corpus or a writ of certiorari, as prescribed in this article, for the purpose of inquiring into the cause of the imprisonment or restraint, and, in a case prescribed by law, of delivering him therefrom.

2. Civil Practice Act, § 1231. Restrictions on allowance of writs.

A person is not entitled to either of the writs specified in the last section in either of the following cases:

1. Where he has been committed or is detained by virtue of a mandate issued by a court or a judge of the United States, in a case where such courts or judges have exclusive jurisdiction under the laws of the United States or have acquired exclusive jurisdiction by the commencement of legal proceedings in such a court.

2. Where he has been committed or is detained by virtue of the final judgment or decree of a competent tribunal of civil or criminal jurisdiction; or the final order of such a tribunal made in a special proceeding instituted for any cause, except to punish him for a contempt; or by virtue of an execution or other process issued upon such a judgment, decree or final order.

3. Civil Practice Act, § 1263. Habeas corpus after certiorari.

Notwithstanding a writ of certiorari has been issued or returned, as prescribed in this article, the court or judge before which or whom it is returnable may issue a writ of habeas corpus, which, in all respects, is subject to the foregoing provisions of this article relating to the latter writ. If the court or judge refuses a writ of certiorari, or upon the return thereof refuses to discharge the prisoner, the latter may claim and is entitled to the writ of habeas corpus, as prescribed in this article.

4. Judgment or process.

A person imprisoned or restrained in his liberty within the State for any cause is entitled, except in one of the cases specified in section 1231 of the Practice Act, to a writ of habeas corpus for the purpose of inquiring into the cause of the imprisonment or restraint. If it appears that the prisoner is unlawfully imprisoned or restrained in his liberty the court or judge must make a final order discharging him forthwith.⁹ The restrictions contained in section 1231, as to the writ not being available when the prisoner is detained under a final judgment or order or under an execution or process issued upon such a judgment or order, are construed less broadly than section 1231 would indicate. The court, in many cases, is authorized to go behind the judgment or process and determine its validity. This question is further discussed in subsequent paragraphs in this chapter relating to the action of the court on the return of the writ.¹⁰

⁹ *People ex rel. Stabile v. Warden*, etc., 202 N. Y. 138.

¹⁰ See, *infra*, Art. VI, Proceedings on Return.

5. Prisoner held for grand jury.

The prisoner may have the writ before indictment to inquire whether the evidence on a preliminary examination was sufficient to hold him.¹¹ Or if one is improperly held by coroner, the writ may issue.¹² When the warrant is issued before indictment, the prisoner is entitled to have the legality of his detention inquired into and passed upon.¹³ Where findings essential to the validity of a commitment under the Code of Criminal Procedure, after a preliminary examination, are made that a crime had been committed, and that probable cause exists to believe that the defendant is guilty thereof, and the findings are supported by evidence, the discretion of the magistrate in holding the accused cannot be reviewed on habeas corpus.¹⁴ A defendant, charged with a felony of which, by statute, a conviction cannot be had without testimony corroborating that of complainant, is not entitled to release on habeas corpus, notwithstanding there was no such corroboration on his examination before the magistrate by whom committed; lack of corroboration being material on the trial only.¹⁵ But it has been held that a defendant, held for the grand jury upon a charge of rape in the second degree, is entitled to be discharged upon habeas corpus, unless the testimony of the complainant that she was under eighteen years of age at the date of the alleged crime is corroborated.¹⁶

6. Before examination by magistrate.

Where one is arrested on a warrant issued by a magistrate, such arrest constitutes an actual restraint of his person, entitling him to an immediate writ of habeas corpus without awaiting an examination before a magistrate.¹⁷ On a writ of habeas corpus to review the legality of petitioner's restraint on a warrant issued by a magistrate, the court will look back of the warrant to ascertain if the facts stated in the depositions of the prosecutor and his witnesses are sufficient to confer jurisdiction on the magistrate to issue

11. *People v. Martin*, 1 Park. Cr. 187; *People v. Tompkins*, 1 Park. Cr. 224; *Ex parte Tayloe*, 5 Cow. 39; *People v. Stanley*, 18 How. Pr. 179.

12. *People v. Budge*, 4 Park. Cr. 519.

13. *Matter of Marceau*, 32 Misc. 217, 65 N. Y. Supp. 717.

14. *People ex rel. Burnham v. Flynn*, 49 Misc. 328, 99 N. Y. Supp. 198;

rev'd, 114 App. Div. 578, 100 N. Y. Supp. 31; aff'd, 189 N. Y. 180.

15. *People ex rel. Baron v. Warden of City Prison of City of New York*, 56 Misc. 108, 106 N. Y. Supp. 109.

16. *People v. Harrison*, 63 Misc. 18, 117 N. Y. Supp. 477.

17. *People ex rel. Perkins v. Moss*, 187 N. Y. 410.

the warrant.¹⁸ Upon habeas corpus and certiorari to inquire into the cause of the relator's detention, he having been arrested on a charge of perjury, while the court will not pass upon the weight of the evidence it will determine whether there was legal evidence to justify the magistrate in issuing the warrant, and the oath of a single witness, without any corroboration, that the accused swore falsely, is insufficient to confer jurisdiction.¹⁹ On appeal from an order dismissing writs of habeas corpus and certiorari the court must examine the depositions presented to the magistrate, and, if it appears that they do not tend to establish the commission of a crime, the relator must be discharged.²⁰

7. Sentence partially legal.

Where a person has been imprisoned under a sentence part of which is legal and part illegal, he is not entitled to a writ of habeas corpus to inquire into the unlawful part, until the legal period has expired.²¹ The granting of the writ to review a sentence, the imprisonment under a valid requirement of which has not expired, is premature.²² If the sentence is excessive, the prisoner is not entitled to the writ until the expiration of the sentence within the power of the court to impose.²³ Although a person may have been sentenced to imprisonment for a longer period than allowed by the statute, he is not entitled to release on habeas corpus at the expiration of the legal term, where, as a matter of fact, he has received a further sentence for a different crime, the imprisonment therefor to begin at the expiration of the former sentence.²⁴ Where a prisoner is legally sentenced on a first count, the legality of his sentence on a second count, to commence at the termination of his first sentence, cannot be raised pending his sentence on the first count, since, even if illegal, his discharge would be improper until the termination of the first sentence.²⁵ A person under sentence of fine and imprisonment imposed by a court of sessions cannot be discharged on habeas corpus on the ground that the court of sessions exceeded its powers in

18. *People ex rel. Perkins v. Moss*, 187 N. Y. 410.

19. *People ex rel. Jacobs v. McGirr*, 39 Misc. 471, 80 N. Y. Supp. 171.

20. *People ex rel. Hegeman v. Corrigan*, 129 App. Div. 62, 113 N. Y. Supp. 504; rev'd, 195 N. Y. 1.

21. *People ex rel. Bedell v. Kinney*, 24 App. Div. 309, 48 N. Y. Supp. 749.

22. *People ex rel. Bedell v. Kinney*,

24 App. Div. 309, 48 N. Y. Supp. 749.

23. *People ex rel. Trainor v. Baker*, 89 N. Y. 460; *People ex rel. Sabatina v. Jennings*, 108 Misc. 93, 177 N. Y. Supp. 210.

24. *People ex rel. Curtis v. Kidney*, 183 App. Div. 451, 170 N. Y. Supp. 1061.

25. *People ex rel. Dawkins v. Frost*, 58 Misc. 618, 109 N. Y. Supp. 1121.

imposing the fine, where the court had power to imprison but the term of imprisonment had not expired.²⁶

8. Person on bail.

Under section 1230 of the Civil Practice Act, the imprisonment or restraint is an actual physical one, and a person at large on bail cannot have the writ until he is surrendered by his bail and thus actually in custody.²⁷ A judgment debtor who is on the jail limits is not entitled to be discharged on habeas corpus, although the judgment did not authorize an execution against his person.²⁸

F. When granted to determine custody of child.

1. Domestic Relations Law, § 70. Habeas corpus for child detained by parent.

A husband or wife, being an inhabitant of this State, living in a state of separation, without being divorced, who has a minor child, may apply to the Supreme Court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court, on due consideration, may award the charge and custody of such child to either parent for such time, under such regulations and restrictions, and with such provisions and directions, as the case may require, and may at any time thereafter vacate or modify such order. (See B., C. & G. Consol. L., 2nd Ed., p. 1915.)

2. Domestic Relations Law, § 71. Habeas corpus for child detained by Shakers.

If it shall appear on such application or the return of the writ, that the husband or wife of the applicant has become attached to the society of Shakers, and detains a child of the marriage among them, and that such child is secreted or concealed among them, the court may issue a warrant in aid of such writ of habeas corpus, directed to the sheriff of the county where the child is suspected to be, commanding such sheriff, in the daytime, to search the dwelling-houses and other buildings of such society, or of any members thereof, or any other buildings specified in the warrant, for such child, and to bring him before the court, and the sheriff must forthwith execute such warrant. (See B., C. & G. Consol. L., 2nd Ed., p. 1920.)

3. Common law.

The common-law writ of habeas corpus was a writ in behalf of liberty, and its purpose was to deliver a prisoner from unjust imprisonment and illegal and improper restraint. It was not a proceeding calculated to try the right of parents and guardians to the custody of infant children. It was frequently used, however, when children were

26. *People ex rel. O'Brien v. Woodworth*, 78 Hun, 586, 29 N. Y. Supp. 211, 60 St. Rep. 787.

27. *People ex rel. Albert v. Pool*, 77

App. Div. 148, 78 N. Y. Supp. 1026.

28. *People ex rel. Smith v. Biggart*, 25 App. Div. 20, 48 N. Y. Supp. 1030.

detained from their parents and guardians on the ground that absence from legal custody was equivalent to illegal restraint and imprisonment. In the case of children of the age of discretion the object of the writ was usually accomplished by allowing the party restrained the exercise of his volition, but in the case of an infant of an age to be incapable of determining what was best for itself the court or officer made the determination for it, and, in so doing, the child's welfare was the chief end in view.²⁹ Section 70 of the Domestic Relations Law is not exclusive, or the only authority for the exercise of the power of the court over the custody and possession of minor children in whose proper training and education the State, as *parens patriae*, has an interest.³⁰

4. General jurisdiction to determine custody.

Under section 70 of the Domestic Relations Law and section 1230 of the Civil Practice Act, a writ of habeas corpus may be had to determine the custody of an infant. But the statutory provisions are only permissive and do not give an absolute right to either parent.³¹ The writ may be applied for by a parent or guardian to obtain control of children.³²

On habeas corpus brought under the Domestic Relations Law, the proceedings should be in conformity with the usual rules of practice governing such writ.³³ While the writ and the practice thereunder may be said to be by virtue of the common law, the court in making its decision as to the custody of the child is governed by equitable considerations.³⁴ Where the court has gained jurisdiction of the father of a child, in whose custody he is, the mere fact that he is living in an adjoining State is no bar to the exercise of the power of the court to require his production.³⁵ But where a juvenile asylum bound out children committed to it, to per-

29. *Rex v. Delevel*, 3 Burr. 1435; *In re Waldron*, 13 Johns. 418; *People ex rel. Barry v. Mercein*, 8 Paige, 47, 25 Wend. 73; *People ex rel. Wilcox v. Wilcox*, 14 N. Y. 575; *People ex rel. Whele v. Weisenbach*, 60 N. Y. 385; *Hurd on Habeas Corpus*, chap. 9.

30. *Matter of Stewart*, 77 Misc. 524, 137 N. Y. Supp. 202.

31. *Matter of Reynolds*, 8 N. Y. Supp. 172, 28 St. Rep. 538.

32. *People v. Mercein*, 8 Paige, 47.

See *Mercein v. Barry*, 25 Wend. 65; *People v. Mercein*, 3 Hill, 399; *People v. Wilcox*, 22 Barb. 178; *Wilcox v. Wilcox*, 14 N. Y. 575. See, also, *People v. Cooper*, 1 Duer, 725.

33. *Matter of Mather*, 140 App. Div. 478, 125 N. Y. Supp. 483.

34. *People ex rel. Pruyn v. Walts*, 122 N. Y. 241.

35. *People ex rel. Billotti v. N. Y. Juvenile Asylum*, 57 App. Div. 383, 68 N. Y. Supp. 279.

sons in another State, before it could have known that a writ of habeas corpus would be applied for, and afterward made an effort to have them brought back into the State, but the children themselves refused to return, and the persons to whom they were indentured refused to give them up, the asylum has no such control over the children as would justify the issuance of a writ of habeas corpus.³⁶

Under section 70 of the Domestic Relations Law a habeas corpus proceeding will not lie by the mother of children legally adopted for permission to see them.³⁷ The proceeding by habeas corpus is not to be used to try the right of the parent to the custody of a child who has arrived at years of discretion, and remains away from the parent of its own volition, and where no restraint of the child is shown, and an abuse of the parental authority appears, an order dismissing the parent's writ is proper.³⁸ Absence from the custody of parents of a girl eighteen years old, emancipated and entitled to her wages, and obliged to earn her living, is not absence from legal custody which is equivalent to restraint, so as to justify habeas corpus proceedings against a person into whose employ she had voluntarily entered.³⁹

A habeas corpus proceeding instituted on the ground that an infant, over eighteen, was illegally restrained by her father in the house where he was said to be living in open adultery with his housekeeper, will be dismissed, where upon the return to the writ the daughter swears, in an affidavit, that she has a happy home and congenial surroundings, and is not restrained of her liberty, and the allegations of adultery are not proved. In any event, in such a case, the writ must be dismissed where the infant marries before the order taking her away from her father is signed, and the justice signing the order knows of this fact.⁴⁰

A commitment of a child to a house of industry, made by a competent criminal tribunal, cannot be reviewed by habeas corpus or certiorari, the remedy being by appeal under section 749, Code of Criminal Procedure.⁴¹

36. *People ex rel. Billotti v. N. Y. Juvenile Asylum*, 57 App. Div. 383, 68 N. Y. Supp. 279.

37. *Matter of McDevitt*, 101 Misc. 588, 168 N. Y. Supp. 433.

38. *People ex rel. Oprandy v. Ciarcia*, 49 App. Div. 90, 63 N. Y. Supp. 497.

39. *People ex rel. Watson v. Buffett*,

75 App. Div. 365, 78 N. Y. Supp. 175.

40. *People ex rel. Bishop v. Bishop*, 117 App. Div. 445, 102 N. Y. Supp. 592.

41. *People ex rel. Stern v. N. Y. Soc. for Prevention of Cruelty to Children*, 27 Misc. 457, 58 N. Y. Supp. 118, 29 Civ. Pro. 191.

5. *Res adjudicata*.

Where the custody of a child has been awarded to her mother under a final order in habeas corpus proceedings, which order has never been modified, the father cannot procure a writ of habeas corpus to review the matter, without showing a material change in the situation.⁴² Where there is an adjudication that petitioner is not, and respondent is, entitled to the custody of an infant, it is a bar to a subsequent application; but the rule is otherwise if the petition is dismissed.⁴³ But a former habeas is not *res adjudicata* when the questions raised are different, or in some cases, even upon the same facts.⁴⁴

A habeas corpus decree of another State for the custody of a child is not conclusive in this State upon the interests of the child, where it was not a party to the proceeding.⁴⁵ But the determination of the Court of Chancery of the foreign State, entrusting the custody of the child to the care of the father, under the direction of the court, will not be disregarded by the courts of this State unless circumstances require a different disposition.⁴⁶

An order of adoption whereby one other than the petitioner in habeas corpus acquires the right to the custody of a child will generally preclude the petitioner from having the custody of the child.⁴⁷ Thus, where the father, after the death of his wife, has placed his child in a charitable institution as a public charge, from which it has been legally adopted by others, he has not, as against the persons adopting the child, an absolute right to its custody.⁴⁸ But an adoption order does not prevent the court from disposing of the custody of the child so as to promote his best interests.⁴⁹ The statute providing for an application to the Surrogate's Court for the rescission of an agreement of adoption does not deprive the Supreme Court of jurisdiction to take the child from its adoptive parents under habeas corpus on proper showing.⁵⁰

42. *Matter of Lederer*, 38 Misc. 668, 78 N. Y. Supp. 236.

43. *Matter of Price*, 12 Hun, 508.

44. *People v. Fancher*, 1 Hun, 27; *People v. Brady*, 56 N. Y. 182.

45. *People v. Dewey*, 23 Misc. 267, 50 N. Y. Supp. 1013.

46. *People ex rel. Billotti v. N. Y. Juvenile Asylum*, 57 App. Div. 383, 68 N. Y. Supp. 279.

47. See *People ex rel. Letino v. Feser*, 195 App. Div. 90, 186 N. Y. Supp. 443.

48. *Ex parte Sarcona*, 133 N. Y. Supp. 913.

49. *People ex rel. Cornelius v. Callan*, 69 Misc. 187, 124 N. Y. Supp. 1074.

50. *People v. Paschal*, 68 Hun, 344, 22 N. Y. Supp. 881.

Where a writ of habeas corpus issued on the relation of a mother for the purpose of testing the validity of the commitment of her children to an institution has been dismissed, the matter as to her is *res adjudicata* and she cannot thereafter attack an order of the Surrogate's Court authorizing the adoption of the children by their uncle.⁵¹ The Supreme Court has no jurisdiction by habeas corpus to modify a judgment in an action for separation awarding the custody of a child without qualification, especially where the situation of the parties has in no way changed since the entry of the judgment.⁵²

Where children were committed by the Children's Court to an institution while proceedings were being taken under section 486 of the Penal Law for their final disposition, and such commitment was made without notice to their father, and, therefore, provisional, it did not preclude the father from obtaining a writ of habeas corpus, or affect his right, at the hearing upon the return thereto, to show that his children were not exposed to danger if confided to his care and that their welfare would be promoted if they were surrendered by the institution and placed in the care of their grandmother.⁵³

6. General right to custody.

At common law the father had the paramount right to the custody of the children. The law awards the custody to the father unless the welfare of the child demands an award to the mother.⁵⁴ A child will not be taken from the custody of its father and given to its mother where it does not appear that its welfare requires the change.⁵⁵ The common-law preference of the father will generally prevail, if the mother has abandoned the family without justification.⁵⁶ But the court is always authorized to make a different disposition when it is justified by the circumstances.⁵⁷ Thus,

51. *Matter of Antonopoulos*, 171 App. Div. 659, 157 N. Y. Supp. 587.

52. *People ex rel. Hyland v. Hyland*, 187 App. Div. 374, 175 N. Y. Supp. 626.

53. *People ex rel. Riesner v. Hospital*, 230 N. Y. 119.

54. *People ex rel. Sinclair v. Sinclair*, 91 App. Div. 322, 86 N. Y. Supp. 539.

55. *Day v. Day*, 4 Misc. 235, 24 N. Y. Supp. 873; *People v. Trafford*, 12 N. Y. Supp. 43.

56. *Ullman v. Ullman*, 151 App. Div. 419, 135 N. Y. Supp. 1080; *People ex rel. Snell v. Snell*, 77 Misc. 538, 137 N. Y. Supp. 193.

57. **General rules.**—It is laid down by Hurd, in his treatise on habeas corpus, that in exercising the jurisdiction in habeas corpus the following principles deduced from the cases are of general application.

"First. The court is in no case bound to deliver the child into the custody of any claimant, or of any

in the case of a infant of tender years, the mother will generally be allowed its custody as against the father.⁵⁸ The fact of the parents living apart may entitle the mother to the custody of an infant.⁵⁹ The husband may lose his right to the custody by immorality or inability to provide for its support, or the court may assign it to another when it is manifestly for the well-being of the child.⁶⁰ In all cases the welfare of the child is the primary consideration.⁶¹ The natural claims of the parent must give way where it clearly appears that the child's welfare requires a different disposition of its custody.⁶² The one consideration is the welfare of the child, and the custody of the child will not be taken from one parent and given to another merely to punish one of the parents for a failure to comply with an order of the court.⁶³

If the best interests of the child require it, the custody may be awarded to a grandparent, or other person, as against the parent.⁶⁴

other person, but may leave it in such custody as the welfare of the child at the time appears to require.

"Second. In controversies between parents for the custody of their legitimate children, the right of the father is held to be paramount to that of the mother; but the welfare of the child, and not the technical legal right, is the criterion by which to determine to whom the custody of the child shall be awarded.

"Third. In controversies between parents for the custody of their illegitimate children, the right of the mother is paramount; but as in the last case, the welfare of the child and not the technical legal right determines the custody.

"Fourth. In all cases, if the child has arrived at the age of discretion, it will be permitted to elect in whose custody it will remain, provided its choice under the circumstances does not, in the opinion of the court, lead to an improper custody."

58. *People ex rel. Sinclair v. Sinclair*, 91 App. Div. 322, 86 N. Y. Supp. 539; *People v. Mercein*, 8 Paige, 47; *People v. Chegaray*, 18 Wend. 637; *People v. Nickerson*, 19 Wend. 16; *People v. Humphreys*, 24 Barb. 521;

People v. Olmstead, 27 Barb. 9, 2 Kent's Com. 194; *People v. Mercein*, 3 Hill, 399.

59. *Mercein v. Barry*, 25 Wend. 64; *People v. Mercein*, 8 Paige, 48.

60. *Matter of Cuneen*, 17 How. Pr. 516; *Matter of Holmes*, 19 How. Pr. 329.

61. *People ex rel. Pruyn v. Walts*, 122 N. Y. 238; *Ullman v. Ullman*, 151 App. Div. 419, 135 N. Y. Supp. 1080; *Chamberlain v. Chamberlain*, 194 App. Div. 470, 185 N. Y. Supp. 98; *People ex rel. Multer v. Multer*, 107 Misc. 58, 175 N. Y. Supp. 526.

62. *People ex rel. Dunlap v. N. Y. Juvenile Asylum*, 58 App. Div. 133, 68 N. Y. Supp. 656, 32 Civ. Pro. 28; *Matter of Meyer*, 156 App. Div. 174, 141 N. Y. Supp. 123.

63. *People ex rel. Winston v. Winston*, 31 App. Div. 121, 52 N. Y. Supp. 814.

64. *People ex rel. Elder v. Elder*, 98 App. Div. 244, 90 N. Y. Supp. 703; *People ex rel. Hume v. Phelps*, 58 Misc. 625, 109 N. Y. Supp. 943; *Paddock v. Egar*, 57 Hun, 591, 10 N. Y. Supp. 710, 32 St. Rep. 925; *In re Lundergan*, 8 N. Y. Supp. 924, 30 St. Rep. 383; *In re Riemann*, 10 N. Y. Supp. 516, 31 St. Rep. 13.

An application by the mother of a child for its custody, as against the father of the child, will be denied where a divorce she had obtained in another State had been declared void, but she continued living with a second husband.⁶⁵ But, if she does not continue to live with the second husband after the adjudication of the invalidity of the marriage, the court may properly award her the custody of the children of the first marriage.⁶⁶

Irrespective of the validity of a testamentary provision made by a father appointing guardians of the person and property of his children where the mother survives, she will not be awarded custody if she be morally unfit.⁶⁷

7. Consideration of wishes of infant.

The inclination of the infant may be consulted in a proper case.⁶⁸ But the court is bound to respect the rights of the parent or guardian, and these may not be overthrown by the mere wishes of the child. The jurisdiction, however, of the court is equitable in its character, the welfare of the child is the chief object to be attained, and must be the guide for the judgment of the court.⁶⁹

8. Illegitimate child.

The father of a bastard has no right to its control; its mother is entitled to its custody in case she is a proper person.⁷⁰

9. Proceedings on return of writ.

Until the child is produced before the court, it cannot adjudicate upon the issue whether the relator is an unfit person to have its custody. The court cannot award the custody of the child to a party to the proceeding without the child being brought before the court and without an examination into the merits of the application, even though

65. *People ex rel. Ludden v. Winston*, 34 Misc. 21, 69 N. Y. Supp. 452.

66. *Osterhoudt v. Osterhoudt*, 48 App. Div. 74, 62 N. Y. Supp. 529, 49 App. Div. 636; appeals dismissed, 168 N. Y. 358; *People ex rel. Winston v. Winston*, 65 App. Div. 231, 72 N. Y. Supp. 456.

67. *People ex rel. Wright v. Gerow*, 136 App. Div. 824, 121 N. Y. Supp. 652.

68. *Jones v. Erbert*, 17 Abb. 395; *People v. Kling*, 6 Barb. 366; *Matter*

of *Waldron*, 13 Johns. 418; *People v. Wilcox*, 22 Barb. 178; *People v. Pillow*, 1 Sandf. 672; *Matter of McDowles*, 8 Johns. 329; *People v. Cooper*, 8 How. 288.

69. *People ex rel. Pruyn v. Walts*, 122 N. Y. 238. See, also, *People ex rel. Elder v. Elder*, 98 App. Div. 244, 90 N. Y. Supp. 703.

70. *People v. Kling*, 6 Barb. 366; *Robalina v. Armstrong*, 15 Barb. 247; *Matter of Doyle*, Clarke's Ch. 157; *Jones v. Erbert*, 17 Abb. 397.

the person having the custody of the child has failed to make a return and is in contempt.⁷¹

Where a resident of this State has removed a child from the State to avoid the jurisdiction of the court in the matter of its custody, the court, on obtaining jurisdiction of the custodian, may by order compel the production of the child in court, and may enforce the order by attachment.⁷²

On the production of a child before the court there must be an examination into the facts which the return sets forth as a reason why the custody should not be awarded to the relator. It is improper to award custody without such investigation.⁷³ The proceeding is summary in its nature, and denials of the allegations of the return made to the writ may be made in an informal manner by affidavits or even orally.⁷⁴ Any one may ordinarily appear and litigate for the child.⁷⁵ The testimony in cases of this character should ordinarily be taken before the judges themselves to save expenses to the parties, and because the judge who ultimately has to pass upon the question of the proper custody of the children with reference to their interests and welfare can do so much more intelligently where he has seen and heard the witness than where he has merely read the minutes of his stenographer.⁷⁶

G. When granted in extradition cases.

Section 827 of the Code of Criminal Procedure indicates that one arrested under a warrant issued by the Governor in extradition proceedings may have a writ of habeas corpus in some cases. The action of the Governor in issuing a warrant for the extradition of an alleged fugitive from justice can be reviewed on habeas corpus.⁷⁷

To sustain the warrant, it is necessary: 1. Where the papers upon which the Governor acted in issuing his warrant are before the court, it must appear therefrom that the prisoner is duly charged with the commission of a crime in the demanding State. 2. It must also appear upon the face of the papers, either by affirmative allegation or by necessary inference from the nature of the

71. *People ex rel. Winston v. Winston*, 31 App. Div. 121, 52 N. Y. Supp. 814.

72. *People ex rel. Winston v. Winston*, 25 Misc. 676, 56 N. Y. Supp. 323.

73. *Matter of Mather*, 140 App. Div. 478, 125 N. Y. Supp. 483.

74. *People ex rel. Keator v. Moss*,

6 App. Div. 414, 39 N. Y. Supp. 690.

75. *People v. McLeod*, 3 Hill, 654, n.

76. *Matter of Teese*, 32 App. Div. 46, 52 N. Y. Supp. 517.

77. *People ex rel. Jourdan v. Donahue*, 84 N. Y. 438; *People ex rel. Cockran v. Hyatt*, 172 N. Y. 176.

offense charged, that the prisoner was in the demanding State at the time when the offense charged against him was committed, for it is under such circumstances only that he can be held to be a fugitive from justice. 3. The prisoner must also be identified as the person against whom the charge was made, and for whose arrest the warrant of the Governor has been issued.⁷⁸

The courts will not interfere on habeas corpus and discharge a fugitive from justice upon technical grounds, unless it be clear that the Governor's action in issuing a warrant for extradition plainly contravenes the law.⁷⁹ The court will not inquire into the sufficiency of the indictment where it apparently charges an offense; the determination of its sufficiency being the duty of the tribunals of the State in which the offense is alleged to have been committed.⁸⁰ When the warrant is based upon an indictment found in another State rather than upon an information on affidavit, the accused will not generally be released on habeas corpus.⁸¹ The presentation to the Governor of this State of a copy of a duly certified information, with the requisition of the Governor of another State demanding relator's extradition, charging relator with the commission of an offense certified by such demanding Governor to be a crime in his State, is sufficient to require the surrender of the relator and the writ of habeas corpus must be dismissed.⁸²

Before a warrant of extradition can be sustained it must appear as a jurisdictional fact that the prisoner is a fugitive from justice—that is, that he was actually present in the demanding State when the crime was committed. His constructive presence therein is not enough.⁸³ While the warrant makes out a *prima facie* case that the prisoner is a fugitive from justice,⁸⁴ he is entitled to question the lawfulness of his arrest and imprisonment, and to show by com-

78. *People ex rel. Ryan v. Conlin*, 15 Misc. 303, 36 N. Y. Supp. 888, 72 St. Rep. 110. See, also, *People ex rel. McCoy v. Warden of City Prison*, 3 Crim. Rep. 370.

79. *People ex rel. Meeker v. Baker*, 142 App. Div. 598, 127 N. Y. Supp. 382.

80. *People ex rel. Hamilton v. Police Com'r of City of N. Y.*, 100 App. Div. 483, 91 N. Y. Supp. 760; *People ex rel. Meeker v. Baker*, 142 App. Div. 598, 127 N. Y. Supp. 382; *People ex rel. Goldfarb v. Gargan*, 181 App. Div.

410, 168 N. Y. Supp. 1027.

81. *People ex rel. Himmelstein v. Baker*, 137 App. Div. 824, 122 N. Y. Supp. 516.

82. *People ex rel. Currier v. Chief of Police*, 97 Misc. 254, 162 N. Y. Supp. 845; *People ex rel. MacSherry v. Enright*, 112 Misc. 568, 184 N. Y. Supp. 248.

83. *People ex rel. Genna v. McLaughlin*, 145 App. Div. 513, 130 N. Y. Supp. 458.

84. *People ex rel. Draper v. Pinkerton*, 77 N. Y. 245.

petent evidence as a ground for his release that he is not a fugitive from justice of the demanding State, and thereby to overcome the presumption to the contrary arising from the extradition warrant.⁸⁵ Thus, he may show that he was not within the State where the alleged crime was committed at the time of the commission thereof.⁸⁶ But a person is properly committed for extradition to another State and his writ of habeas corpus should be dismissed where it appears that he was present in the foreign State at the time he made the alleged false representations for which he was indicted, even though he did not remain in the foreign jurisdiction until the consummation of the crime.⁸⁷ In case of disputed testimony as to the presence of the accused in the State, the decision of the Governor will not ordinarily be disturbed on habeas corpus.⁸⁸

The question whether the person demanded is substantially charged with a crime against the laws of the State from whose justice he is alleged to have fled, by an indictment or affidavit, certified as authentic by the Governor of the State making the demand, is a question of law and always open on the face of the papers to judicial inquiry on an application for a discharge under a writ of habeas corpus.⁸⁹ But habeas corpus is not the proper proceeding to try the question of a relator's guilt or innocence of the crime charged, the proceedings being limited to the determination of whether the person held in custody is or is not a fugitive from justice.⁹⁰ The court has no right to consider the charge on the merits or to undertake to determine whether it is well founded.⁹¹

The court can know nothing judicially about the circumstances of the alleged crime, except the facts recited in the warrant or stipulated by counsel, where the record does

85. *People ex rel. Genna v. McLaughlin*, 145 App. Div. 513, 130 N. Y. Supp. 458; *People ex rel. LaRoque v. Enright*, 115 Misc. 206, 189 N. Y. Supp. 167.

86. *People ex rel. Meeker v. Baker*, 142 App. Div. 598, 127 N. Y. Supp. 382; *People ex rel. Genna v. McLaughlin*, 145 App. Div. 513, 130 N. Y. Supp. 458; *People ex rel. Fuchs v. Police Commissioner*, 83 Misc. 643, 146 N. Y. Supp. 781; *People ex rel. Debono v. Board of Police Comrs.*, 89 Misc. 248, 153 N. Y. Supp. 491, 32 N. Y. Cr. 499. Compare *People ex*

rel. Meeker v. Baker, 139 App. Div. 471, 124 N. Y. Supp. 47.

87. *People ex rel. Goldfarb v. Gargan*, 181 App. Div. 410, 168 N. Y. Supp. 1027.

88. *People ex rel. LaRoque v. Enright*, 115 Misc. 206, 189 N. Y. Supp. 167.

89. *People ex rel. Marshall v. Moore*, 167 App. Div. 479, 153 N. Y. Supp. 10; *aff'd*, 217 N. Y. 632.

90. *People ex rel. Teitelbaum v. Ryan*, 181 App. Div. 404, 168 N. Y. Supp. 787.

91. *Matter of Clark*, 9 Wend. 212.

not contain the indictment or proofs as to the facts.⁹² Where the papers upon which a warrant of extradition is issued are withheld by the Executive, the warrant itself can only be looked to for the evidence that the essential conditions of its issue have been complied with, and it is sufficient if it recites what the law requires.⁹³ The question before the court is whether the relator is unlawfully deprived of his liberty, and whether the Governor of this State in honoring the demand of a foreign State has acted without authority of law. It is not enough for the relator to show that the indictment is defective under the laws of this State; he is bound to overcome the presumption that the governors of the two states have performed their duties under the laws of the United States.⁹⁴

Upon a petition by a person charged with being a fugitive from justice for a writ of habeas corpus, the identity of the name of such person with the name of the person named in the rendition warrant raises a presumption that the persons are the same.⁹⁵ In the absence of papers on which the warrant was granted the warrant alone can be considered, and recitals in the warrant are sufficient to sustain its validity. A mistake in the spelling of defendant's name is no ground for a discharge where the pronunciation remains the same and it is apparent that the defendant was the person intended.⁹⁶ A person held for extradition for a crime committed in another State should not be discharged on habeas corpus merely because the warrant for arrest names him as "Morris Edelston, alias Edelstein," while the warrant of extradition names him as Morris Edelston, and he claims that his correct name is Morris Edelstein and that he can prove an alibi.⁹⁷

Where an appeal is taken in good faith from an order dismissing a writ of habeas corpus and remanding the relator to the custody of a police commissioner and direct-

92. *People ex rel. Meeker v. Baker*, 139 App. Div. 471, 124 N. Y. Supp. 471.

93. *People ex rel. Jourdan v. Donahue*, 84 N. Y. 438.

94. *People ex rel. Marshall v. Moore*, 167 App. Div. 479, 153 N. Y. Supp. 10.

Overcoming presumptions.—Presumptions arising from the facts stated in the extradition warrant may be overcome by stipulations or admissions of counsel entered upon the record in habeas corpus proceedings to

inquire into the cause of the detention. *People ex rel. Meeker v. Baker*, 139 App. Div. 471, 124 N. Y. Supp. 47.

95. *People ex rel. Teitelbaum v. Ryan*, 181 App. Div. 404, 168 N. Y. Supp. 787.

96. *Matter of Scrafford*, 36 St. Rep. 748, 59 Hun. 323, 12 N. Y. Supp. 945.

97. *People ex rel. Edelstein v. Warden of City Prison*, 154 App. Div. 261, 138 N. Y. Supp. 1095, 29 N. Y. Cr. 492.

ing the relator to deliver him to the agent of another State, pursuant to a rendition warrant, and it appears that a question is presented which justifies the appeal, a stay should be granted. If the offense with which the relator is charged is bailable in this State he should be admitted to bail pending the appeal from the order.⁹⁸

H. When granted to review commitment for contempt.

Habeas corpus may be a proper procedure to procure the release of one improperly imprisoned for contempt of court.⁹⁹ If an attempt is made to punish witnesses for disobedience of a void subpoena, they are entitled to a remedy by habeas corpus.¹ In case the alleged contempt is innocent or meritorious, the writ will lie, and it may be questioned collaterally on habeas.²

An order committing a party for a civil contempt, which fails to comply with the law that it shall adjudge that the misconduct complained of was calculated to, or did actually defeat, impair, impede, or prejudice the rights or remedies of a party, furnishes no foundation for imprisonment and is without jurisdiction. The party is entitled to be relieved from imprisonment on habeas.³ Where no legal foundation is present upon which a person could be adjudged to be in contempt and directed to be imprisoned for refusal to pay a sum of money, the decision is unauthorized and beyond the jurisdiction of the court and habeas corpus will lie.⁴

Where the return to a writ of habeas corpus, procured by a husband for the purpose of obtaining from his wife the custody of their infant child, alleges that the child is living in New Jersey and is not a resident of New York, and no traverse is interposed to such allegation, the mother of the child cannot be adjudged guilty of contempt for a failure to produce the child as demanded by the writ.⁵

I. When granted in insanity cases.

1. Insanity Law, § 93. Habeas corpus.

Any one in custody as an insane person is entitled to a writ of habeas corpus, upon a proper application made by him or some friend in his behalf. Upon the return of such writ, the fact of his insanity shall be inquired into and

98. *People ex rel. Meeker v. Baker*, 24 N. Y. 74.
139 App. Div. 471, 124 N. Y. Supp. 47.

99. See the chapter CONTEMPT.

1. *People ex rel. Willett v. Quinn*, 150 App. Div. 813, 135 N. Y. Supp. 477, 27 N. Y. Cr. 388.

2. *People ex rel. Hackley v. Kelly*,

3. *Matter of Swenarton*, 40 Hun, 41.
4. *In re Hess*, 1 N. Y. Supp. 813, 48 Hun, 590, 16 St. Rep. 255.

5. *People ex rel. Winston v. Winston*, 31 App. Div. 121, 52 N. Y. Supp. 814.

determined. The medical history of the patient, as it appears in the case book, shall be given in evidence, and the superintendent or medical officer in charge of the institution wherein such person is held in custody, and any proper person, shall be sworn touching the mental condition of such person. Where a second or subsequent application is made for the discharge from custody of the same patient, any party to the proceeding may introduce in evidence any testimony, in relation to the mental condition of such patient, received upon any former hearing or trial, together with all the exhibits introduced in evidence upon such hearing or trial in connection with such testimony without calling the witnesses who gave such testimony, such evidence to have the same force and effect as if such witnesses had been called. (See B., C. & G. Consol. L., 2nd Ed., p. 3819.)

2. Application of statute.

The question of the sanity of a person confined in an insane asylum may be tried by habeas corpus under section 93 of the Insanity Law.⁶ But it has been said that the question should not be tried in this manner where there are pending proceedings before a jury.⁷ The provisions of the Insanity Law, conferring upon one in custody as an insane person a right to a writ of habeas corpus to determine his sanity, do not prescribe the procedure in such cases, and hence it is regulated by the provisions of the Civil Practice Act.⁸ A proceeding under the Insanity Law is one of the cases mentioned in section 1282 of the Civil Practice Act as "otherwise expressly provided for by statute."⁹ A relator who has not shown that his ward is sane is not entitled to have her discharge from a sanitarium under section 93. But the committee of the person of an incompetent may, under the conditions prescribed in section 94 of the Insanity Law, procure a writ of habeas corpus to obtain her custody although she is not wholly sane.¹⁰ The word "friend" as

6. *Matter of Dixon*, 11 Abb. N. C. 118.

Minor.—Where, upon the hearing under such writ of habeas corpus, it appears that the alleged lunatic, a minor, has been committed to an institution for the custody and treatment of the insane, upon a void certificate of lunacy and, further, that the alleged lunatic is not and never was insane, the court has no power to remand her to the custody of the institution upon the theory that her detention therein was by virtue of delegated parental authority and that such detention was reasonable and necessary under the circumstances. There is no parental authority which alone justi-

fies the confinement of a sane minor in a madhouse. The fact that the minor was not taken back to the institution, but was sent abroad by her parents under tutelary control, does not affect her right to appeal from the order remanding her to the institution. *People ex rel. Bebro v. Bond*, 104 App. Div. 47, 93 N. Y. Supp. 277.

7. *Matter of Laurent*, 11 Abb. N. C. 120.

8. *People ex rel. Woodbury v. Hendrick*, 168 App. Div. 553, 153 N. Y. Supp. 188; *aff'd*, 215 N. Y. 339.

9. *People v. Grifenhagen*, 154 N. Y. Supp. 965.

10. *Matter of Andrews*, 126 App. Div. 794, 111 N. Y. Supp. 417.

used in section 93 means "one favorably disposed" to the alleged insane person. An appeal from an order dismissing such a writ of habeas corpus will not be dismissed by the Appellate Division upon the ground that the relator had no interest in the proceeding and was practically a stranger, where it appears that the Special Term, with full knowledge of all the facts on which the motion to dismiss the appeal was based, entertained the habeas corpus proceeding and proceeded to a determination thereof on the merits.¹¹

J. Miscellaneous cases for granting writ.

Section 575 of Real Property Law relative to proceedings to discover the death of a tenant for life provides that in proceedings for that purpose the writ of habeas corpus may be issued to bring up a person imprisoned within the State. Section 1715 of the Penal Law relative to the apprehension of persons about to fight provides that a person so committed may, at any time, be discharged upon a writ of habeas corpus, upon his executing the bond required by the committing magistrate. And when it shall be necessary, for any purpose, to bring any prisoner confined in a county jail before the Supreme Court, a County Court, or a Court of General Sessions, which may be sitting in such county, such court may by order, and without issuing any writ of habeas corpus, or other process, direct such prisoner to be brought before them accordingly.¹²

The Criminal Code also provides under section 898a, with reference to summary punishment of professional criminals, after defining the crime and making provision for its punishment, that "any person who may or shall feel aggrieved at any such act, judgment or determination of any such police magistrate or justice of the peace, pursuant to the provisions of this section, may apply to any judge or justice of any court having the power to issue a writ of habeas corpus for the issuance of said writ, and upon return thereof there shall be a rehearing of evidence, and the judge or justice may either discharge, modify, or confirm the commitment."

11. *People ex rel. Bebro v. Bond*,
104 App. Div. 47, 93 N. Y. Supp. 277.

12. Code of Criminal Procedure, sec-
tion 10-b.

ARTICLE II.

APPLICATION FOR WRIT.

A. Civil Practice Act, § 1232. Applications generally.

Application for the writ must be made, by a written petition, signed either by the person for whose relief it is intended or by some person in his behalf, to either of the following courts or officers:

1. The Supreme Court at a special term or the appellate division thereof, where the prisoner is detained within the judicial district within which the term is held.

2. A justice of the Supreme Court in any part of the State.

3. An officer authorized to perform the duties of a justice of the Supreme Court at chambers, being or residing within the county where the prisoner is detained; or, if there is no such officer within that county capable of acting, or, if all those who are capable of acting and authorized to grant the writ are absent, or have refused to grant it, then to an officer authorized to perform those duties residing in an adjoining county.

Where application for either writ is made, as prescribed in subdivision third of this section, without the county where the prisoner is detained, the officer must require proof by the oath of the person applying, or by other sufficient evidence, of the facts which authorize him to act as therein prescribed; and if a judge in that county, authorized to grant the writ, is said to be incapable of acting, the cause of the incapacity must be specially set forth. If such proof is not produced, the application must be denied.¹³

B. Code of Criminal Procedure, § 25. Habeas corpus in Supreme Court.

During the session of the Supreme Court in any county, no person detained in a county jail of such county, upon a criminal charge, shall be removed therefrom by writ of habeas corpus, unless such writ shall have been issued by or shall be made returnable before such court.

C. Civil Practice Act, § 1233. Writs issued at instance of people.

Where either writ is required in an action or special proceeding, civil or criminal, to which the people are a party or in which they are interested, it may be awarded upon the application of the attorney-general, or of the district attorney having charge of the action or special proceeding; and the indorsement of the allowance thereof must state that it was issued on such an application.

D. Civil Practice Act, § 1234. Contents of petition.

The petition must be verified by the oath of the petitioner to the effect that he believes it to be true, and must state, in substance:

1. That the person in whose behalf the writ is applied for is imprisoned or restrained in his liberty; the place where, unless it is unknown, and the officer

13. Limitation on jurisdiction.—The jurisdiction of the Supreme Court, of which the Appellate Division is a part, in habeas corpus is beyond the power of the Legislature to disturb. The provision of section 1232, that an application for a writ of habeas corpus may be made to the Appellate Divi-

sion only "where the person is detained within the judicial district within which the term is held," is void, as being beyond the power of the Legislature to enact. *People ex rel. Patrick v. Frost*, 133 App. Div. 179, 117 N. Y. Supp. 524.

or person by whom he is so imprisoned or restrained, naming both parties if their names are known, and describing either party whose name is unknown.

2. That he has not been committed and is not detained by virtue of any judgment, decree, final order or process, specified in section twelve hundred and thirty-one of this act.

3. The cause or pretence of the imprisonment or restraint, according to the best knowledge and belief of the petitioner.

4. If the imprisonment or restraint is by virtue of a mandate, a copy thereof must be annexed to the petition, unless the petitioner avers, either, that by reason of the removal or concealment of the prisoner before the application a demand of such a copy could not be made, or that such a demand was made, and the legal fees for the copy were tendered to the officer or other person having the prisoner in his custody, and that the copy was refused.

5. If the imprisonment is alleged to be illegal, the petition must state in what the alleged illegality consists.

6. It must specify whether the petitioner applies for the writ of habeas corpus or for the writ of certiorari.

E. Civil Practice Act, § 1241. Issuance without application.

Where a justice of the Supreme Court, in court or out of court, has evidence, in a judicial proceeding taken before him, that any person is illegally imprisoned or restrained in his liberty within the state; or where any other judge authorized by this article to grant the writs has evidence, in like manner, that any person is thus imprisoned or restrained within the county where the judge resides; he must issue a writ of habeas corpus or a writ of certiorari for the relief of that person, although no application therefor has been made.

F. Civil Practice Act, § 1281. Delivery of copy of mandate or other authority.

An officer or other person who detains any one by virtue of a mandate or other written authority must deliver, upon reasonable demand and tender of his fees, a copy thereof to any person who applies therefor, for the purpose of procuring a writ of habeas corpus or a writ of certiorari in behalf of the prisoner. If he knowingly refuses so to do, he forfeits two hundred dollars to the prisoner.

G. Petitions.

A petitioner for a writ of habeas corpus is only required to allege, among other things, that he "is imprisoned or restrained of his liberty; the place where . . . and the officer or person by whom he is so imprisoned or restrained," as provided by section 1234.¹⁴ The petition must show the place of the detention of the prisoner or it is defective. It should also negative the fact of the detention by virtue of a judgment or decree.¹⁵ The failure to state in the petition that the person in whose behalf the writ is applied for is not detained by virtue of a final order of a competent tribunal, made in a special proceeding, or of an

14. *People ex rel. Perkins v. Moss*, 187 N. Y. 410, aff'g 113 App. Div. 329, 99 N. Y. Supp. 138.

15. *People v. Cowles*, 59 How. Pr. 287.

execution or transcript issued on such order, is a fatal defect. The failure of a relator to incorporate in his petition for a writ of habeas corpus all the matters specified in Civil Practice Act is waived by respondent's appearing and filing a return to the writ, instead of moving to quash.¹⁶

H. Custody of children.

A petition by a wife living separate from her husband for a habeas corpus for the purpose of removing her minor child from the custody to which it had been committed by its father and to have it committed to her should be presented to the court, and the writ should be issued by the court. A judge of chambers cannot issue it.¹⁷ Section 77 of the Civil Practice Act, conferring upon a county judge within his county the power conferred by law on an officer authorized to perform the duties of a justice of the Supreme Court at chambers or out of court, does not include jurisdiction of the care, custody, and control of infants.¹⁸

I. Security for costs.

As nothing must be allowed as a bar or impediment to the allowance of this writ, security for costs cannot be required of a non-resident relator.¹⁹

16. *People ex rel. Jenkins v. Kuhne*, 57 Misc. 30, 107 N. Y. Supp. 1020; *aff'd*, 127 App. Div. 916, 111 N. Y. Supp. 1136; *dism'd*, 195 N. Y. 610; *People ex rel. Hoyle v. Osborn*, 6 Civ. Pro. 299.

17. *People ex rel. Hoyle v. Osborn*, 6 Civ. Pro. 299.

Objections waived.—Where, in proceedings to obtain the custody of an infant, the attorney for the respondent makes the objection that the petition for the writ of habeas corpus was directed to a judge and not to the court, and that the writ was granted by a judge at chambers and not by the court, and thereafter withdraws his objection in open court and the issues are tried, he will not be permitted on appeal to repudiate the withdrawal of

the objection and his word given to the court that he had withdrawn the same. The defect in proceedings for a writ of habeas corpus to inquire into the detention of an infant, that the petition was directed to a judge and not to the court, and that the writ was granted by a judge at chambers and not by the court, may be waived by the respondent. *People ex rel. Noel v. O'Dell*, 192 App. Div. 866, 183 N. Y. Supp. 124.

18. *People ex rel. Williams v. Corey*, 46 Hun, 408; followed in *People ex rel. Parr v. Parr*, 49 Hun, 473, which was *aff'd*, 121 N. Y. 679.

19. *People ex rel. James v. The Society for the Prevention of Cruelty to Children*, 19 Misc. 677, 44 N. Y. Supp. 1100.

ARTICLE III.

THE WRIT.

A. Civil Practice Act, § 1235. Grant of writ.

A court or a judge authorized to grant either writ must grant it without delay whenever a petition therefor is presented, as prescribed in the foregoing sections of this article, unless it appears from the petition itself or the documents annexed thereto that the petitioner is prohibited by law from prosecuting the writ. For a violation of this section, a judge, or, if the application was made to a court, each member of the court who assents to the violation, forfeits to the prisoner one thousand dollars, to be recovered by an action in his name or in the name of the petitioner to his use. A writ of habeas corpus may be issued under this section on the first day of the week, commonly called Sunday.

B. Civil Practice Act, § 1236. Issuance of writ.

1. The writ must be issued under the seal of the court by which it is awarded. Where it is allowed by a judge out of court and is returnable before a court of record, it must be issued under the seal of the court before which it is returnable. Where it is returnable before a judge out of court, or before a body or tribunal other than a court of record, it must be issued under the seal of the Supreme Court. Where the seal of the Supreme Court is to be used, as prescribed in this section, it may be the seal of the county wherein the writ is awarded or wherein it is returnable.

2. The writ must be issued in behalf of the people of the State; but where it is awarded upon the application of a private person, it must show that it was issued upon the relation of that person.

3. The officer or other person against whom the writ is issued shall be styled the defendant therein.

4. The presiding judge of a court by which the writ is awarded, or the judge who allows such a writ out of court, as the case may be, must sign an allowance thereof indorsed thereupon, stating the date of the allowance.^{19a}

C. Civil Practice Act, § 1237. Form of writ of habeas corpus.

The writ of habeas corpus, issued as prescribed in this article, must be substantially in the following form, the blanks being properly filled up:

"The People of the State of New York,

To the Sheriff of," etc. (or "to A. B.")

"We command you, that you have the body of C. D., by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said C. D. is called or charged, before," ("the Supreme Court, at a special term or term of the appellate division thereof, to be held," or "E. F., justice of the Supreme Court," or otherwise, as the case may be) "at on " "to do and receive what shall then and there be considered, concerning the said C. D." And have you then there this writ.

"Witness,, one of the justices" (or "judges") "of the said court," (or "county judge," or otherwise, as the case may be,) "the day of, in the year nineteen hundred and"

19a. Seal.—The omission of the seal of the court from a writ of habeas corpus does not render it void. People ex

rel. Jenkins v. Kuhne, 57 Misc. 30, 107 N. Y. Supp. 1020; aff'd, 127 App. Div. 916; appeal dismissed, 195 N. Y. 610.

D. Civil Practice Act, § 1238. Form of writ of certiorari.

The writ of certiorari issued as prescribed in this article, must be substantially in the following form, the blanks being properly filled up:

"The People of the State of New York,

To the Sheriff of," etc. (or "to A. B.")

"We command you, that you certify fully and at large, to," ("the Supreme Court, at a special term or term of the appellate division thereof, to be held," or "E. F., justice of the Supreme Court," or otherwise, as the case may be,) "at, on, "the day and cause of the imprisonment of C. D., by you detained, as it is said, by whatsoever name the said C. D. is called or charged. And have you then there this writ."

"Witness,, one of the justices," (or "judges") "of the said court," (or "county judge," or otherwise, as the case may be,) "the day of, in the year nineteen hundred and"

E. Civil Practice Act, § 1239. When returnable.

1. Either writ may be made returnable forthwith or on a future day certain as the case requires.

2. If application for either writ is made to the Supreme Court, or to a justice thereof, in a county other than that where the person is imprisoned or confined, the writ may be made returnable, in its or his discretion, before any judge authorized to grant it, in the county of the imprisonment or confinement.

3. A writ of habeas corpus cannot be made returnable on Sunday.

F. Civil Practice Act, § 1240. Defects in form.

The writ of habeas corpus or the writ of certiorari shall not be disobeyed for any defect of form, and particularly in either of the following cases:

1. If the person having the custody of the prisoner is designated either by his name of office, if he has one, or by his own name; or, if both names are unknown or uncertain, by an assumed appellation. Any person upon whom the writ is served is deemed to be the person to whom it is directed, although it is directed to him by a wrong name or description or to another person.

2. If the person directed to be produced is designated by name, or otherwise described in any way so as to be identified as the person intended.

G. Civil Practice Act, § 1242. Service of habeas corpus or certiorari.

A writ of habeas corpus or of certiorari, issued as prescribed in this article may be served by delivering it to the person to whom it is directed. If he cannot be found with due diligence, it may be served by leaving it at the jail or other place in which the prisoner is confined, with any under officer, or other person of proper age, having charge, for the time, of the prisoner, and paying or tendering to him the fees or charges for bringing up the prisoner. If the person upon whom the writ ought to be served keeps himself concealed or refuses admittance to the person attempting to serve it, it may be served by affixing it in a conspicuous place on the outside either of his dwelling-house or of the place where the prisoner is confined. In that case, the service is complete without tendering the fees or charges for bringing up the prisoner. A writ of habeas corpus may be served on the first day of the week, commonly called Sunday.

H. Civil Practice Act, § 1243. Service of habeas corpus and fees.

1. A writ of habeas corpus can be served by any person of the age of twenty-one years and upwards.

2. Where the prisoner is in custody of a sheriff, coroner, constable or marshal, the service is not complete unless the person serving the writ tenders to the officer the fees allowed by law for bringing up the prisoner and delivers to him an undertaking, with at least one surety, in a sum specified therein, to the effect that the surety will pay the charges of carrying back the prisoner if he shall be remanded, and that the prisoner will not escape by the way, either in going to, remaining at, or returning from the place to which he is to be taken. The sum so specified must be at least twice the sum for which the prisoner is detained, if he is detained for a specific sum of money; if not, it must be one thousand dollars.

3. A court or a judge, in its or his discretion, upon allowing a writ of habeas corpus directed to any person other than a sheriff, coroner, constable, or marshal, may require the applicant, in order to render the service thereof complete, to pay the charges of bringing up the prisoner. In that case, the amount of the charges, not to exceed the fees allowed by law to a sheriff for a similar service, must be specified in the certificate allowing the writ.

4. This section is not applicable to a case where the writ is allowed upon the application of the attorney-general or a district attorney.

I. Issuance of writ mandatory.

Section 1235 seems to give an absolute right to the granting of the writ, and no special order of the court is necessary for its issuance.²⁰ The act of issuing a habeas corpus may be said to be a ministerial and not a judicial act.²¹ A writ of habeas corpus to secure release from detention under an alleged illegal commitment cannot be dismissed on a showing that the relator has subsequently been duly charged with the commission of the crime attempted to be charged by the proceedings complained of in the writ, as, under section 1235 making the issuance of the writ mandatory on proper showing, it is the duty of the court to discharge the defendant from custody as to any further detention under the particular proceedings complained of, if they are illegal.²²

J. Returnable in another county.

Regardless of legislative provisions, a writ of habeas corpus may be made returnable in a county other than that in which the relator is restrained, though a court be in session in that county.²³

20. *People ex rel. Jenkins v. Kuhne*, 57 Misc. 30, 107 N. Y. Supp. 1020; *aff'd*, 127 App. Div. 916; appeal dismissed, 195 N. Y. 610.

21. *Nash v. People*, 36 N. Y. 607.

22. *People ex rel. Farley v. Crane*,

94 App. Div. 397, 88 N. Y. Supp. 343.

23. *People ex rel. Robin v. Hayes*, 82 Misc. 165, 143 N. Y. Supp. 325; *aff'd*, 163 App. Div. 725, 149 N. Y. Supp. 250.

K. Tender of fees and bond.

Section 1243 requiring the relator in a writ of habeas corpus to pay certain fees and give an undertaking to the respondent is for the sole benefit of the latter, and may, therefore, be waived by him. Where no objection was made when a writ of habeas corpus was served that no fees were tendered to respondent, and no undertaking was given as required by such section, and the respondent finally obeyed the writ without requiring either fees or undertaking, he could not object that the writ was invalid for that reason.²⁴ The tender of fees and bond are not required in case a district attorney or the attorney-general applies for the writ.

L. Alteration of writ.

Where, after the issuance of a writ of habeas corpus, relator's counsel changed the name intended for relator in two places in the writ to correct a mistake, and make the writ consistent throughout, such change did not invalidate the writ; since it was either within the implied authority of counsel to make the writ conform to the intent of the justice issuing it, or if it was a material alteration made without authority, it was the act of a stranger to the writ, and, therefore, did not affect the writ as originally issued.²⁵

ARTICLE IV.**RETURN TO WRIT.****A. Civil Practice Act, § 1244. Obedience to writ and return.**

1. A sheriff, coroner, constable or marshal, upon whom complete service of a writ of habeas corpus is made, as prescribed in this article, must obey and make return to the writ according to the exigency thereof, whether it is directed to him or not. Any other person, upon whom such a writ is served, having the custody of the individual for whose benefit it was issued, must obey and execute it according to the command thereof without requiring any bond or the payment of any charges, except such as are specified in the certificate allowing the writ.

2. A person upon whom a writ of certiorari, issued as prescribed in this article, is served, upon payment or tender of the fees allowed by law for making a return to the writ, and for copying the warrant, or other process or proceeding, to be annexed thereto, must obey and return the writ in like manner, according to the exigency thereof.

3. Where a writ of habeas corpus is returnable on a day certain, the return must be made at the time and place specified therein. Where such a writ is

24. People ex rel. Jenkins v. Kuhne, — **25.** People ex rel. Jenkins v. Kuhne, 57 Misc. 30, 107 N. Y. Supp. 1020; 57 Misc. 30, 107 N. Y. Supp. 1020; aff'd, 127 App. Div. 916, 111 N. Y. aff'd, 127 App. Div. 916, appeal dismissed, 195 N. Y. 610. Supp. 1136; dismissed, 195 N. Y. 610.

returnable forthwith, at a place within twenty miles of the place of service, the return must be made and the prisoner must be produced within twenty-four hours after service; and the like time must be allowed for each additional twenty miles.

B. Civil Practice Act, § 1245. Contents of return.

The person upon whom either writ has been duly served must state plainly and unequivocally in his return:

1. Whether or not, at the time when the writ was served or at any time theretofore or thereafter, he had in his custody or under his power or restraint the person for whose relief the writ was issued.

2. If he so had that person, when the writ was served, and still has him, the authority and true cause of the imprisonment or restraint, setting it forth at length. If the prisoner is detained by virtue of a mandate or other written authority, a copy thereof must be annexed to the return, and, upon the return of the writ, the original must be produced and exhibited to the court or judge.

3. If he so had the prisoner at any time, but has transferred the custody or restraint of him to another, the return must conform to the return required by the second subdivision of this section, except that the substance of the mandate or other written authority may be given if the original is no longer in his hands; and that the return must state particularly to whom, at what time, for what cause and by what authority the transfer was made.

The return must be signed by the person making it, and, unless he is a sworn public officer and makes his return in his official capacity, it must be verified by his oath.

C. Civil Practice Act, § 1246. Production of prisoner.

The person upon whom a writ of habeas corpus has been duly served must also bring up the body of the prisoner in his custody, according to the command of the writ, unless he states in his return that the prisoner is so sick or infirm that the production of him would endanger his life or his health.

D. Civil Practice Act, § 1270. Concealing prisoner to avoid writ.

Any one having in his custody, or under his power, a person entitled to a writ of habeas corpus or a writ of certiorari, as prescribed in this article, or a person for whose relief a writ of habeas corpus or a writ of certiorari has been duly issued, as prescribed in this article, who, with intent to elude the service of the writ or to avoid the effect thereof, transfers the prisoner to the custody, or places him under the power or control of another, or conceals him, or changes the place of his confinement, is guilty of a misdemeanor; and, upon conviction thereof, shall be punished as specified in the last section.

A person who knowingly assists in the violation of this section is guilty of a misdemeanor, and, upon conviction thereof, shall be punished as specified in the last section.

E. General contents of return.

Section 1245 prescribes the contents of the return. The production of the commitment alone is not sufficient.²⁶ The sworn statement of a party on whom the writ was not served is not admissible as a return.²⁷ But the return need not con-

^{26.} *Matter of Haller*, 3 Abb. N. C. 65.

^{27.} *People ex rel. v. Mercein*, 8 Paige, 47.

tain the evidence on which the prisoner's conviction was based.²⁸

A return to a writ of habeas corpus to procure the release of a prisoner from the workhouse which states that he is held under a commitment from a city magistrate is not defective in failing to show that he was arrested under a warrant, as it will be presumed that the magistrate acquired jurisdiction over the prisoner in the proper manner.²⁹

It is not necessary under subdivision 1 of section 1245 to state in the language of the statute "whether or not, at the time when the writ was served, or at any time theretofore or thereafter, he had in his custody, or under his power or restraint, the person for whose relief the writ was issued," but the law is fully satisfied when the defendant has placed before the court facts from which it may properly determine that the person is not restrained of his liberty. The return, not being traversed or contradicted in any manner, must be taken as true.³⁰

Upon the writ of certiorari to inquire into the cause of detention, the party is required to return to the judge issuing the writ, by what right he holds the custody of the person detained. Under this requirement, he returns simply the commitment.³¹

Where the petition on application for a writ to inquire into the cause of detention of one confined in a penitentiary did not allege that the relator was detained without a proper warrant of commitment, and the writ did not require the keeper to return the warrant or other instrument by which he detained the relator, but simply required the return of the cause of his imprisonment, it was held that the certified minutes of the court showing the judgment and sentence imposed sufficiently answered the writ, and the keeper was not required to return the warrant.³² A sheriff's return should be construed liberally.³³

Section 1244 makes it the duty of the person on whom a writ of habeas corpus is served to obey, and make return to it according to the "exigency thereof," and declares that when the writ is returnable forthwith, at a place within twenty miles of the place of service, the prisoner must be

28. *People ex rel. Fleischman v. Fox*, 34 Misc. 82, 69 N. Y. Supp. 545.

29. *People ex rel. Edwards v. Warden of Workhouse*, 37 Misc. 639, 75 N. Y. Supp. 1111.

30. *People ex rel. Baxter v. Baxter*, 57 App. Div. 179, 68 N. Y. Supp. 201.

31. *People ex rel. Taylor v. Seaman*, 8 Misc. 153, 59 St. Rep. 463, 29 N. Y. Supp. 329.

32. *People ex rel. Trainor v. Baker*, 89 N. Y. 460.

33. *People v. Nevins*, 1 Hill, 154.

produced within twenty-four hours; and section 1246 declares that the person on whom the writ is served must bring up the body of the prisoner in his custody according to the "command" of the writ. It is held that the time specified in section 1244 is the maximum time only, and hence, where a writ required the production of the prisoner "forthwith and immediately," it is no excuse for the respondent's delay to afford an opportunity to photograph and measure the prisoner though he is produced within twenty-four hours.³⁴

F. Production of prisoner.

The production of the body is a necessary element of the writ which issues for the purpose of protecting the liberty of the person. As in ordinary proceedings the determination of the right to his liberty is the matter for ultimate decision; the writ begins with a demand for that liberty, and demands his presence before the court for summary determination. As has heretofore been said and appears by the foregoing section, the return must give the reason for non-production in case of sickness or infirmity. Without the production of the body the case has no status.³⁵ The person upon whom the writ has been duly served must bring up the body of the prisoner under peril, in case of neglect, of attachment and commitment.³⁶ The return in case of non-production of the prisoner must be full and complete, and an evasive return will not be tolerated.³⁷ An officer making a return should show in case he does not produce the prisoner that he is not under his control.³⁸

G. Further or amended return.

Where objection is made to a return, it seems a further return by the sheriff may be made showing the facts, or the judge may take oral evidence to ascertain them.³⁹ A return may be amended.⁴⁰

34. *People ex rel. Jenkins v. Kuhne*, 57 Misc. 30, 107 N. Y. Supp. 1020; aff'd, 127 App. Div. 916, 111 N. Y. Supp. 1136; *dism'd*, 195 N. Y. 610.

35. *In re Lampert*, 10 Wkly. Dig. 109.

36. *People ex rel. James v. Society for the Prevention of Cruelty to Children*, 19 Misc. 677, 44 N. Y. Supp.

1100.

37. *Rex v. Winton*, 5 T. R. 89.

38. *Matter of Stacy*, 10 Johns. 328.

39. *People ex rel. Clark v. Grant*, 111 N. Y. 584, aff'g 47 Hun, 605.

40. 5 Wait's Pr. 532, and cases cited; 3 Hill, 657, n.; *Matter of Hobson*, 40 Barb. 34.

ARTICLE V.

NOTICE TO INTERESTED PARTIES.

A. Civil Practice Act, § 1258. Notice before order for discharge made.

Where it appears from the return to either writ that the prisoner is in custody by virtue of a mandate, an order for his discharge shall not be made until notice of the time when, and the place where, the writ is returnable, or to which the hearing has been adjourned, as the case may be, has been either personally served, eight days previously, or given in such other manner and for such previous length of time as the court or judge prescribes, as follows:

1. Where the mandate was issued or made in a civil action or special proceeding to the person who has an interest in continuing the imprisonment or restraint, or his attorney,

2. In every other case, to the district attorney of the county within which the prisoner was detained at the time when the writ was served.

For the purpose of an appeal, the person to whom notice is given, as prescribed in the first subdivision of this section, becomes a party to the special proceeding.

B. Notice to district attorney.

Under the provisions of section 1258, the district attorney should have notice of a proceeding by habeas corpus where a person has been convicted of a criminal offense; and the county judge has no right to discharge a prisoner without such notice.⁴¹ In case of a criminal contempt, notice must be given the district attorney.⁴² The failure to give notice to the district attorney, when required by law, renders the granting of an order of discharge irregular.⁴³

C. Notice to interested party.

Section 1258 requires notice of the hearing to be given to the person interested in continuing the imprisonment of the relator. Such notice should be given to the plaintiff in a divorce suit, where defendant seeks to be liberated on habeas corpus from a commitment for failure to pay alimony and counsel fees.⁴⁴ Notice must be given, although the party resides out of the county.⁴⁵ The failure to give the notice of the return of the writ deprives the justice of jurisdiction to order the discharge of the prisoner.⁴⁶

Where it appears that the prisoner is held under a mandate in a civil case, an order of discharge cannot be made

41. *People v. Carter*, 48 Hun, 166, 14 Civ. Pro. 241.

42. *People v. Cassells*, 5 Hill, 164.

43. *People ex rel. Navagh v. Frink*, 41 Hun, 188, 4 St. Rep. 162.

44. *People ex rel. Clark v. Grant*, 111 N. Y. 587.

45. *People v. Pelham*, 14 Wend. 48.

46. *People ex rel. Asmus v. Melody*, 91 App. Div. 569, 86 N. Y. Supp. 837; *People v. Warden of Kings County Jail*, 160 App. Div. 408, 145 N. Y. Supp. 1064.

where no notice of the hearing has been given to the parties interested in continuing the imprisonment.⁴⁷ But the jurisdiction of the Supreme Court is always presumed; and its order, discharging on habeas corpus a judgment debtor in supplementary proceedings committed as for a contempt, regular and apparently valid on its face, is a protection and defense to the sheriff executing the order of discharge, even though in fact said order was void for want of jurisdiction, because made without notice to the judgment creditor, as required by section 1258.⁴⁸

The provisions of the Practice Act do not require that the sheriff shall give notice to the judgment creditor of an application to discharge upon habeas corpus a judgment debtor, committed for disobedience of an order fining him for contempt in not appearing for examination in supplementary proceedings, and the sheriff is not required to have knowledge or notice that the judgment creditor has been notified before he shall obey the writ of habeas corpus or the order directing the judgment debtor's discharge.⁴⁹

D. Sufficiency of notice.

A copy of the petition need not be served; it is sufficient to serve a notice giving the time and place where the writ is returnable.⁵⁰ An order to show cause may, upon same grounds stated as in other cases, take the place of the notice of eight days.

ARTICLE VI.

PROCEEDINGS ON RETURN.

A. Civil Practice Act, § 1247. Appearance of parties.

The parties to a special proceeding instituted by either writ may appear by attorney with like effect as in an action brought in the Supreme Court. Where the attorney-general or the district attorney does not appear for the people, the attorney for the relator is deemed also the attorney for the people.

B. Disobedience to writ.

1. Civil Practice Act, § 1248. Disobedience of writ.

Where a person who has been duly served with either writ refuses or neglects, without sufficient cause shown by him, fully to obey it, as prescribed in sections twelve hundred and forty-five and twelve hundred and forty-six, the court or judge before which or whom it is made returnable, upon proof of the due service thereof, must issue forthwith a warrant of attachment, directed

⁴⁷. *Matter of Leggat*, 162 N. Y. 437, 31 Civ. Pro. 6.

⁴⁸. *Levy v. Melody*, 50 Misc. 509, 99 N. Y. Supp. 153.

⁴⁹. *Levy v. Melody*, 50 Misc. 509, 99 N. Y. Supp. 153.

⁵⁰. *Ex parte Beatty*, 12 Wend. 229.

generally to the sheriff of any county where the delinquent may be found, or, if the delinquent is a sheriff, to any coroner of his county, or to a particular person specially appointed to execute the warrant and designated therein; commanding such officer or other person forthwith to apprehend the delinquent and bring him before the court or judge. Upon the delinquent being so brought up, an order must be made committing him to close custody in the jail of the county in which the court or judge is, or, if he is a sheriff, in the jail of a county other than his own, designated in the order; and, in either case, without being allowed the liberties of the jail. The order must direct that he stand committed until he makes return to the writ and complies with any order which may be made by the court or judge in relation to the person for whose relief the writ was issued.

2. Civil Practice Act, § 1249. Precept to bring up prisoner.

The court or judge, in its or his discretion, at the time when the warrant of attachment is issued, or afterwards, also may issue a precept to the sheriff, coroner or other person, to whom the warrant is directed, commanding him forthwith to bring before the court or judge the person for whose benefit the writ was granted, who must thereafter remain in the custody of the officer or person executing the precept until discharged, bailed or remanded, as the court or judge directs.

3. Civil Practice Act, § 1250. Assistance in execution of writ.

The sheriff, coroner or other person, to whom a warrant of attachment or precept is directed, as prescribed in either of the last two sections, may call to his aid in the execution thereof the power of the county, as the sheriff may do in the execution of a mandate issued from a court of record.

C. Application of statutes.

Section 1248 refers to a case where the respondent fails to make any return to the writ, and does not apply where the default consists in the method and manner of making the return. But this provision is not exclusive, and does not preclude the court from punishing respondent as for a contempt in cases not covered by it.⁵¹ An *ex parte* order adjudging a defendant guilty of criminal contempt in wilfully disobeying a writ of habeas corpus is unauthorized by section 1248.⁵²

D. Answer to return.

1. Civil Practice Act, § 1259. Answer to return and proceedings thereupon.

A prisoner, produced upon the return of a writ of habeas corpus, under oath may deny any material allegation of the return or make any allegation of fact showing either that his imprisonment or detention is unlawful or that he is entitled to his discharge. Thereupon the court or judge must proceed in a sum-

51. *People ex rel. Jenkins v. Kuhne*, 57 Misc. 30, 107 N. Y. Supp. 1020; aff'd, 127 App. Div. 916; aff'd, 195 N. Y. 610.

52. *People ex rel. Bishop v. Bishop*, 184 App. Div. 227, 171 N. Y. Supp. 562.

mary way to hear the evidence produced in support of or against the imprisonment or detention and to dispose of the prisoner as the justice of the case requires.

2. Return not controverted.

If no answer is made to the return, material facts stated therein are taken as true.⁵³ The return is assumed to be true, except in so far as its material allegations are controverted by the answer. The provision in the statute requiring the court or judge before whom the prisoner is brought to proceed in a summary way to hear the evidence has no application unless the material allegations showing jurisdiction are controverted by a proper answer.⁵⁴ But the objection that there was no traverse to the return cannot be taken, if evidence was taken and considered without objection.⁵⁵ If no question of fact is raised, the question is one of law as upon a demurrer.⁵⁶

Where a petition for habeas corpus alleged that relator was held by virtue of an agreement between petitioner, his mother, and defendant, and the return negatived this allegation by stating that relator was held by virtue of a commitment, and the petitioner did not traverse the return, relator should have been remanded.⁵⁷

3. Jurisdictional questions.

The jurisdiction of the court in making the commitment or mandate under which the prisoner is detained may be denied by the answer. The jurisdiction of a magistrate to issue a commitment is properly presented on habeas corpus, or on a writ of certiorari to inquire into the cause of detention, by traversing the return, and by presenting the information or evidence upon which the magistrate acted.⁵⁸ Where want of jurisdiction depends upon facts which do not appear in the return, it is necessary to set up those facts by way of traverse; but when they appear in the return, the question of jurisdiction may properly be raised by demurrer as presenting only an issue of law.⁵⁹

53. *People ex rel. Albert v. Pool*, 77 App. Div. 148, 78 N. Y. Supp. 1026; *People ex rel. Evans v. McEwan*, 67 How. Pr. 105.

54. *People ex rel. Danziger v. P. E. House of Mercy*, 128 N. Y. 180.

55. *People v. Carpenter*, 46 Barb. 619.

56. *Bennac v. People*, 4 Barb. 31; *Matter of Decosta*, 1 Park. 129. See 3 Hill, 658, n.

57. *People ex rel. Sampson v. N. Y. Catholic Protectory*, 93 App. Div. 196, 87 N. Y. Supp. 557; *People ex rel. Gagnat v. Superintendent*, 37 Misc. 92, 74 N. Y. Supp. 752.

58. *People ex rel. Farley v. Crane*, 94 App. Div. 397, 88 N. Y. Supp. 343.

59. *People ex rel. Ordway v. St. Saviour's Sanitarium*, 34 App. Div. 363, 56 N. Y. Supp. 431.

An answer filed to a return in habeas corpus, alleging that the relator was not sworn and examined before a police magistrate, upon her commitment to a House of Mercy, is demurrable if it does not dispute the jurisdiction of the magistrate, or allege facts showing a want of jurisdiction.⁶⁰ When a return to a writ contains the commitment and a copy of the complaint, and an answer is interposed denying that the petitioner was examined or any evidence taken, an issue of fact is made up, and the case should be heard on the evidence.⁶¹

4. Allegations in answer.

It has been said that denials to the return may be made in an informal manner by affidavits, or even orally.⁶² But an answer to a return in habeas corpus proceedings so far as "any allegation of fact" is concerned is to be tested by the general requirements of pleading, and mere general allegations of fraud, conspiracy, or wrongdoing made against the trial judge are insufficient.⁶³ The provision that a prisoner produced upon the return to a writ of habeas corpus may controvert the return, does not authorize the special term to accept as true statements of fact contained in his answer to the return without evidence to support them.⁶⁴

5. Trial of issues.

If the answer raises an issue upon a material fact stated in the return, a trial becomes necessary, for the court cannot

60. *People ex rel. Lazarus v. House of Mercy*, 23 App. Div. 383, 48 N. Y. Supp. 217.

61. *In re Simon*, 59 Hun, 624, 13 N. Y. Supp. 399.

62. *People ex rel. Keator v. Moss*, 6 App. Div. 414, 39 N. Y. Supp. 690.

63. *People ex rel. Patrick v. Frost*, 133 App. Div. 180, 117 N. Y. Supp. 524.

Denial of custody.—Where the return of a corporation to a writ sued out by a parent who entrusted her child to its care for two years, at the expiration of that time, states that the child has been indentured to a person in another State, and that neither it or its officers had at the time of service of the writ nor has since had the custody or control of the child, which fact is denied in the traverse, it is error to make a final order for the restoration of the child, without re-

quiring proof as to whether defendant has control of it, as may be done under section 1259. *People ex rel. Dunlap v. N. Y. Juvenile Asylum*, 58 App. Div. 133, 68 N. Y. Supp. 656.

Where an order of adoption recited all the jurisdictional facts necessary to its validity and that it appeared to the satisfaction of the county judge "that said minor has been abandoned by its parents," an allegation in the traverse to the return to a writ of habeas corpus that the mother had no notice of the proceeding raises a question of law affecting the validity of the order of adoption and it is error for the Special Term to dismiss the writ. *Matter of Livingston*, 151 App. Div. 1, 135 N. Y. Supp. 328.

64. *People ex rel. Moore v. Holmes*, 151 App. Div. 257, 135 N. Y. Supp. 467.

determine the matter from the papers.⁶⁵ The facts contained in the return must be first inquired into.⁶⁶ Except in rare cases where the facts before the court cannot be materially changed, qualified, or explained, the determination of important issues ought not to be made in a habeas corpus proceeding, as it is not calculated to thoroughly develop the facts as in the case when a regular trial is had, witnesses examined and cross-examined, alleged errors reviewed on appeal, and counsel present throughout, protecting the interests of both parties.⁶⁷ If the process by which the prisoner is held is valid on its face, the burden of impeaching its validity rests upon the prisoner upon appeal.⁶⁸

There is ample precedent for the impaneling of a jury to aid in trying the issues of fact raised upon the traverse to the return in a habeas corpus proceeding.⁶⁹ The command of section 1259 for a "summary" way of procedure means that it shall be prompt and without unreasonable and unnecessary delay, but whether the questions of fact should be submitted to the jury for the aid of the court is within the discretion of the justice to be decided by the circumstances of the particular case.⁷⁰ Or, if an issue is raised as to the proper person to have the custody of an infant, a reference may be ordered to take proof and report to the court with an opinion.⁷¹

6. Costs on trial of issue.

Where a demurrer was interposed to the return of the sheriff to a writ of habeas corpus, and the case decided on the demurrer, it was held proper to tax a trial fee of \$20 as upon a trial of an issue of law, and not proper to tax costs before notice of trial on the demurrer strictly speaking.⁷² A defendant in a habeas corpus proceeding should not be charged with costs until there has been an examination into the facts required of the court by section 1259, which involves and implies a full, fair, patient, and impartial hearing.⁷³ Under section 1259, providing that in habeas corpus pro-

65. *Matter of Lee*, 220 N. Y. 532.

66. *Squire's Case*, 12 Abb. Pr. 38.

67. *People v. McLaughlin*, 194 N. Y. 557.

68. *Matter of Taylor*, 8 Misc. 159, 28 N. Y. Supp. 500.

69. *People v. Grifenhagen*, 154 N. Y. Supp. 965.

70. *People ex rel. Woodbury v.*

Hendrick, 215 N. Y. 339.

71. *People ex rel. Keator v. Moss*, 6 App. Div. 414, 39 N. Y. Supp. 690; *Matter of Meyer*, 146 App. Div. 626, 131 N. Y. Supp. 380.

72. *In re Bernhard*, 1 N. Y. Supp. 225, 14 Civ. Pro. 195, 48 Hun, 620.

73. *Everett v. Everett*, 75 App. Div.

369, 78 N. Y. Supp. 193.

ceedings the court shall examine into the facts, a decision cannot be rendered against defendant on the merits, with a requirement that he pay the costs, where he is not allowed to give testimony explaining his conduct, and rebutting the inference that he is an improper custodian for an infant, and is told that he is out of the case, and had no occasion to come at all.⁷⁴

Where the superintendent of a State hospital received relator under a court order and an order of the State Commission in Lunacy, on relator's discharge on habeas corpus because the original order of commitment was void, it was an abuse of discretion to award costs against the superintendent, since he was not responsible in any way for the commitment, though when the writ of habeas corpus issued he did not surrender the relator without delay or investigation; it being his duty to refuse to surrender him until all the questions involved could be judicially determined.⁷⁵

In proceedings by a husband to secure the custody of his children, after offering to consent to an agreement giving to himself and his wife alternately the custody of their children, he cannot be compelled to pay \$3,000 in reference and stenographer's fees in attempting to secure custody of his children.⁷⁶

E. Inquiry into cause of detention.

1. Civil Practice Act, § 1251. Proceedings on return of habeas corpus.

The court or judge before which or whom the prisoner is brought by virtue of a writ of habeas corpus, issued as prescribed in this article, must examine, immediately after the return of the writ, into the facts alleged in the return and into the cause of the imprisonment or restraint of the prisoner; and must make a final order to discharge him therefrom if no lawful cause for the imprisonment or restraint or for the continuance thereof, is shown; whether the same was upon a commitment for an actual or supposed criminal matter or for some other cause.

2. Extent of inquiry, in general.

Speaking in general terms, there are only two questions which are inquired into upon the hearing: (1) jurisdiction of the court; and (2) form of the mandate.⁷⁷ Only the jurisdiction or power of the court to make the judgment or order

74. *People ex rel. Watson v. Buffett*, 75 App. Div. 365, 78 N. Y. Supp. 175.

75. *People ex rel. Putnam v. Palmer*, 122 App. Div. 123, 106 N. Y. Supp. 583; *dism'd*, 197 N. Y. 524.

76. *Matter of Teese*, 32 App. Div. 46, 52 N. Y. Supp. 517, 6 Anno. Cas. 149.

77. *People ex rel. Smith v. Van DeCarr*, 86 App. Div. 9, 83 N. Y. Supp. 245; *appeal dismissed*, 183 N. Y. 569; *Matter of Taylor*, 8 Misc. 159, 28 N. Y. Supp. 500; *People v. Sheriff of New York*, 29 Barb. 622; *People ex rel. Ryan v. Webster*, 86 Hun, 68, 33 N. Y. Supp. 337.

under which relator is detained can be attacked.⁷⁸ The writ cannot be used as a substitute for an appeal or writ of error.⁷⁹ Its purpose is not to review trials,⁸⁰ or to try rights of guardianship,⁸¹ or to try the title to any office.⁸²

One held under a judgment based on a criminal conviction is not entitled to release on habeas corpus because the judgment was for any reason irregular, or because there had been a mistrial, since, if the judgment was irregular, the proper proceeding was by motion for arrest of judgment, or by an appeal from the judgment.⁸³

A writ of habeas corpus cannot perform the functions of an appeal from a judgment of conviction; the court can only inquire into the question of jurisdiction and if it appears that the power existed to pronounce the judgment, the writ must be dismissed.⁸⁴ A trial cannot be reviewed or errors therein corrected by a writ of habeas corpus.⁸⁵ The regularity of the proceedings, the sufficiency of evidence, or accuracy of decisions, when not affecting jurisdiction, cannot be brought up on habeas corpus.⁸⁶

Habeas corpus is not a writ of review so that the court on a return thereto may inquire into "the legality or the justice" of the judgment under which the relator is imprisoned, but it is restricted to a consideration of the jurisdiction of the court that pronounced judgment to ascertain whether the person is detained by a final judgment of a "competent tribunal of . . . criminal jurisdiction."⁸⁷ Where, upon a verified complaint made to a city judge charg-

78. *People ex rel. White v. Feenaughty*, 51 Misc. 468, 101 N. Y. Supp. 700.

79. *Ex parte Yarborough*, 110 U. S. 651.

Delinquency court.—Upon habeas corpus the court cannot inquire into the legality or justice of a delinquency court organized under the Military Code for an error in the exercise of its jurisdiction. The remedy is by certiorari or appeal, and where neither the petition nor answer to the return denied the existence or the organization of the court, although it was one of limited jurisdiction, its jurisdiction cannot be attacked. *People ex rel. Patterson v. Reed*, 64 Hun, 453, 46 St. Rep. 597, 19 N. Y. Supp. 878.

80. *Matter of Moses*, 13 Abb. N. C. 189, 66 How. Pr. 296; *Wales v. Whit-*

ney, 114 U. S. 571; *People v. Catholic Protectory*, 38 Hun, 127; *aff'd on another point*, 101 N. Y. 195.

81. *People v. Mercein*, 8 Paige, 47; *People v. Wilcox*, 22 Barb. 186.

82. *Matter of Wakker*, 3 Barb. 162.

83. *People ex rel. Weick v. Warden of City Prison*, 117 App. Div. 154, 102 N. Y. Supp. 374; *aff'd*, 188 N. Y. 549.

84. *People ex rel. Hubert v. Kaiser*, 206 N. Y. 46.

85. *People ex rel. Reynolds v. Warden of City Prison*, 44 Misc. 149, 89 N. Y. Supp. 830; *People ex rel. Sabatina v. Jennings*, 108 Misc. 93, 177 N. Y. Supp. 210.

86. *Baker's Case*, 11 How. Pr. 418; *People v. McCormick*, 4 Park. Cr. 9.

87. *People ex rel. Patrick v. Frost*, 133 App. Div. 179, 117 N. Y. Supp. 524.

ing the relator with abandonment of his minor children, he was arrested upon a warrant sufficient upon its face, the question of the relator's guilt or innocence of the offense charged cannot be determined on habeas corpus and he must be remanded to custody.⁸⁸

The question whether or not the summons was duly served is not available on habeas corpus. The remedy is by motion in the court out of which the summons issued.⁸⁹ After a commitment is duly issued, the motives or malice of the informing witness may not be questioned on habeas corpus.⁹⁰ One charged with crime cannot invoke the aid of a writ of habeas corpus in order to obtain a discharge from imprisonment because of a delay in prosecution.⁹¹

It is only the facts necessarily involved that will be determined.⁹² Habeas corpus being a writ of right, the only question brought up is the fact of commitment.⁹³ If the restraint is alleged not to be by virtue of legal process the truth of all matters returned may be inquired into.⁹⁴ The existence and validity of process under which a prisoner is held are the proper subjects of inquiry.⁹⁵

3. Constitutionality of statute.

Upon the return to a writ of habeas corpus, the court may inquire into the constitutionality of the statute under which the judgment was rendered, for it is without authority, and not the judgment of a competent tribunal, if it is based upon an unconstitutional statute.⁹⁶ Where there is no issue of fact and the jurisdiction of the committing magistrate depends on the wording of the charge in the complaint, the constitutionality of the act under which the relator is held may be raised on a writ of habeas corpus taken out by him, and an additional writ of certiorari is unnecessary.⁹⁷

88. *People ex rel. Armstrong v. Quigley*, 75 Misc. 151, 134 N. Y. Supp. 953.

89. *People v. Dunn*, 54 N. Y. Supp. 194.

90. *People ex rel. Willett v. Quinn*, 150 App. Div. 813, 135 N. Y. Supp. 477, 27 N. Y. Cr. 388.

91. *People ex rel. McGowan v. Warden of City Prison*, 155 App. Div. 484, 140 N. Y. Supp. 864. See, also, *Estes v. Warden City Prison*, 11 Wkly. Dig. 271.

92. *People v. Wilcox*, 22 Barb. 186.

93. *People ex rel. Sampson v. N. Y. Catholic Protectory*, 93 App. Div. 196, 87 N. Y. Supp. 557; *People ex rel. Gagnat v. Superintendent*, 37 Misc. 92, 74 N. Y. Supp. 752.

94. *People v. Cassells*, 5 Hill, 164.

95. *Matter of Lagrave*, 45 How. Pr. 301.

96. *Matter of Kemler*, 7 N. Y. Supp. 145. Compare *Matter of Donohue*, 1 Abb. N. C. 1.

97. *People ex rel. Wilson v. Flynn*, 37 Misc. 87, 74 N. Y. Supp. 731; *aff'd*, 72 App. Div. 67, 76 N. Y. Supp. 293.

4. Organization of court.

The prisoner may show that the court in which he was convicted was not legally constituted, as that it was composed of only two judges when three were necessary.⁹⁸ Whether a judge conducting the trial of a cause is a *de facto* judge or not may be determined in the proceedings.⁹⁹ But habeas corpus is not the proper remedy to challenge the jurisdiction of the court on the ground that the term was unlawfully continued.¹

5. Sufficiency of indictment.

The writ of habeas corpus does not lie to question the sufficiency of an indictment valid on its face or the sufficiency of the evidence before the grand jury.² Where the court in which indictments are found and presented has jurisdiction of the class of offenses charged, it must in the first instance determine the validity of such indictments, and questions as to their sufficiency are not reviewable by habeas corpus. The proper procedure is by demurrer or motions in the trial court.³

Where, upon the trial of an indictment, the defendant pleads guilty to one of the counts contained therein and is thereupon convicted and sentenced upon such count, he cannot, in the absence of a motion in arrest of the judgment of conviction or of a direct appeal from such judgment, raise the question in habeas corpus or certiorari proceedings whether the count under which he was convicted stated facts sufficient to charge him with a crime.⁴

6. Review of action of committing magistrate.

Where there was sufficient evidence before a committing magistrate to require him to decide whether the defendant had committed an offense, his determination thereon cannot be reversed and the defendant discharged on habeas corpus.⁵

98. Matter of Devine, 21 How. Pr. 80; People v. Devine, 5 Park. Cr. 42.

99. People v. Hayes, 86 Misc. 88, 149 N. Y. Supp. 115.

1. People ex rel. Friedman v. Hayes, 172 App. Div. 442, 158 N. Y. Supp. 949.

2. People ex rel. Moore v. Warden of City Prison, 150 App. Div. 644, 135 N. Y. Supp. 883; People v. McLeod, 25 Wend. 483; s. c., 1 Hill, 377; People v. Rulloff, 5 Park. Cr. 77.

3. People ex rel. Childs v. Knott,

228 N. Y. 608.

4. People ex rel. Schneider v. Hayes, 108 App. Div. 6, 95 N. Y. Supp. 471.

5. People ex rel. Peterson v. McFarlane, 25 App. Div. 630, 49 N. Y. Supp. 599.

Usury.—The rule that upon habeas corpus the court will not consider the weight and credibility of evidence, and where there is sufficient ground for judicial inquiry will refuse to discharge the prisoner, but leave him to stand trial, applied in the case of one

In habeas corpus, when it appears that the person is in custody under a commitment by the magistrate, the only inquiry is, as to whether the magistrate had jurisdiction, and the magistrate's decision cannot be reviewed; hence it is not essential to return the evidence on the trial.⁶

Under the provisions of the Code of Criminal Procedure, providing that a magistrate can commit a person to answer for a crime only when it appears that a crime has been committed and that there is sufficient cause to believe the defendant guilty thereof, some evidence of defendant's guilt is necessary to give the magistrate jurisdiction, and, therefore, on habeas corpus the court may go behind the commitment and ascertain whether there was any evidence before the committing magistrate which connected defendant with the crime.⁷ The court may look back of the warrant to see if the facts stated in the depositions of the prosecutor conferred jurisdiction upon the magistrate to issue the warrant.⁸ Where, on traversing the return to a writ of certiorari or habeas corpus issued to inquire into the detention of relator under a commitment, it appears by the information or evidence on which the magistrate acted that there is no evidence that the crime charged has been committed, or that there is no evidence of reasonable ground for believing it was committed by him, he is entitled to his discharge.⁹ If the commitment does not sufficiently state the particular crime charged, the prisoner held thereunder may be discharged.¹⁰

accused of the crime of usury who claimed that the acts complained of were done as manager of a loan association, and legal under the statute, which claims were disputed by the prosecution. *People v. Dunlap*, 32 Misc. 390, 66 N. Y. Supp. 161.

Liquor Tax Law.—A return to a writ of habeas corpus, which showed a commitment in form, directing that applicant be held to answer for a regular violation of the Liquor Tax Law, and showed upon its face that the magistrate had jurisdiction to commit, required the dismissal of the writ. *People ex rel. Laughran v. Flynn*, 48 Misc. 159, 96 N. Y. Supp. 653; order rev'd, *People ex rel. Laughran v. Same*, 110 App. Div. 279, 96 N. Y. Supp. 655; aff'd, 184 N. Y. 579.

6. *People ex rel. Danziger v. P. E. House of Mercy*, 128 N. Y. 182.

7. *People ex rel. Bungart v. Wells*, 57 App. Div. 140, 68 N. Y. Supp. 59; *In re Henry*, 13 Misc. 734, 35 N. Y. Supp. 210, 69 St. Rep. 590; *People v. Finn*, 57 Misc. 659, 110 N. Y. Supp. 22; *People ex rel. Pickard v. Sheriff*, 11 Civ. Pro. 173; *People v. Gage*, 149 N. Y. Supp. 43.

8. *People ex rel. Wilson v. Warden of City Prison*, 151 App. Div. 108, 135 N. Y. Supp. 841; *People ex rel. Burke v. McLaughlin*, 77 Misc. 13, 136 N. Y. Supp. 122; aff'd, 152 App. Div. 912, 137 N. Y. Supp. 1116; aff'd, 207 N. Y. 769.

9. *People ex rel. Bungart v. Wells*, 57 App. Div. 140, 68 N. Y. Supp. 59; *People ex rel. Farley v. Crane*, 94 App. Div. 397, 88 N. Y. Supp. 343.

10. *People ex rel. Allen v. Hagan*, 170 N. Y. 46.

Where a grand jury failed to indict for grand larceny, but wrote on the papers "sent to court of special sessions by grand jury, to be disposed of as petit larceny, December 7, 1906," and subsequently the district attorney filed an information for petit larceny, and the accused was detained under a commitment thereon, in a habeas corpus proceeding, the legality of the detention is not affected by the action of the grand jury.¹¹ Where a person is held to the grand jury, charged with the crime of grand larceny, and the matter is sent by the grand jury to a court of special sessions, to be disposed of as petit larceny, and he is convicted of such crime, he cannot procure his discharge on habeas corpus because the magistrate who heard the charge erroneously sent the case to the grand jury in the first instance, instead of the court of special sessions, to which it belonged.¹²

When a magistrate in the city of New York acts as a committing magistrate and holds a defendant for trial in another court, the question whether the evidence before the magistrate justifies the issuance of the warrant may be tested on habeas corpus.¹³ But where such magistrate instead of holding a defendant for trial in another court commits a defendant charged with disorderly conduct for trial before himself, he is exercising his summary jurisdiction to try a case of disorderly conduct conferred by the Consolidation Act, and his decision as to whether the facts charged constituted the offense and whether the defendant was guilty cannot be reviewed by habeas corpus, but only by appeal.¹⁴

7. Former jeopardy.

The question whether a person who has been tried under an indictment resulting in a disagreement of the jury is placed in jeopardy a second time by the trial of another indictment for the same offense may be determined on habeas corpus.¹⁵ A trial judge may at any time during the trial discharge the jury and a new trial may thereafter be had when, in his opinion, some substantial reason has arisen during the course of the trial making that course necessary. If the jury has been so discharged for an inadequate reason

11. *People ex rel. Burns v. Flaherty*, 119 App. Div. 462, 104 N. Y. Supp. 173.

12. *People ex rel. O'Brien v. Hayes*, 38 Misc. 163, 77 N. Y. Supp. 284.

13. *People ex rel. Conway v. Warden of 2d Dist. Prison*, 180 App. Div. 336, 167 N. Y. Supp. 280.

14. *People ex rel. Conway v. Warden of 2d Dist. Prison*, 180 App. Div. 336, 167 N. Y. Supp. 280.

15. *People ex rel. Bullock v. Hayes*, 215 N. Y. 172; *People ex rel. Stabile v. Warden, etc.*, 202 N. Y. 138. Compare *People v. Ruloff*, 3 Park. Cr. 126.

and without the consent of the defendant, the remedy is not by habeas corpus, but by plea of former jeopardy interposed at the new trial. But after a case has been submitted, the judge can discharge the jury only in one or the other of the instances specified in section 428 of the Code of Criminal Procedure, and in that case the defendant may resort for remedy either to habeas corpus or to the plea of former jeopardy.¹⁶

8. Illegality of arrest.

A defendant, though illegally brought within the court's jurisdiction, and committed to the workhouse, under a conviction before a city magistrate for vagrancy, after a trial, for six months, unless sooner discharged, is not entitled to a writ of habeas corpus to review the commitment, on the contention that she was arrested by an officer, without a warrant, who was not present when her alleged crime was committed.¹⁷

F. When petitioner remanded.

1. Civil Practice Act, § 1252. Remanding prisoner.

The court or judge must forthwith make a final order to remand the prisoner if it appears that he is detained in custody for either of the following causes, and that the time for which he may legally be so detained has not expired:

1. By virtue of a mandate issued by a court or a judge of the United States in a case where such courts or judges have exclusive jurisdiction.

2. By virtue of the final judgment or decree of a competent tribunal, of civil or criminal jurisdiction; or the final order of such a tribunal made in a special proceeding instituted for any cause, except to punish him for a contempt; or by virtue of an execution or other process issued upon such a judgment, decree or final order.

3. For a criminal contempt, defined in section seven hundred and fifty of the judiciary law, and specially and plainly charged in a commitment made by a court, officer or body having authority to commit for the contempt so charged.¹⁸

2. Detention under authority of United States.

It has been said that the writ may issue even where the detention is by alleged authority of the United States.¹⁹ But under it, soldiers enlisted by the United States cannot be

16. *People v. Montlake*, 184 App. Div. 578, 172 N. Y. Supp. 102.

17. *People ex rel. Edwards v. Warden of City Prison*, 37 Misc. 635, 76 N. Y. Supp. 286.

18. *Constitutionality*.—Section 1252 is not unconstitutional. *People ex rel. Hubert v. Kaiser*, 150 App. Div. 541,

135 N. Y. Supp. 274; *aff'd*, 206 N. Y. 46; see *People ex rel. Goldstein v. Clancy*, 163 App. Div. 614, 616, 148 N. Y. Supp. 977.

19. *People ex rel. v. Gaul*, 44 Barb. 98; *Matter of Sullivan*, 1 N. Y. Leg. Obs. 314. See *Matter of Barrett*, 42 Barb. 479; s. c., 25 How. 380.

discharged.²⁰ And the rule laid down in the Federal courts is that after a State judge issuing the writ is fully apprised by the return of the officer that the person is in custody of the United States, he can proceed no further; and this seems to be the now settled practice.²¹

3. Detention under final judgment.

Where it appears upon the return to the writ that a person is detained in custody by virtue of the final judgment or decree of a competent tribunal, it is the duty of the judge to make an order remanding the prisoner to custody.²² A court will not review the mandate of another court of general jurisdiction on habeas corpus, where there is no jurisdic-

20. *Matter of O'Connor*, 48 Barb. 258; *Reilly's Case*, 2 Abb. N. S. 334; *Matter of Ferguson*, 9 Johns. 239.

21. *Tarble's Case*, 13 Wall. (U. S.) 397.

22. *People ex rel. Dawkins v. Frost*, 129 App. Div. 498, 114 N. Y. Supp. 209; *People ex rel. McLoughlin v. Wilson*, 88 Hun, 258, 68 St. Rep. 535, 34 N. Y. Supp. 734, citing *People ex rel. Danziger v. Protestant Episcopal House of Mercy*, 128 N. Y. 185; *People ex rel. Lotz v. Norton*, 76 Hun, 7; *Matter of Donohue*, 1 Abb. N. C. 10; *People ex rel. Phelps v. Fancher*, 2 Hun, 226.

Minutes of entry of judgment.—A return to a writ of habeas corpus showed that relator was convicted of selling liquor without a license and sentenced to imprisonment. The sheriff had not received, when the writ was issued, copies of the minutes showing the entry of judgment, as provided by the Code of Criminal Procedure, section 486. Held, that the certified copies of the minutes were merely evidence of the existence of process under which the detention was made, and that the prisoner was detained by virtue of a judgment, and the writ will be dismissed. *People ex rel. Barrett v. Wells*, 57 Misc. 662, 109 N. Y. Supp. 1081; *People ex rel. Loris v. Wells*, 57 Misc. 662, 109 N. Y. Supp. 1081.

Delivery to bail.—Where, after the conviction of a person in the District

Court of the United States in the State of Pennsylvania of conspiracy against the government, he is released on bail pending his appeal to the Circuit Court of Appeals, and, before the disposition of the appeal, he is tried in the State courts of New York on a charge of forgery and sentenced to prison by reason whereof he cannot be surrendered to the United States courts upon the affirmance of his conviction in Pennsylvania; and where the United States courts thereupon proceed against his bail and the bail and those who had been adjudged the owners of securities pledged by the defendant to indemnify his bail apply to the State court by writ of certiorari issued as a substitute for a writ of habeas corpus to deliver up the defendant to them that they may surrender him in exoneration to the United States court; held, the provisions of section 1352 require the judge who grants the writ to remand the prisoner. *People ex rel. Am. Surety Co. v. Benham*, 71 Misc. 345, 128 N. Y. Supp. 610.

Imbecile.—If he is held under a judgment of conviction, he cannot be released under habeas corpus, although it appears that he has always been an imbecile; the remedy is an application for a new trial or an application to the governor to inquire into his mental condition. *People ex rel. Cassidy v. Lawes*, 112 Misc. 257, 182 N. Y. Supp. 545.

tional defect.²³ A person confined under the final judgment of a criminal court of record cannot be discharged upon a writ of habeas corpus, unless that court had no jurisdiction, or no power to impose the sentence inflicted.²⁴ A commitment properly issued has, in habeas corpus cases, all the force and effect given to a final judgment of a court of competent jurisdiction under the provisions of section 1231.²⁵ Where the return to a writ of habeas corpus shows that defendant was duly committed by a city magistrate on competent evidence, he should be remanded under section 1252.²⁶ A writ of habeas corpus will not lie to review the conviction before a magistrate who had jurisdiction to entertain the charge and impose the sentence.²⁷ If the return shows that the relator has been sentenced, and is detained under the process of a court of competent jurisdiction, it is the duty of the court to remand him, unless it be shown the trial court was without jurisdiction to pass the sentence.²⁸

The only inquiry that a county judge can make upon the return to a writ of certiorari is, as to whether it appears from the judgment itself that the inferior court had jurisdiction.²⁹ If the prisoner is detained by virtue of an execution issued upon the judgment of a court, made in an action in which the court confessedly had jurisdiction, the writ should

23. *People ex rel. Pond v. Tamsen*, 15 Misc. 364, 37 N. Y. Supp. 497.

24. *People v. Quartararo*, 76 Misc. 55, 133 N. Y. Supp. 985.

Legality of parole.—A writ of habeas corpus must be dismissed, irrespective of the legality of a parole under which the relator has been at liberty, where it appears that he is being held by virtue of a final judgment of a competent tribunal of criminal jurisdiction, and it does not appear that his time of service under said judgment has expired. *People ex rel. Johnson v. Kidney*, 185 App. Div. 769, 173 N. Y. Supp. 388.

25. *People ex rel. Kuhn v. P. E. House of Mercy*, 133 N. Y. 207; *People ex rel. Phelps v. Oyer and Terminer of New York*, 14 Hun, 21.

26. In *People ex rel. Kuhn v. P. E. House of Mercy*, 133 N. Y. 208; *People ex rel. Smith v. Van De Carr*, 86 App. Div. 9, 83 N. Y. Supp. 245; *People ex rel. Perry v. Hagan*, 25 Misc. 125, 54 N. Y. Supp. 826; *People ex rel.*

Manning v. Hagan, 34 Misc. 24, 69 N. Y. Supp. 451; *People ex rel. Edwards v. Warden of City Prison*, 37 Misc. 635, 76 N. Y. Supp. 286; *Cohen v. Warden of Workhouse*, 150 N. Y. Supp. 596.

27. *People ex rel. Eisen v. Flynn*, 37 Misc. 90, 74 N. Y. Supp. 740.

28. *People ex rel. Kemler v. Durstont*, 119 N. Y. 570; *People ex rel. Smith v. Van De Carr*, 86 App. Div. 9, 83 N. Y. Supp. 245; *dism'd*, 183 N. Y. 569; *People ex rel. Stephani v. North*, 91 Misc. 616, 155 N. Y. Supp. 595.

Petit larceny.—A judgment convicting a defendant of petit larceny not charged as a first offense is not illegal and excessive because it includes a provision that he be imprisoned "at hard labor," and cannot be reviewed on habeas corpus. *People ex rel. Gainance v. Platt*, 148 App. Div. 579, 132 N. Y. Supp. 939.

29. *People ex rel. Ryan v. Webster*, 86 Hun, 68, 33 N. Y. Supp. 337.

be dismissed and the prisoner remanded.³⁰ But if the detention is unlawful or unauthorized, although it is pursuant to a final judgment or decree, the relator may be discharged.³¹ Thus, if the court had no jurisdiction to render the judgment in question, his release may be secured through habeas corpus. Where a sheriff relies on a judgment of conviction as authority for detaining a prisoner, he is required to establish the fact of such judgment.³²

4. Criminal contempt.

Where it appears that the relator is detained for a criminal contempt specially and plainly charged in the commitment made by a court having authority to commit for contempt, so charged, he must be remanded.³³ Where one is held on an order adjudging him guilty of contempt, he will be discharged on habeas corpus; first, where the punishment exceeded that which the court was authorized to inflict by section 751 of the Judiciary Law; or second, if it be assumed that he is held under the provisions for the punishment for a civil contempt and there is no adjudication that the conduct complained of was calculated to, or did actually, impede, impair or prejudice the rights and remedies of the petitioner.³⁴ Facts not traversed or denied, alleged in a petition for a writ of habeas corpus instituted to procure relator's discharge from imprisonment under an order adjudging her in contempt, even if not admitted, constitute evidence upon the hearing of the writ, and if they show that he was not guilty of contempt he is entitled to be discharged.³⁵

G. When petitioner discharged.

1. Civil Practice Act, § 1253. Discharge of prisoner in civil cases.

If it appears upon the return that the prisoner is in custody by virtue of a mandate in a civil cause, he can be discharged only in one of the following cases:

1. Where the jurisdiction of the court which, or of the officer who, issued the mandate, has been exceeded, either as to matter, place, sum or person.

2. Where, although the original imprisonment was lawful, yet by some act, omission or event, which has taken place afterwards, the prisoner has become entitled to be discharged.

30. *People ex rel. Crane v. Grant*, 13 Civ. Pro. 209.

31. *People ex rel. Harris v. Gill*, 85 App. Div. 192, 83 N. Y. Supp. 135; *aff'd*, 176 N. Y. 606.

32. *People ex rel. Snyder v. Whitney*, 22 Misc. 226, 49 N. Y. Supp. 591.

33. *People ex rel. Taylor v. Seaman*, 8 Misc. 152, 59 St. Rep. 462, 29 N. Y. Supp. 329.

34. *Matter of Swenarton v. Shupe*, 40 Hun, 42.

35. *Matter of Depue*, 185 N. Y. 60.

3. Where the mandate is defective in a matter of substance required by law, rendering it void.

4. Where the mandate, although in proper form, was issued in a case not allowed by law.

5. Where the person having the custody of the prisoner under the mandate is not the person empowered by law to detain him.

6. Where the mandate is not authorized by a judgment, decree or order of a court, or by a provision of law.

2. Civil Practice Act, § 1254. Inquiry by court upon return.

But a court or judge, upon the return of a writ issued as prescribed in this article, shall not inquire into the legality or justice of any mandate, judgment, decree or final order, specified in the last section but one, except as therein stated.

3. Question of jurisdiction.

It is proper in habeas corpus proceedings for a relator to attack the jurisdiction of the court in rendering the final judgment or decree under which he is detained.³⁶ Section 1254 does not prevent a determination as to whether the court rendering the judgment had jurisdiction.³⁷ Final process is held to be reviewable when there is in fact no judgment or decree, or when the judgment or conviction is void.³⁸

The competency of the tribunal to render the judgment or decree under which a person is held in custody and its jurisdiction over him either as to matter, place, sum, or person is by the strictest implication made the subject of inquiry upon a hearing before a judge or court issuing a writ of habeas corpus, and the court is thereby expressly required upon the return of such a writ to institute an inquiry into the cause of detention and discharge the prisoner when there is a lack of jurisdiction on the part of the tribunal making an order for his detention.³⁹ Final judgment must be that of a tribunal competent to pronounce the judgment, and where competency to pronounce is exhausted or never existed it does not come within the definition of the

36. *People v. Bowe*, 58 How. 393; *People v. Oyer and Terminer*, 14 Hun, 21; *Devlin's Case*, 5 Abb. Pr. 281; *People v. Cassells*, 5 Hill, 164; *Catlin v. Neilson*, 16 Hun, 214; *People ex rel. Stokes v. Risely*, 38 Hun, 280; *People ex rel. Tweed v. Liscomb*, 60 N. Y. 559; *People ex rel. McKenna v. Kennedy*, 78 Misc. 482, 138 N. Y. Supp. 581; *aff'd*, 154 App. Div. 558, 139 N. Y. Supp. 896, 29 N. Y. Cr. 896.

37. *People ex rel. Tweed v. Liscomb*, 60 N. Y. 760; *People ex rel. v. Warden, etc.*, 100 N. Y. 20.

38. *Ex parte Beatty*, 12 Wend. 229; *People v. Rawson*, 61 Barb. 619; *People v. Willett*, 15 How. 210; *Matter of Divine*, 11 Abb. 90; *s. c.*, 21 How. 80.

39. *People ex rel. Tweed v. Liscomb*, 60 N. Y. 559; *People ex rel. Frey v. The Warden, etc.*, 100 N. Y. 20.

final judgment as to which habeas corpus is ineffective.⁴⁰ If a party is held under a judgment when there was no jurisdiction to pronounce the same, through either want of jurisdiction or through excess thereof, the judgment is void and he may be released on habeas corpus without being put to an appeal from the judgment.⁴¹

The test of a prisoner's right to relief by habeas corpus is not whether the court or magistrate had jurisdiction of the subject-matter for which the judgment was rendered and of the person of the party against whom it was rendered, but whether the tribunal was competent by reason of its civil or criminal jurisdiction to render the judgment by virtue of which the imprisonment is inflicted.⁴² Habeas corpus will lie where there was no power in the court to render the judgment which was pronounced, and where the certificate of conviction, by virtue of which one was imprisoned, is no warrant for his detention.⁴³ Where a prisoner is held under a judgment of a court made without authority of law, the proper tribunal will, upon habeas corpus, look into the record so far as to ascertain the fact, and if it be found to be so, will discharge the prisoner.⁴⁴ On a writ of habeas corpus on a commitment in the nature of a final judgment, the only question is whether the magistrate had jurisdiction of the offense, of the person, and to pronounce the judgment rendered.⁴⁵ But the question whether a court is without jurisdiction to try a defendant for a first offense upon an indictment charging a second offense cannot be raised by habeas corpus proceedings.⁴⁶

4. Void sentence.

Where a sentence is void, a person may be discharged notwithstanding the apparent exception by section 1231, since the Constitution gives the remedy by habeas corpus in cases of illegal detention and the Legislature cannot narrow its scope.⁴⁷ Where the judgment of a court of record is void

40. *People ex rel. Stokes v. Risely*, 38 Hun, 280; *People v. Carter*, 48 Hun, 165, 14 Civ. Pro. 241, 15 St. Rep. 640.

41. *People ex rel. Young v. Stout*, 8 Hun, 341.

42. *People ex rel. Martin v. Walters*, 15 Abb. N. C. 461.

43. *People ex rel. Johnson v. Webster*, 92 Hun, 378, 36 N. Y. Supp. 995.

44. *People ex rel. Frey v. The Warden*, etc., 100 N. Y. 20; *People ex rel.*

Stumpf v. Craig, 79 Misc. 98, 140 N. Y. Supp. 652, 29 N. Y. Cr. 29; *People ex rel. Sabold v. Webb*, 5 N. Y. Supp. 835, 23 St. Rep. 335.

45. *People ex rel. Reynolds v. Warden of City Prison*, 44 Misc. 149, 89 N. Y. Supp. 830; *People v. Neilson*, 16 Hun, 214.

46. *People ex rel. Goldstein v. Clancy*, 163 App. Div. 614, 148 N. Y. Supp. 977.

47. *People ex rel. Dunnigan v. Web-*

by reason of a lack of power to impose the punishment given, the prisoner may be remanded for resentencing, and the record corrected; but where such improper sentence was given in a court of special sessions, the prisoner cannot be remanded for the further action of the court, for it has ceased to exist for the purpose of the case, when the judgment was pronounced.⁴⁸ The courts of special sessions have power to suspend sentence indefinitely, and impose sentence at the expiration of a limited time, but it seems that a prisoner may be discharged in habeas corpus proceedings where the sentence is void because the recorder was *functus officio*.⁴⁹ A person held under the sentence of imprisonment for nonpayment of a fine imposed for a violation of the Liquor Tax Law may be released on a writ of habeas corpus, as the court has no jurisdiction to impose such a sentence.⁵⁰

5. Excessive sentence.

Where a court has jurisdiction of a criminal case and imposes a sentence upon the defendant's plea of guilty, the fact that the sentence is excessive will not authorize a discharge upon habeas corpus, but the remedy of the defendant is by appeal,⁵¹ or a motion for arrest of judgment.⁵² In any event, he is not entitled to the remedy while the valid portion of the sentence is unexpired.⁵³

6. Unauthorized mandate.

Where the process issued is not allowed by law, the writ will issue.⁵⁴ Where a relator is committed to prison in a proceeding not authorized by law, the court or judge before whom the prisoner is brought under a writ of habeas corpus must make a final order discharging him from imprisonment.⁵⁵ A person arrested under a judgment obtained without jurisdiction or under a process not authorized by the judgment or by statute may be released by a writ of habeas

ster, 14 Misc. 617, 36 N. Y. Supp. 745; aff'd, 1 App. Div. 631, 37 N. Y. Supp. 1148.

48. *People ex rel. Johnson v. Webster*, 92 Hun, 378, 36 N. Y. Supp. 995. See, also, *People ex rel. Devoe v. Kelly*, 97 N. Y. 212.

49. *People ex rel. Dunnigan v. Webster*, 14 Misc. 617, 36 N. Y. Supp. 745; aff'd, 1 App. Div. 631, 37 N. Y. Supp. 1148.

50. *People v. Stock*, 26 App. Div.

564, 50 N. Y. Supp. 483; aff'd, 157 N. Y. 681.

51. *People ex rel. Bretton v. Schleth*, 68 Misc. 307, 123 N. Y. Supp. 686; *Ex parte Morris*, 163 N. Y. Supp. 907.

52. *People v. Quartararo*, 76 Misc. 55, 133 N. Y. Supp. 985.

53. See, *supra*, Art. I-E-7, Sentence Partially Legal.

54. *Squire's Case*, 12 Abb. Pr. 38.

55. *People ex rel. Fries v. Riley*, 25 Hun, 587.

corpus. Section 1231, which provides that a person detained by virtue of an execution or other process issued upon a judgment shall not be entitled to the writ of habeas corpus, refers to a valid and authorized and not to a void execution.⁵⁶ The legality of an arrest under civil process may thus be inquired into.⁵⁷ A person confined under a commitment void on its face may have the writ.⁵⁸ If the force of the mandate has expired, the prisoner may have his release by habeas corpus.⁵⁹

A commitment for a breach of the peace in threatening to commit a crime which does not state that an undertaking was required by the magistrate, and that it was not given, and which does not specify the amount of bail, is void and furnishes no authority to the sheriff to detain such person.⁶⁰ Where neither the commitment nor the return of the magistrate sets forth an offense known to the law by any statutory or legal definition, the record is insufficient, and the relator should be discharged from custody.⁶¹

7. Defective mandate.

Informality in a commitment for contempt is not available on habeas corpus.⁶² In order to entitle one to discharge the process must be void, not voidable; defects which may be cured by amendment make the process voidable only.⁶³ A prisoner is not entitled to a discharge on habeas corpus if the mistake or error which is claimed to render his detention illegal can be corrected.⁶⁴ One sentenced to imprisonment is not entitled to release on habeas corpus where the record

56. *Winne v. Hotaling*, 84 Hun, 166, 32 N. Y. Supp. 450, 65 St. Rep. 736.

57. *People v. Kelly*, 35 Barb. 444; *People v. Willet*, 6 Abb. Pr. 37, 15 How. Pr. 210. But see *Cable v. Cooper*, 15 Johns. 152; *Bank v. Jenkins*, 18 Johns. 305.

58. *People ex rel. Knowlton v. Sadler*, 2 N. Y. Cr. 438.

59. *People ex rel. Wolfe v. Johnson*, 194 App. Div. 451, 185 N. Y. Supp. 452.

60. *People ex rel. Day v. Reese*, 24 Misc. 528, 53 N. Y. Supp. 965.

61. *People ex rel. Clark v. Keeper of N. Y. State Reformatory for Women*, 176 N. Y. 465.

62. *People v. Nevins*, 1 Hill, 154; *Davidson's Case*, 13 Abb. Pr. 129;

People v. Goodhue, 2 Johns. Ch. 198; *People ex rel. Kearny v. Kelly*, 22 How. Pr. 309; *Kahn's Case*, 11 Abb. 147; s. c., 19 How. 475.

63. *People ex rel. Utley v. Seaton*, 25 Hun, 305; *Benedict v. Thayer*, 20 Hun, 547.

Petit larceny.—A certificate of conviction which states that the defendant was before the recorder on a certain charge of petit larceny is sufficient, although it does not specify the goods taken or state from whom they were taken. *People ex rel. Hunt v. Markell*, 22 Misc. 607, 50 N. Y. Supp. 766, 84 St. Rep. 766.

64. *People ex rel. Smith v. McFarlane*, 50 App. Div. 95, 63 N. Y. Supp. 622.

does not show the defects alleged to exist in the certificate of conviction.⁶⁵

Where a return to a writ of habeas corpus states that the relator is held under a warrant for "disorderly conduct," and is defective, in that there is no such offense under the statutes, but it appears that the relator is held as a "disorderly person," and the commitment states that he has abandoned his wife without adequate support, which brings him within the definition of a disorderly person, under the Code of Criminal Procedure, section 899, the writ of habeas corpus will be dismissed.⁶⁶

One is not illegally deprived of his liberty by the keeper of a prison because the warrant of commitment is not signed, there being no requirement that it should be signed; and the authority for the detention being the sentence, a certified copy of which should be delivered to the jailor, under the Code of Criminal Procedure, section 486, providing that the authority for the execution of a judgment is a certified copy of the entry thereof on the minutes, which must be furnished to the officer executing the judgment, and section 489, providing the sheriff must deliver such certified copy with defendant to the keeper of the prison.⁶⁷ But a certificate of conviction which contains no mandate to the sheriff to receive and confine the prisoner, and which is not certified by the magistrate or county clerk, is insufficient to authorize his detention.⁶⁸

8. Legality or justice of judgment or mandate.

Under section 1254 of the Civil Practice Act, a court or judge upon the return of a writ of habeas corpus may not inquire into the legality or justice of any mandate, judgment, decree, or final order.⁶⁹ That is to say, the merits cannot be reviewed.⁷⁰ But it is said that the provisions of section 1254 apply only to courts of record.⁷¹

65. *People ex rel. Bedell v. Foster*, 132 App. Div. 116, 116 N. Y. Supp. 530.

66. *Matter of Newkirk*, 37 Misc. 404, 75 N. Y. Supp. 777.

67. *People ex rel. Dauchy v. Pitts*, 118 App. Div. 457, 103 N. Y. Supp. 258.

68. *People ex rel. Snider v. Whitney*, 22 Misc. 226, 49 N. Y. Supp. 591.

69. *People ex rel. Gunn v. Webster*,

75 Hun, 278, 26 N. Y. Supp. 1007, 58 St. Rep. 225; *Matter of Taylor*, 8 Misc. 159, 28 N. Y. Supp. 500.

70. *People v. Shea*, 3 Park. Cr. 562; *People v. Keeper of Penitentiary*, 37 How. 494; *Case of Twelve Commitments*, 19 Abb. 394.

71. *People ex rel. Laird v. Han-nah*, 92 Hun, 476, 37 N. Y. Supp. 702.

9. Subsequent right to discharge.

On habeas corpus, an error in the trial or judgment cannot be shown; but the expiration of the sentence, a reversal of the judgment or a pardon may be ground for the release of the prisoner.⁷² The question whether a pardon granted by a governor, who at the time of granting it was under impeachment by the Assembly, is valid, may be determined upon habeas corpus.⁷³ Where a defendant pleads guilty to an indictment for seduction, the court, having jurisdiction of the defendant and the offense, is empowered to pronounce sentence, and where the defendant pending the plea and sentence marries the prosecutrix, there is not a want of jurisdiction to impose the sentence, and his remedy is by motion in arrest of judgment and not by writ of habeas corpus.⁷⁴

H. Irregular commitment.

1. Civil Practice Act, § 1255. Proceedings on irregular commitment.

If it appears that the prisoner has been legally committed for a criminal offence, or if he appears by the testimony offered with the return, or upon the hearing thereof, to be guilty of such an offence, although the commitment is irregular, the court or judge before which or whom he is brought must make a final order forthwith to discharge him upon his giving bail, if the case is bailable, or, if it is not bailable, to remand him. Where bail is given pursuant to an order made as prescribed in this section, the proceedings are the same as upon the return to a writ of certiorari where it appears that the prisoner is entitled to be bailed.

2. Application of statute.

Section 1255 applies where a party has been committed.⁷⁵ One whose conviction is valid will not be released on habeas corpus though the commitment was erroneous, if such judgment was incorporated in the commitment.⁷⁶ A commitment which merely charges the relator with having caused the death of a person named is defective as not charging a crime, but where the return to a writ of habeas corpus also embraces the proceedings before the coroner, from which it appears that the relator was legally committed for a criminal offense, the commission of which by him may be fairly inferred under the evidence, the order for his discharge from imprisonment

⁷². *People v. Cavanaugh*, 2 Abb. Pr. 84; *Bennac v. People*, 4 Barb. 31; *People v. Cassells*, 5 Hill, 164; *People v. Edymoin*, 8 How. Pr. 478.

⁷³. *People ex rel. Robin v. Hayes*, 163 App. Div. 725, 149 N. Y. Supp. 250.

⁷⁴. *People ex rel. Schraff v. Frost*, 198 N. Y. 110.

⁷⁵. *Matter of Gorsline*, 21 How. Pr. 85.

⁷⁶. *People ex rel. Peck v. Schantz*, 13 Misc. 563, 34 N. Y. Supp. 1099.

should be upon his giving bail as required by section 1255.⁷⁷ A commitment to the Protestant Episcopal House of Mercy which does not contain an adjudication and statement of the exact age of the prisoner is not invalid, where it recites that she is of the age of twenty-one years, but the prisoner on habeas corpus should be remanded to the magistrate who made the commitment in order that a proper commitment may be made.⁷⁸ A woman charged with grand larceny will not be released on habeas corpus proceedings because, in the order fixing the amount of bail, the pronoun "he" is used.⁷⁹

Where the warrant of commitment is the sole authority for the confinement which is being inquired into in a habeas corpus proceeding, and where it specifies as the crime with which the accused is charged an offense which is not supported by the evidence, and wholly fails to specify the crime which the evidence does tend to establish, it is not simply "irregular" and may not be made the basis for holding the accused on account of the latter offense, under the provisions of section 1255.⁸⁰

I. Commitment to another officer.

1. Civil Practice Act, § 1256. Commitment to another officer.

Where a prisoner is not entitled to his discharge and is not bailed, he must be remanded to the custody, or placed under the restraint, from which he was taken, unless the person, in whose custody or under whose restraint he was, is not lawfully entitled thereto; in which case, the order remanding him must commit him to the custody of the officer or person so entitled.

2. Application of statute.

Where a person is committed for a contempt, and where the objection that the sheriff had no power to imprison the prisoner in that particular county, as commanded by the commitment, might be well taken, yet in such case the court may make an order remanding him to the custody of the officer lawfully entitled thereto.⁸¹ Under section 1256, it is expressly provided that where a prisoner is not entitled to his discharge, he must be remanded to the custody from which he was taken, unless the person in whose custody he was is not lawfully entitled thereto; in which case the order

77. Matter of Joerns, 51 Misc. 395, 100 N. Y. Supp. 503.

78. People ex rel. Ginter v. Protestant Episcopal House of Mercy, 57 Misc. 657, 110 N. Y. Supp. 172.

79. People ex rel. Wilson v. Warden of City Prison, 123 App. Div. 288, 107

N. Y. Supp. 1103.

80. People ex rel. Howey v. Warden, 207 N. Y. 354.

81. People ex rel. Post v. Grant, 50 Hun, 243, 3 N. Y. Supp. 142, 20 St. Rep. 48.

remanding him must commit him to the custody of the officer or person so entitled.⁸² The fact that a person sixteen years old, convicted of a felony, was erroneously committed to a house of refuge does not entitle him to be discharged on habeas corpus.⁸³ It has been held that the correctness of a sentence as to the place of imprisonment cannot be inquired into on a writ of habeas corpus.⁸⁴

J. Civil Practice Act, § 1257. Custody of prisoner pending the proceedings.

Pending the proceedings, and before a final order is made upon the return, the court or judge before which or whom the prisoner is brought may either commit him to the custody of the sheriff of the county wherein the proceedings are pending or place him in such care or custody as his age and other circumstances require.

**ARTICLE VII.
FINAL ORDER.**

A. Civil Practice Act, § 1262. Final discharge of prisoner.

If it appears that the prisoner is unlawfully imprisoned or restrained in his liberty, the court or judge must make a final order discharging him forthwith. If it appears that he is lawfully imprisoned or detained, and is not entitled to be bailed, the court or judge must make a final order dismissing the proceedings. A final order made in a proceeding brought on behalf of a person imprisoned or detained in any of the state hospitals mentioned in section forty of the insanity law, or in the Matteawan State Hospital or in the Dannemora hospital for insane convicts, shall be conclusive evidence, upon a hearing of any subsequent proceeding involving the detention of the same person, of all the facts determined by the court, unless such final order shall otherwise specify.

B. Civil Practice Act, § 1266. Service of final order for discharge.

A final order to discharge a prisoner, made as prescribed in this article, may be served in like manner as an injunction order, and when so served, it may be enforced in the same manner as a final judgment in a civil action, except where special provision for its enforcement is otherwise made in this act. Where such an order directs a discharge upon giving bail, the service thereof is not complete until service of the certificate, or other proof prescribed by law, showing that bail has been given as required thereby.

C. Civil Practice Act, § 1267. Enforcement of order for discharge.

Obedience to a final order to discharge a prisoner, made as prescribed in this article, may be enforced by the court which, or the judge who, made the same, by attachment, as for a neglect to make a return to a writ of habeas

⁸². *People ex rel. Post v. Grant*, 50 Hun, 243, 3 N. Y. Supp. 142, 20 St. Rep. 48.

⁸³. *People ex rel. Mittelman v. Supt. of House of Refuge on Ran-*

dall's Island, 46 Misc. 131, 93 N. Y. Supp. 218.

⁸⁴. *People ex rel. Rice v. Keeper of Penitentiary*, 37 How. Pr. 494.

corpus, and with like effect. A person guilty of such disobedience forfeits to the prisoner aggrieved one thousand two hundred and fifty dollars, in addition to the damages which the latter sustains.

D. Civil Practice Act, § 1268. Final order; application of provisions relating to actions.

The final determination of the rights of the parties is styled a final order. The provisions of this act relating to amendments, motions and intermediate orders, in an action, are applicable to similar acts in such a special proceeding, except where special provision is otherwise made therein, or where the proceeding is repugnant to the object of the state writ or the mode of procedure thereunder.

E. Civil Practice Act, § 1269. Reimprisonment of prisoner after discharge.

A prisoner who has been discharged by a final order made upon a writ of habeas corpus or certiorari, issued as prescribed in this article, shall not be again imprisoned, restrained, or kept in custody, for the same cause. But it is not deemed to be the same cause, in either of the following cases:

1. Where he has been discharged from a commitment on a criminal charge; and is afterwards committed for the same offence, by the lawful order or other mandate of the court wherein he was bound by recognizance to appear or in which he has been indicted or convicted for the same offence.

2. Where he has been discharged in a criminal cause for defect of proof or for a material defect in the commitment; and is afterwards arrested on sufficient proof, and committed by a lawful mandate for the same offence.

3. Where he has been discharged, in a civil action or special proceeding, for an illegality in the judgment, final order or other mandate, as prescribed in this article; and is afterwards imprisoned by virtue of a lawful judgment, final order or other mandate, for the same cause of action.

4. Where he has been discharged, in a civil action or special proceeding, from imprisonment by virtue of an order of arrest; and is afterwards taken in execution or other final process, in the same action or special proceeding, or arrested in another action or special proceeding, after the first was discontinued.

If a court or judge, or any other person, in the execution of a judgment, order or other mandate, or otherwise, knowingly violates, causes to be violated, or assists in the violation of this section, he, or if the act or omission was that of a court, each member of the court assenting thereto, forfeits to the prisoner aggrieved one thousand two hundred and fifty dollars. He is also guilty of a misdemeanor, and, upon conviction thereof, shall be punished by fine not exceeding one thousand dollars, or by imprisonment not exceeding six months, or by both, in the discretion of the court.

F. Reimprisonment.

There is no principle upon which, after an imprisonment has been adjudged to be illegal, a party can be restrained of his liberty without some new legal process so long as the judgment stands.⁸⁵ If the prisoner is rearrested, he may

⁸⁵ People ex rel. Young v. Stout, Supp. 421; aff'd, 144 N. Y. 699.
10 Misc. 247, 63 St. Rep. 862, 31 N. Y.

again have the writ.⁸⁶ But if the court has no jurisdiction to discharge the prisoner, the order is void and he may be rearrested.⁸⁷ The words "for the same cause" in section 1269 of the Civil Practice Act mean an imprisonment on the same information and not an imprisonment under a new information followed by a lawful warrant, the sufficiency of both of which stands unchallenged.⁸⁸ Where one has been discharged from imprisonment under a commitment to await the action of the grand jury, an action for malicious prosecution cannot be maintained before the grand jury has considered the case, because, by the force of section 1269, such a commitment does not prevent a subsequent imprisonment for the same cause, and an action for malicious prosecution cannot be maintained until the proceeding complained of has been legally terminated in favor of the accused.⁸⁹

Where a husband was arrested and imprisoned under a commitment for contempt for failure to pay alimony, and afterward another commitment was issued against him for the same cause, and again, because the two preceding commitments were irregular and defective, a third commitment was issued, under none of which had he been discharged by the court, although he applied by habeas corpus for his discharge from arrest, under the two first commitments, but said two first commitments were countermanded by the plaintiff therein, it was held that he could not obtain his release under habeas corpus, and it seems he could not secure his discharge on this ground, even if he had been discharged from imprisonment under the two first commitments, if such discharge was made on the ground of the illegality of the commitments.⁹⁰

G. Action for penalty for second arrest.

Where an action is brought to recover a penalty under section 1269 of the Civil Practice Act for a second arrest which is prohibited by such section, the complaint must negative the exceptions contained in such section.⁹¹

86. *People ex rel. v. Kelly*, 1 Abb. N. S. 432.

87. *Spalding v. People*, 7 Hill, 301; *Cable v. Cooper*, 15 Johns. 152.

88. *Sutton v. Butler*, 74 Misc. 251, 133 N. Y. Supp. 936; *aff'd*, 151 App. Div. 894, 135 N. Y. Supp. 1145.

89. *Hines v. Parker*, 11 App. Div.

327, 42 N. Y. Supp. 955.

90. *People ex rel. Clark v. Grant*, 13 Civ. Pro. 813, 47 Hun, 604; *aff'd*, 111 N. Y. 584.

91. *Sutton v. Butler*, 74 Misc. 251, 133 N. Y. Supp. 936, 26 N. Y. Cr. 413; *aff'd*, 151 App. Div. 894, 135 N. Y. Supp. 1145.

H. Continuance of preliminary examination.

Where the parties named in a warrant delivered to a constable have been brought before a justice of the peace charged with the crime of larceny, and the hearing is adjourned, the action of the special county judge in discharging the prisoners from custody in habeas corpus proceedings instituted before him on the adjourned day, and before any further proceedings before the justice, on the ground that the papers on which the warrant was founded were not sufficient to give the justice jurisdiction, the writ of habeas corpus not running to the constable and he not being present in those proceedings, does not operate to end the criminal proceedings, although the justice of the peace took no further action in the matter before the commencement of an action by the accused to recover damages for false imprisonment and malicious prosecution.⁹²

I. Conditional order.

An order in habeas corpus proceedings discharging a person committed to a State hospital for the insane, and directing that it may be vacated and the person recommitted without a further hearing in case he violates conditions therein, prohibiting him from going into the State of Massachusetts, to which he consented, is erroneous and illegal.⁹³

ARTICLE VIII.**WARRANT FOR PRISONER.****A. Civil Practice Act, § 1271. Warrant to bring up prisoner before writ issued.**

Where it appears, by proof satisfactory to a court or judge authorized to grant either writ, that a person is held in unlawful confinement or custody, and that there is good reason to believe that he will be carried out of the state, or suffer irreparable injury, before he can be relieved by a writ of habeas corpus or a writ of certiorari, the court or judge must issue a warrant, reciting the facts, directed to a particular sheriff, or generally to any sheriff or constable, or to a person specially designated therein; and commanding him to take, and forthwith to bring before the court or judge, the prisoner, to be dealt with according to law. If the warrant is issued by a court, it must be under the seal thereof; if by a judge, it must be under his hand.

Where the proof specified in this section is also sufficient to justify an arrest of the person having the prisoner in his custody, as for a criminal offence, committed in taking or detaining him, the warrant must also contain a direction to arrest that person for the offence.

⁹². *Vorce v. Oppenheim*, 37 App. Div. 69, 55 N. Y. Supp. 596.

⁹³. *People ex rel. Savage v. Hutchins*, 219 N. Y. 200.

B. Civil Practice Act, § 1272. Execution of warrant granted before writ.

The officer or other person to whom the warrant is directed and delivered must execute it by bringing the prisoner therein named, and also, if so commanded in the warrant, the person who detains him, before the court or judge issuing it; and thereupon the person detaining the prisoner must make a return, in like manner, and the like proceedings must be taken, as if a writ of habeas corpus had been issued in the first instance.

C. Civil Practice Act, § 1273. Proceedings to punish offender.

If the person having the prisoner in his custody is brought before the court or judge as for a criminal offence, he is entitled to be examined, and must be committed, bailed or discharged by the court or judge as in any criminal case of the same nature.

ARTICLE IX.**CERTIORARI.****A. Civil Practice Act, § 1260. Proceedings upon sickness or infirmity of prisoner.**

Where the return to a writ of habeas corpus states that the prisoner is so sick or infirm that the production of him would endanger his life or health, and the return is otherwise sufficient, the court or judge, if satisfied of the truth of that statement, must decide upon the return and dispose of the matter as if a writ of certiorari had been issued.

B. Civil Practice Act, § 1261. Certiorari instead of habeas corpus.

Where an application is made for a writ of habeas corpus, as prescribed in this article, and it appears to the court or judge upon the petition and the documents annexed thereto that the cause or offence for which the party is imprisoned or detained is not bailable, a writ of certiorari may be granted instead of a writ of habeas corpus, as if the application had been made for the former writ. Upon the return to such a writ of certiorari, the court or judge before which or whom it is returnable must proceed as upon a return to a writ of habeas corpus and must hear the proofs of the parties in support of and against the return.

C. Civil Practice Act, § 1264. Bail on certiorari.

If, upon the return to a writ of certiorari, issued as prescribed in this article, it appears that the person imprisoned or detained is entitled to be bailed, the court or judge must make a final order fixing the sum in which he is to be admitted to bail, specifying the court and the term thereof at which he is required to appear, and directing his discharge upon bail being given accordingly, as required by law. If sufficient bail is immediately offered, the court or judge must take it; otherwise, bail may be given afterwards, as prescribed in this section.

Upon the production of the order, or, if it was made by a court, of a certified copy thereof, to a justice of the supreme court, or to the county judge or special county judge of the county where the prisoner is detained, the judge must take the recognizance of the prisoner, with two sureties, in the sum so fixed, conditioned for the appearance of the prisoner, as prescribed in the order. Each person offering himself as a surety must show, by his oath, to the satis-

faction of the judge, that he is a householder in the county and worth twice the sum in which he is required to be bound, over and above all demands against him. It is not necessary that the prisoner should appear in person before the judge to acknowledge the recognizance; but it may be acknowledged by the prisoner, and certified, in like manner as a deed to be recorded in the county.

D. Civil Practice Act, § 1265. Discharge of prisoner bailed.

The judge must immediately file the recognizance with the clerk of the court before which the prisoner is bound to appear. He must also make a certificate upon the order or the certified copy thereof to the effect that it has been complied with. Upon production of the certificate, the prisoner is entitled to his discharge from imprisonment for any cause stated in the return to the certiorari.

E. Distinguished from order of certiorari.

The writ of certiorari to review the decisions of inferior tribunals has been abolished by the Civil Practice Act, and in its place there has been substituted an order of certiorari.⁹⁴ This order of certiorari is to be distinguished from the writ discussed in this chapter. The order cannot be used to review a determination made in any criminal matter, except a criminal contempt of court.⁹⁵ Before the adoption of the Code of Criminal Procedure, criminal proceedings were in some cases reviewed by writ of certiorari rather than by appeal. Section 515 of the Code of Criminal Procedure restricts the method of review to an appeal.⁹⁶ But, it has not intended by section 515 of the Code of Criminal Procedure to make any change in the practice on certiorari in connection with the writ of habeas corpus.⁹⁷

F. Purpose of certiorari.

The use of the writ of certiorari is to enable the proceeding to continue without the presence of the prisoner, and the form of the writ is given by and under section 1238. The proceedings are the same as under the writ of habeas corpus. The writ of certiorari to inquire into the cause of detention is not in its nature essentially a writ of review. The writ is directed to the sheriff or the person having the prisoner in custody. He is required to return to the judge issuing the writ by what right he holds the custody of the person detained. Upon this requirement he returns simply the commitment. He has not possession of the evidence

94. See chapter Certiorari.

95. *People ex rel. Manning v. Hagan*, 34 Misc. 24, 69 N. Y. Supp. 451.

96. *People ex rel. Edwards v. The*

Warden, 37 Misc. 639, 75 N. Y. Supp. 1111.

97. *People ex rel. Taylor v. Forbes*, 143 N. Y. 219.

upon which the commitment was granted. He cannot certify any such evidence, nor is he required so to do. Under section 1261, if the offense is not bailable, upon an application for a writ of habeas corpus, the court or judge may grant a writ of certiorari. Under a writ of certiorari to inquire into the cause of detention, the relator is entitled to no other or greater rights than under a writ of habeas corpus. Under the writ of habeas corpus, the body of the person must be produced; if the offense is bailable, the court may then accept bail. If the offense is not bailable there is no necessity of the presence of the detained person upon the argument, and a writ of certiorari may be issued which calls for precisely the same return from the custodian, but does not bring the body of the detained person. Under the writ then the same questions arise, the same facts appear for determination, and the same limitation rests upon the power of the court as upon a writ of habeas corpus. The relator has gained nothing by having two writs.⁹⁸

In the case of a conviction, at least, the writ of certiorari to inquire into the detention of the relator is not more extensive and affords no greater right or remedy than the writ of habeas corpus, and was designed to reach only those cases where the production of the body was unnecessary to the decision of the question to be presented; and it is not the province of this writ of certiorari to bring up the evidence for review. The practice which has sprung up in the first department of issuing both writs in cases of detention before or without conviction is acquiesced in on the ground of convenience, in having the magistrate certify the information or evidence upon which the relator has been held and which the court in such cases examines to see if there is *any* evidence of guilt, rather than because any warrant for such practice can be found in the Civil Practice Act. In cases of conviction the inquiry on both writs is whether the magistrate who issued the warrant of commitment had jurisdiction of the offense of the relator and to impose sentence, and whether it had expired, but the decision may not be reviewed.⁹⁹

The writ of certiorari calls for the same return as the writ of habeas corpus, save that the body of the defendant need not be brought up. It is obtained on the same petition and on the same facts as a writ of habeas corpus and is subject

⁹⁸ People ex rel. Taylor v. Seaman, 8 Misc. 153, 29 N. Y. Supp. 331, 59 St. Rep. 463.

⁹⁹ People ex rel. Smith v. Van de Carr, 86 App. Div. 9, 83 N. Y. Supp. 245; dismissed, 183 N. Y. 569.

to the same proceeding.¹ A sheriff, having a prisoner in custody, to whom a writ of certiorari to inquire into the cause of detention is issued, simply returns the commitment, and not the evidence upon which the commitment was granted.²

ARTICLE X.

APPEALS.

A. Civil Practice Act, § 1274. Appeals in cases under this article.

An appeal may be taken from an order refusing to grant a writ of habeas corpus or a writ of certiorari, as prescribed in this article, or from a final order, made upon the return of such a writ, to discharge or remand a prisoner or to dismiss the proceedings. Where final order is made to discharge a prisoner upon his giving bail, an appeal therefrom may be taken before bail is given; but where the appeal is taken by the people, the discharge of the prisoner upon bail shall not be stayed thereby. An appeal does not lie from an order of the court or judge before which or whom the writ is made returnable, except as prescribed in this section.

B. Civil Practice Act, § 1275. Appeal by people.

An appeal from a final order discharging a prisoner committed upon a criminal accusation, or from the affirmance of such an order, may be taken in the name of the people by the attorney-general or the district attorney.

C. Civil Practice Act, § 1276. Bail upon appeal.

Where a prisoner who stands charged, upon a criminal accusation, with a bailable offence, has perfected or intends to take an appeal from a final order dismissing the proceedings remanding him, or otherwise refusing to discharge him, made as prescribed in this article, the court or judge, upon his application, either before or after the final order, and upon such notice to the district attorney as the court or judge thinks proper, must make an order fixing the sum in which the applicant shall be admitted to bail pending the appeal; and thereupon, when his appeal is perfected, he must be admitted to bail accordingly.

D. Civil Practice Act, § 1277. Form of bail on appeal.

The recognizance for that purpose must be conditioned that the prisoner will appear at a term of the appellate division of the supreme court to be held at a time and place designated in the order and abide by and perform the judgment or order of the appellate court. It must be taken and approved by a justice of the supreme court, or by the court or judge from whose order the appeal is taken, or by the county judge of the county in which the order was made. In all other respects, the proceedings are the same as prescribed in this article, where it appears, upon the return of a writ of certiorari, that the prisoner is entitled to be admitted to bail.

E. Civil Practice Act, § 1278. Appeal to Court of Appeals.

Where a prisoner who stands charged with an offence, specified in the last section, has perfected an appeal to the court of appeals from a final order of

1. People ex rel. Bungart v. Wells, 57 App. Div. 140, 68 N. Y. Supp. 59. 2. People ex rel. Taylor v. Seaman, 8 Misc. 152, 29 N. Y. Supp. 329.

the supreme court affirming an order refusing his discharge, or reversing an order granting his discharge, the court from whose order the appeal is taken, or a judge thereof, must admit him to bail upon his application, as prescribed in the last section; except that the recognizance must be conditioned to appear, at a term of the appellate division of the supreme court from which the appeal is taken, to abide by and perform its judgment or order made after the determination of the appeal.

F. Civil Practice Act, § 1279. Custody of prisoner pending bail.

Where the sum in which a prisoner shall be admitted to bail has been fixed, as prescribed in either of the last two sections, he must remain in the custody of the sheriff of the county in which he then is, until he is admitted to bail, as therein prescribed; or, if he does not give the requisite bail, until the time to appeal has expired or the appeal is disposed of, and the further direction of the court, made thereupon.

G. Civil Practice Act, § 1280. Bail valid for adjourned terms.

Where no order or other direction of the court, relating to the disposition of the prisoner is made at the term specified in a recognizance, given as prescribed in section twelve hundred and seventy-seven or twelve hundred and seventy-eight of this act, the matter is deemed adjourned without an order to that effect to the next term of the appellate division of the supreme court to be held in the same department; and thereafter to each successive term until such an order or direction is made. The prisoner is bound to attend at each successive term of the appellate division; and the recognizance is valid for his attendance accordingly without any notice or other formal proceedings.

H. Appealable orders.

An appeal cannot be taken from an order directing a further return to a writ of habeas corpus or certiorari,³ or from an order directing a reference in the proceeding.⁴ Where, in proceedings by habeas corpus, instituted by a guardian to obtain the custody of a child of about seven years of age, from one in whose custody the child had been placed in accordance with the wishes of its mother expressed prior to her death, and the order appealed from dismissed the writ without prejudice to other proceedings; the order was not a final adjudication as to the legal rights of the relator, and rested in the discretion of the court, and so was not reviewable.⁵

3. *Matter of Larson*, 96 N. Y. 381, holding that the question may be raised in the Court of Appeals.

4. *People ex rel. Keator v. Moss*, 6 App. Div. 414, 39 N. Y. Supp. 690.

5. *People ex rel. Pruyne v. Wales*, 122 N. Y. 238.

Order remanding infant.—On appeal to the General Term from the order

of the Special Term dismissing a writ of habeas corpus, requiring defendant to produce an infant, the order was reversed and proceedings remitted to the Special Term for new hearing. On such hearing an order was made remanding the infant to the custody of relator. A motion was thereupon made to set aside such order on the ground

An order in a habeas corpus proceeding which does not determine or end the proceeding but continues it in force, leaving it to be ended by an order to be subsequently made, is not appealable, since it is not a final order; and an order of the Appellate Division reversing it and dismissing the proceeding is, therefore, without jurisdiction. The latter order, however, is final, because it dismissed the proceeding and is, therefore, reviewable by the Court of Appeals.⁶ Where the writ is dismissed without prejudice to the renewal of the application, there is no final adjudication in the matter, and such dismissal will not be reviewed by the Court of Appeals.⁷

The first sentence of section 1274 gives the people the unqualified right to appeal from a final order discharging the prisoner. The succeeding sentence is permissive and was intended to authorize an appeal before bail is given, where the discharge, instead of being absolute, is conditional, and to provide that in such case an appeal by the people should not stay the discharge of the prisoner upon giving bail.⁸ This section in allowing an appeal by the People is not invalid on the theory that it suspends the privilege of the writ of habeas corpus contrary to the provisions of the State and Federal constitutions.⁹

I. Party entitled to appeal.

The custodian of a prisoner should not be allowed in ordinary criminal cases to maintain an appeal from an order discharging the prisoner from imprisonment, if the appeal is opposed by the prosecuting authorities representing the people. The mere fact that he is a party to the writ and is denominated a defendant in the Practice Act does not give him a right to appeal where he has no interest in the subject-matter.¹⁰

Where upon a hearing on habeas corpus before a justice

that the Special Term had no jurisdiction to make it, which motion was denied. *Held*, that the order thereon was not reviewable in the Court of Appeals, if without jurisdiction it was within the discretion of the court to set it aside, or leave the defendant to set up its invalidity when an attempt should be made to enforce it. *People ex rel. Brush v. Brown*, 103 N. Y. 684.

6. *People ex rel. Duryee v. Duryee*, 188 N. Y. 440.

7. *People ex rel. Pruyn v. Walts*, 122 N. Y. 241.

8. *People ex rel. Hubert v. Kaiser*, 206 N. Y. 46.

9. *People ex rel. Hubert v. Kaiser*, 150 App. Div. 541, 135 N. Y. Supp. 274; *aff'd*, 206 N. Y. 46.

10. *Matter of Quinn*, 2 App. Div. 103, 37 N. Y. Supp. 534, 25 Civ. Pro. 226, citing *People ex rel. Breslin v. Lawrence*, 107 N. Y. 607.

of the Supreme Court the relator was remanded to custody and the Appellate Division reversed the order and directed the discharge of the prisoner, the justice is not the proper person to take an appeal to the Court of Appeals. It seems the appeal in such case should be in the name of the people by the attorney-general or district attorney under section 1275.¹¹ Under section 1275, expressly authorizing the district attorney to appeal from an order discharging a prisoner committed on a criminal accusation, the district attorney has authority to appeal in a proceeding against the keeper of the penitentiary, where the judge who allowed the writ required notice of the proceeding to be given such attorney and he appeared therein.¹²

An order made by a special county judge declaring that the rendition warrant of the Governor is invalid and discharging the defendant is appealable to the Appellate Division, and such appeal is properly taken by the attorney-general by service of the notice of appeal on the clerk and the attorneys for the defendant.¹³

One committed for contempt may prosecute an appeal from the order of commitment though he has been discharged on habeas corpus.¹⁴

J. Practice on appeal.

An appeal from an order discharging the relator in habeas corpus proceedings must be taken in the name of the people or it will be dismissed.¹⁵ The Supreme Court has no power to stay proceedings upon a final order discharging a prisoner in habeas corpus proceedings pending an appeal from such order.¹⁶ An order made by a county judge in habeas corpus proceedings discharging the prisoner from custody cannot be reviewed by an order of certiorari.¹⁷

K. Bail pending appeal.

A prisoner who is held under a conviction of a court of competent jurisdiction and is serving out his sentence under such judgment does not stand charged with any offense

11. *People ex rel. Breslin v. Lawrence*, 107 N. Y. 607.

12. *People ex rel. Dinsmore v. Keeper of Erie Co. Penitentiary of Buffalo*, 125 App. Div. 137, 109 N. Y. Supp. 531.

13. *Matter of Scrafford*, 59 Hun, 323, 12 N. Y. Supp. 945, 36 St. Rep. 748.

14. *Gallagher v. O'Neil*, 3 N. Y. Supp. 126, 21 St. Rep. 161.

15. *People v. Gittens*, 209 N. Y. 527.

16. *People ex rel. Young v. Stout*, 10 Misc. 247, 63 St. Rep. 863, 31 N. Y. Supp. 421; *aff'd*, 144 N. Y. 699.

17. *People ex rel. Catlin v. Tucker*, 3 N. Y. Supp. 792, 16 Civ. Pro. 128.

under sections 1276 or 1277, and the court has no power to admit the prisoner to bail pending an appeal.¹⁸ A relator on habeas corpus who is remanded to custody on a bench warrant, and desires a stay pending an appeal to the Court of Appeals, must himself personally execute the recognizance within the jurisdiction of the court.¹⁹

L. Action by Appellate Court.

The power of an appellate court to remit a case for the resentence of a prisoner where the judgment is void but the conviction is proper is limited to cases where the conviction is had upon an indictment, and no power exists to remit a case for resentence to a court of special sessions, such court not being a court of record.²⁰

Where a defendant, who has been convicted of the crime of conspiracy, and released on bail pending the decision of his application for a certificate of reasonable doubt, was rearrested upon the ground that the allowance of bail was without authority and illegal, and he thereupon instituted habeas corpus proceedings which resulted in his discharge from custody, the Appellate Division is not warranted in affirming the order discharging him, because at the time its decision was made a certificate of reasonable doubt had been granted entitling him to be released upon bail. The order should have been reversed, but the decision of the Appellate Division should be so framed as not to remand the relator to a custody from which he would be entitled to an immediate release.²¹

Where, upon the writ of habeas corpus to procure the discharge of a person committed for contempt in failing to obey an order to appear before a referee to testify as a witness in supplementary proceedings, the county judge, before whom the writ was made returnable, discharged the relator from custody, the Appellate Division has no power to reverse the order of the county judge "as a matter of law and not as a matter of discretion" unless all the jurisdictional facts are admitted or conclusively established; and where such facts are not traversed or denied, and determined in favor of the relator by the county judge, the Appellate Division has no power to disturb his conclusions upon

18. *People ex rel. Hubert v. Kaiser*, 150 App. Div. 915, 135 N. Y. Supp. 694.

19. *People ex rel. Sherwin v. Mead*, 64 How. Pr. 252.

20. *People v. Carter*, 14 Civ. Pro. 241, 48 Hun, 165.

21. *People ex rel. Hummel v. Rear-* don, 186 N. Y. 164.

questions of law only, if there is any evidence to support his findings, or any view of the facts that required or justified him in discharging the relator from custody.²²

On appeal from an order dismissing a writ of habeas corpus, and remanding relator to custody, he having been held to bail on a charge of violating section 372 of the Penal Law, punishing the receiving of a bribe, the inquiry is limited to the question whether there is any evidence tending to show guilt and not as to the weight of the evidence.²³

Where an appeal is taken in the name of the people under section 1275, and the order of the lower court is affirmed, the costs should be paid from the county from which the appeal is taken.²⁴

ARTICLE XI.

PRECEDENTS.

A. Sentence beyond jurisdiction of court.

1. Petition.

SUPREME COURT.

PEOPLE EX REL. WILLIAM M. TWEED

agst.

JOSEPH L. LISCOMB.

} 60 N. Y. 559.

To the Supreme Court of the State of New York, or to any of the justices thereof, or to any officer authorized to perform the duties of a justice of said court at chambers:

The petition of William M. Tweed shows that he is imprisoned or restrained of his liberty by Joseph L. Liscomb, warden of the penitentiary of the city of New York, and that he is not committed or detained by virtue of any process issued by any court of the United States or by any judge thereof, nor is he committed or detained by virtue of a final judgment or decree of any competent tribunal of civil or criminal jurisdiction, or by virtue of any execution issued upon such judgment or decree.

That the cause or pretense of such confinement or restraint, according to the best knowledge or belief of your petitioner, is a warrant, order or process, a copy of which is hereto annexed.

Your petitioner alleges that his said imprisonment under said pretense is illegal and that its illegality consists in the following, among other things:

1. That the court from which said warrant or process purports to have been issued had no jurisdiction or power to take cognizance of or to try the alleged misdemeanors mentioned in the pretended warrant or process.

22. Matter of Dupue, 185 N. Y. 60. Supp. 461.

23. People ex rel. Dickinson v. Van De Car, 87 App. Div. 386, 84 N. Y. 42 Hun, 273, 5 St. Rep. 120.

24. People ex rel. Sinkler v. Terry,

2. That the jury upon whose pretended verdict the said pretended sentences were pronounced was not impaneled according to law of the land and had no jurisdiction or power to try the said supposed offenses.

3. That the judgment of the court in execution of which the said pretended warrant or process was issued was and is absolutely void for want of jurisdiction to render the same.

4. That the pretended trial and conviction of your petitioner was for one misdemeanor only, for which no more than one year's imprisonment and a fine of two hundred and fifty dollars (\$250) could by law be pronounced, and for such misdemeanor and conviction your petitioner has been imprisoned already for more than one year, and has also paid the fine of two hundred and fifty dollars (\$250).

5. That if the said one year's imprisonment was lawful, which your petitioner denies, each and every pretended sentence of the said court whereby your petitioner was condemned to any further imprisonment or to any further fine was and is void.

6. That the term of your petitioner's imprisonment under the said pretended warrant or process has expired.

7. That the said warrant or process does not conform to the alleged judgment of the said Court of Oyer and Terminer and is not warranted by the same.

WHEREFORE, Your petitioner prays that a writ of habeas corpus issue, directed to the said Joseph L. Liscomb, warden of the penitentiary of the city of New York, commanding him to have the body of your petitioner forthwith before the court or officer granting said writ, together with the time and cause of such imprisonment and detention.

WILLIAM M. TWEED.

(Verification.)

2. Writ.

(Title.)

The People of the State of New York, to JOSEPH L. LISCOMB, Warden of the Penitentiary of the City of New York, Greeting:

We command you that you have the body of William M. Tweed by you imprisoned and detained, as it is said, together with the time and cause of such detention and imprisonment, by whatsoever name he shall be called or charged, before the Court of Oyer and Terminer in and for the city and county of New York at the courthouse in the city of New York on the 17th day of December, 1874, at 11 o'clock A. M. of that day, to do and receive what shall then and there be considered concerning him, and have you then and there this writ.

WITNESS: Hon. A. R. Lawrence, justice of the Supreme Court,

[L. s.] the 15th day of December, 1874.

By the Court:

WILLIAM WALSH,
Clerk.

Indorsed — The within writ allowed this 15th day of December, 1874.

A. R. LAWRENCE,
Justice Supreme Court.

3. Return.

(Title.)

The undersigned warden of the New York Penitentiary on Blackwell's Island respectfully returns and shows, that he received the annexed paper marked A on the 15th day of December, A. D. 1874, at 3:25 P. M., at which time there was in the New York Penitentiary, of which he is warden, the body of William M. Tweed, whom he believes to be the person named in said paper marked A, and who was so there under custody as being the person named in the original paper, of which the annexed paper, marked B, is a copy, and the original whereof I now produce, and which I received on the 29th day of November, A. D. 1873, together with the body of the said Tweed, whom I have had and retained ever since under and by virtue of said original paper or warrant of commitment, and so returning the undersigned produces the body of said prisoner in obedience to the command expressed in paper A.

JOSEPH LISCOMB,

Warden of the Penitentiary.

4. Answer to return.

(Title.)

The answer of William Tweed to the return of Joseph L. Liscomb made to the writ of habeas corpus in this case:

Said William M. Tweed says and avers:

1. That there is no record of a judgment of any court of competent jurisdiction which in terms authorizes or purports to authorize the issuing of the pretended warrant of commitment, a copy whereof is annexed to said return.

2. That there is no record of a judgment of any court of competent jurisdiction which in law or fact did or does authorize the issuing of said warrant of commitment.

3. That the court from which said warrant of commitment annexed to the said return purports to have been issued had no jurisdiction nor power to try the alleged misdemeanors mentioned in the said warrant of commitment.

4. That the pretended jury by whom this relator is alleged under said warrant to have been tried and convicted was not impanelled according to the law of the land, was not a lawful jury and had no jurisdiction or power to try the said supposed offenses or to render any verdict respecting the same.

5. That the alleged judgment in execution of which the said pretended warrant of commitment was issued was and is absolutely void for want of jurisdiction to render the same.

6. That the pretended trial and the pretended conviction were for one misdemeanor only, for which no imprisonment for more than one year and no fine greater than two hundred and fifty dollars (\$250) could be pronounced or adjudged against him, although for such imprisonment and conviction the relator has already been imprisoned for more than one year under said pretended warrant and has paid a fine of two hundred and fifty dollars (\$250).

7. That if the said one year's imprisonment is lawful, which the relator denies, each and every pretended sentence of said court whereby said relator was condemned to any further or other imprisonment or to pay any further or other fine was and is void.

8. That the term of the relator's imprisonment under the said pretended warrant of commitment has expired.

9. That the said pretended warrant of commitment does not conform to any judgment or pretended judgment of any court and is not warranted or authorized by the same.

10. That the said warrant of commitment is void for want of a specification of the offense or offenses whereof it is pretended that the relator was convicted.

WILLIAM M. TWEED.

(Add verification.)

B. Void commitment by court-martial.

1. Petition.

SUPREME COURT.

THE PEOPLE EX REL. MORRIS FREY,	} 100 N. Y. 20.
v.	
THE WARDEN OF THE COUNTY JAIL OF NEW YORK COUNTY, ETC.	

To the Honorable Supreme Court of the State of New York, City and County of New York:

The petition of Morris Frey respectfully shows:

1. That your petitioner is imprisoned or restrained of his liberty in the county jail of the county of New York under a process purporting to be a military warrant issued by one John W. Fleck, as president of a regimental court-martial of the 11th regiment, N. G. S. N. Y.

2. That he has not been committed and is not detained by virtue of any judgment, decree, final order or proceedings issued by any court of the United States, or by any judge thereof, nor is he committed or detained by virtue of a final judgment or decree of a competent tribunal of civil or criminal jurisdiction, or a final order thereof, or by virtue of an execution or other process issued upon such judgment, decree or final order, as specified in section 1231 of the Civil Practice Act.

3. The cause or pretense of the imprisonment or restraint according to the best knowledge and belief of your petitioner is for an alleged fine of twenty dollars (\$20) imposed on your petitioner by the said John W. Fleck as president of said regimental court-martial.

That such imprisonment of your petitioner is illegal and unjust for the following reasons, to wit:

1. That your petitioner enlisted when he was under twenty-one years of age, without the consent of his parent then and now living, which fact was then and now is well known to the regiment aforesaid, and that your petitioner is now under twenty-one years of age.

2. That at the time of said enlistment the oath of allegiance was not duly administered to your petitioner as required by law.

3. That the court-martial before which your petitioner was summoned to appear then had not and has not now any jurisdiction over your petitioner.

4. That when your petitioner appeared before said court-martial he demanded of, but was denied by, the said court, the right to be heard by counsel.

5. That your petitioner was refused the right to be heard by the appellate court of appeal from the decision of said court-martial.

6. That at the time of your petitioner's enlistment no enlistment roll was given him as required by law.

WHEREFORE, Your petitioner prays that a writ of habeas corpus issue directed to the warden of the said county jail commanding him to bring and produce the body of your petitioner, Morris Frey, before this honorable court at such time and place as this court shall designate, to the end that your petitioner may be discharged according to the process of law.

(Verification.)

MORRIS FREY.

2. Return setting out jurisdiction.

(Title.)

The return of Capt. John W. Fleck, president of the court-martial, to the writ of habeas corpus herein, respectfully shows:

1. That it is true that the petitioner was under age when he enlisted, but it is not true that he enlisted without the consent of his parent or guardian, as appears from the enlistment papers presented herein.

2. That said enlistment was legal and in proper form and that said Frey was duly sworn in accordance with the Military Code.

3. That the court-martial before which the said petitioner was tried was convened by special orders and in compliance with law, and the petitioner was duly summoned before said court-martial for certain delinquencies, that he appeared and after due hearing was fined twenty dollars (\$20).

4. That it is not true that the petitioner was denied the right to appear by counsel; the case was adjourned to a later evening of which the petitioner had notice, and also of his right to appear by counsel.

5. That, as this respondent is informed and believes, that it is not true that the petitioner was denied the right of appeal.

6. That said Frey was duly committed in proper form, to which your respondent begs leave to refer to as part of this return.

(Add verification.)

JOHN W. FLECK.

3. Traverse.

(Title.)

The traverse of Martin Frey to the return made to his petition, etc., respectfully shows:

1. Your petitioner denies the statement made in said return that your petitioner's alleged enlistment was legal and in proper form, and that your petitioner was sworn in accordance with the Military Code.

2. Your petitioner further denies he was duly summoned before said court-martial, and denies that he had any hearing whatsoever. That said court-martial then had not and has not now any jurisdiction whatever over your petitioner.

3. Your petitioner further denies that he was duly notified to perform the duty for which the alleged neglect of which he was notified as a delinquent as alleged in said warrant referred to in the return of Capt. John W. Fleck. On the contrary, your petitioner alleges that whatever orders were sent to petitioner to attend drills, the same were not served as petitioner is informed and believes in accordance with the requirements of the Military Code, which fact was at the time well known to the captain, John W. Fleck, president of the aforesaid court-martial, and which your petitioner will be able to prove on the proper trial of the issues herein.

4. Your petitioner, further traversing said return, alleges that prior to his said enlistment in said regiment your petitioner was induced to join the same on the false representations made by one of the officers thereof; that the said regiment was not governed by any law governing regular military organizations of this State; that it was merely a social body of persons joined together for social advancement, and that in case of sickness your petitioner would derive a weekly benefit of \$10 during his sickness. That petitioner, relying upon the representations so made to him as aforesaid, and believing them to be true, consented to become a member. That thereupon the petitioner became admitted, without the knowledge or consent of his father, and without being asked to obtain said consent.

That your petitioner was asked to sign a paper in petitioner's name and in the name of his father, which petitioner did without knowing the contents thereof, and which were kept concealed from petitioner's view. That said paper was not signed by petitioner at the headquarters of said regiment, but at a tailor shop in Second avenue, near 84th street, New York city.

5. Your petitioner begs leave to refer to the affidavit of Samuel Frey, hereto annexed, and which is made part of this traverse.

WHEREFORE, Your petitioner prays that he may be discharged from imprisonment as prayed for in said petition.

MORRIS FREY.

(Add verification.)

4. Court order remanding prisoner.

(Title.)

(Caption Special Term.)

Upon the petition for a writ of habeas corpus herein filed, and the writ of habeas corpus thereon issued and upon the return thereto, also filed, and the proceedings had before the court-martial, etc., and after hearing Isaac L. Sink, Esq., attorney for relator for the motion to discharge relator, and Horatio C. King, Esq., judge-advocate-general, etc., in opposition thereto:

It is Ordered, That said writ of habeas corpus be and the same is hereby dismissed, and the relator Morris Frey is hereby remanded back to the custody of the warden of the county jail of the county of New York.

It is further Ordered, That Isaac L. Sink, Esq., the attorney for the relator, in whose custody the relator was placed pending the decision of this application, surrender the said Morris Frey to the warden of the county jail of New York county within forty-eight hours after the service of a duly certified copy of this order upon him.

PATRICK KEENAN,
Clerk.

C. Commitment by justice of peace.

1. Petition.

ULSTER COUNTY COURT.

PEOPLE EX REL. RICHARD STOKES v. JOSEPH H. RISELEY, SHERIFF, ETC.	} 38 Hun, 280.
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To the County Judge of Ulster County:

The petition of Richard Stokes respectfully shows, that he is now a prisoner confined in the custody of George Young, sheriff of Ulster county, at the county jail in said county, for supposed criminal offense.

Your petitioner further shows, that such confinement is by virtue of a commitment made by one F. D. L. Montanye, a justice of the peace of the town of Marbletown, a copy of which is hereto annexed, and to which reference is made for the grounds thereof.

And your petitioner further shows that, to his best knowledge and belief, he is not committed or detained by virtue of any process issued by any court of the United States or any judge thereof, or by virtue of the final judgment or decree of any competent tribunal of civil or criminal jurisdiction, or final order of such court, or by virtue of any execution upon such judgment or decree.

Your petitioner further shows, that he is advised by his counsel, John F. Cloonan, of N. Y., and verily believes that his imprisonment is illegal, and that such illegality consists in this: That the commitment of said magistrate commits him to the county jail for the period of one year in default of payment of the fine of two hundred and fifty dollars (\$250) thereby imposed, and that it is void under section 718 of the Code of Criminal Procedure.

WHEREFORE, Your petitioner prays for a writ of habeas corpus to the end that he may be bailed or discharged from custody.

Dated,	RICHARD STOKES.
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2. Notice to interested party.

(Title.)

To J. N. VANDERLYN, Esq., *District Attorney of Ulster County:*

Please take notice that a writ of habeas corpus, to inquire into the imprisonment of Richard Stokes, now confined by George Young, sheriff of Ulster county, in the common jail of said county, on a commitment made by a court of special sessions in the town of Marbletown, has been issued, and made returnable on the 10th day of May, 1887, before the Hon. William S. Kenyon, county judge of Ulster county, at his chambers in the city of Kingston, at 10 o'clock in the forenoon of that day.

Dated,	JOHN F. CLOONAN, <i>Attorney for Petitioner.</i>
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3. Return.

(Title.)

To the HON. WILLIAM S. KENYON, County Judge of Ulster County:

In obedience to the writ of habeas corpus hereto annexed, I certify and return: That on the 31st day of April, 1887, and before the said writ came to me, the said Richard Stokes was in my custody and detained by me in the county jail of the county of Ulster, under and by virtue of a commitment, a copy of which is hereto annexed, issued by F. D. L. Montanye, Esq., a justice of the peace of the town of Marbletown in said county. That the said Richard Stokes is still in my custody under said commitment, all of which I certify and have now here the body of said Richard Stokes, as by said writ I am commanded.

GEORGE YOUNG,
Sheriff.

4. Order to admit to bail.

IN THE MATTER OF THE APPLICATION OF RICHARD STOKES FOR A WRIT OF HABEAS CORPUS.	}	38 Hun, 280.
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The above-named petitioner, having sued out a writ of habeas corpus, and writ of certiorari to review detention, and a return thereto having been made, and such return having been traversed by the said petitioner and a hearing having this day been had, and it appearing that the said Richard Stokes is entitled to be admitted to bail:

Now, after hearing John F. Cloonan for the petitioner, and J. N. Vanderlyn, Esq., opposed, it is

Ordered, That the said Richard Stokes be discharged from imprisonment on his entering into a recognizance, with two sufficient sureties, to the People of the State of New York, to appear at the next Court of Special Sessions to be held in and for the county of Ulster, at the courthouse in the city of Kingston, on the 10th day of June next, and not to depart the court without leave, and to abide the judgment and order of the court.

WILLIAM S. KENYON,
County Judge.

5. Order discharging prisoner.

IN THE MATTER OF THE APPLICATION OF RICHARD STOKES FOR A WRIT OF HABEAS CORPUS.	}	38 Hun, 280.
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WHEREAS, A writ of habeas corpus has been heretofore issued on the application of Richard Stokes to the sheriff of Ulster county, commanding him to bring up the body of said Stokes for the purpose of inquiry into the cause of his detention, and the said prisoner having been brought before me and an examination had, and it appearing on such examination that the said Richard Stokes is unlawfully imprisoned and restrained of his liberty by reason of want of jurisdiction on the part of the Court of Special Sessions at which he was tried:

Now, after hearing John F. Cloonan on behalf of the prisoner, and J. N. Vanderlyn, district attorney, opposed, it is, therefore, finally

Ordered, That the said Richard Stokes be and hereby is forthwith discharged from the custody of the sheriff of Ulster county, and from further imprisonment under and by virtue of the commitment of the Court of Special Sessions, made herein by F. D. L. Montanye, Esq., by which he was held by said sheriff.

D. Extradition proceedings.

1. Petition.

SUPREME COURT.

PEOPLE EX REL. CHARLES E. CORKRAN

v.

JAMES L. HYATT, AS CHIEF OF POLICE OF
THE CITY OF ALBANY.

172 N. Y. 176.

To HON. D-CADY HERRICK, Justice of the Supreme Court of the State of New York:

The petition of Charles E. Corkran respectfully shows that he is imprisoned and restrained in his liberty at the second precinct station-house in the city of Albany, N. Y., by James L. Hyatt, chief of police of the city of Albany; that he has not been committed and is not detained by virtue of any judgment, decree, final order or process issued by a court or judge of the United States, in a case where such courts or judges have exclusive jurisdiction under the laws of the United States, or have acquired exclusive jurisdiction by the commencement of legal proceedings in such a court; nor is he committed or detained by virtue of the final judgment or decree of a competent tribunal of civil or criminal jurisdiction, of the final order of such a tribunal made in a special proceeding instituted for any cause except to punish him for a contempt; or by virtue of an execution or other process issued upon such a judgment, decree or final order; that the cause or pretense of the imprisonment or restraint of petitioner, according to the best knowledge and belief of your petitioner, is by virtue of an arrest made in pursuance of an executive warrant, issued by the Hon. Benjamin B. Odell, Jr., Governor of the State of New York, on two requisitions from the Governor of the State of Tennessee, reciting that the petitioner has been indicted in the State of Tennessee for the crime of grand larceny and false pretenses, and was a fugitive from the justice of the State of Tennessee.

Your petitioner further shows that his arrest and imprisonment is illegal, and he is unlawfully restrained of his liberty in that he is restrained of his liberty in violation of the law of the United States, namely, the Act of February 12, 1793, section 5278 of the Revised Statutes of the United States, in this, that the executive warrant, under which he is now restrained, shows that the crimes with which he is charged were committed in the State of Tennessee; that the papers accompanying the demand of the Governor of Ten-

nessee are not authenticated as required by that act; that it nowhere appears that your petitioner was personally within the limits of the State of Tennessee at the time said alleged crimes are stated to have been committed; that the Governor of the State of New York had no jurisdiction to issue his warrant in that it did not appear before him that your petitioner was a fugitive from the justice of the State of Tennessee or had fled therefrom; that it did not appear that there was any evidence before the Governor of the State of Tennessee at the time he issued his demand that your petitioner was personally or constructively within the limits of the State of Tennessee when the crimes are alleged to have been committed; that it appears on the face of the indictment accompanying the requisitions of the Governor of Tennessee that no crime under the laws of Tennessee is charged or has been committed; that your petitioner has been unable to procure a copy of the executive warrant or the papers upon which the same was issued and, therefore, is unable to attach the same hereto.

WHEREFORE, Your petitioner prays that a writ of habeas corpus issue, directed to said James L. Hyatt, chief of police of the city of Albany, commanding him that he have the body of said Charles E. Corkran, by him imprisoned and detained, together with the cause of such imprisonment and detention, before Hon. D-Cady Herrick, justice of the Supreme Court of the State of New York, at his chambers in the City Hall, in the city of Albany, N. Y., on the day of March, 1902, at o'clock.

Dated,,

(Add verification.)

2. Writ of habeas corpus.

In the Name of the People of the State of New York, to JAMES L. HYATT, Chief of Police of the City of Albany:

We command you that you have the body of Charles E. Corkran, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention by whatsoever name the said Charles E. Corkran is called or charged, before Hon. D-Cady Herrick, justice of the Supreme Court, at his chambers in the City Hall, in the city of Albany, on the 17th day of March, 1902, at 9:30 o'clock in the forenoon, to do and receive what shall then and there be considered concerning the said Charles E. Corkran, and have you then there this writ.

WITNESS: Hon. D-Cady Herrick, one of the justices of the Supreme Court of the State of New York, the 13th day of March, 1902.

3. Return to writ.

(Title.)

To the Supreme Court of the State of New York:

The return of James L. Hyatt, chief of police of the city of Albany, to the writ of habeas corpus hereto annexed.

Obedient to the command of the annexed writ, I do hereby certify the return:

That before the said writ came to me and on the 13th day of March, 1902, Charles E. Corkran, named herein, was in my custody and detained by me, as chief of police of the city of Albany, under and by virtue of a warrant issued by the Governor of the State of New York for the extradition of said Charles E. Corkran, charged with the commission of the crime of larceny and false pretenses in the State of Tennessee, a copy of which warrant is hereto annexed and made part of this return:

That the said Charles E. Corkran is still in my custody and by me detained by virtue of said warrant.

All of which I certify and I have here the body of said Charles E. Corkran, as by the said writ I am commanded.

Dated,,

4. Traverse to return.

(Title.)

STATE OF NEW YORK, }
CITY AND COUNTY OF ALBANY, } ss.:

Charles E. Corkran, being duly sworn, says that he denies that he committed either the crime of larceny or false pretenses, or any other crime, in the State of Tennessee; he further denies that he was within the State of Tennessee at the times mentioned in the indictments upon which the requisition of the Governor was issued and upon which the warrant of the Governor of the State of New York for his surrender was granted; that he has read the indictments before the Governor of the State of New York, upon which his warrant of arrest was issued, and those indictments charge him with the commission of the crime of larceny and false pretenses on the 20th and 30th days of April, 1901; the 8th day of May, 1901, and the 17th day of June, 1901, and 24th day of June, 1901. Deponent further says that he was not in the State of Tennessee at any time in the months of March, April, May or June, 1901, or any time for more than a year prior to the month of March, 1901. Deponent further denies that he fled from the State of Tennessee or that he is a fugitive from the justice of the State of Tennessee.

Deponent further says that he has heard read the papers accompanying the requisition of the Governor of the State of Tennessee to the Governor of the State of New York, and that said papers do not contain any evidence or proof that said Charles E. Corkran was in the State of Tennessee at any stated time since the 26th and 27th days of May, 1899, and do not contain any evidence or proof that said Charles E. Corkran was in the State of Tennessee on any day in any of the months set forth in said indictments when the said crime or crimes are alleged to have been committed.
(Jurat.)

5. Order dismissing writ.

(Title.)

(Special Term Caption.)

Upon the petition for a writ of habeas corpus herein filed, and the writ of habeas corpus thereon issued, and upon the return thereto filed, and upon the proceedings and testimony had before the court, and after hearing Mark Cohn, Esq., for the relator, and J. Murray

Downs in opposition thereto, it is now, on motion of Scherer & Downs, attorneys for the defendant,

Ordered, That the said writ of habeas corpus be and the same is hereby dismissed, and the said relator, Charles E. Corkran, is hereby remanded back to the custody of the defendant, James L. Hyatt, as chief of the police of the city of Albany, N. Y.

.....,
Justice Supreme Court.

6. Order granting stay and fixing bail.

(Title.)

(Special Term Caption.)

The writ of habeas corpus issued herein on the 13th day of March, 1902, having been dismissed, and the application to discharge the relator denied by Mr. Justice D-Cady Herrick, on the 19th day of March, 1902, and the said justice having made an order remanding the relator to the custody of James L. Hyatt, chief of police of the city of Albany, and granting a stay of proceedings to enable the relator to apply to any justice of the Supreme Court of the State of New York for a stay of proceedings and to be liberated on bail pending the decision of an appeal from the order of Mr. Justice D-Cady Herrick, denying the application of the relator for his discharge, and an application having been duly made to Mr. Justice Alden Chester, justice of the Supreme Court of the State of New York, at his chambers in the city of Albany, New York, on the 19th day of March, 1902, for a stay of proceedings herein and to admit the relator to bail pending the appeal from the said order of Mr. Justice D-Cady Herrick, now, after hearing Mark Cohn, Esq., of counsel for Charles F. Corkran, the relator herein, in favor of such application, and J. Murray Downs, Esq., of counsel for James L. Hyatt, chief of police of the city of Albany, and Vernon Sharp, agent of the State of Tennessee, in opposition, and due deliberation had, it is

Ordered, That a stay of all proceedings under the order of the Special Term of the Supreme Court held by Mr. Justice D-Cady Herrick, made on the 19th day of March, 1902, remanding the custody of the relator to James L. Hyatt, chief of police of the city of Albany, N. Y., and denying the application of relator to be discharged from imprisonment, be and the same hereby is granted until the decision of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, on the appeal taken herein to the said Appellate Division of the Supreme Court, Third Judicial Department, from the said order of Mr. Justice D-Cady Herrick; it is further

Ordered, That the said Charles F. Corkran be admitted to bail pending said appeal in the sum of seventy-five hundred dollars (\$7,500), in an undertaking to be approved by a justice of this court, on notice to the counsel for the said chief of police, and on the filing and approval of said undertaking, the said Charles E. Corkran be liberated and discharged from arrest; and that in the meantime, and until the giving and approval of said undertaking, the said Charles E. Corkran remain in the custody of James L. Hyatt, chief of police of the city of Albany, within the jurisdiction of this court, to wit, in the county of Albany, N. Y. Enter.

.....,
Justice Supreme Court.

E. Custody of children.**1. Petition.**

IN THE MATTER OF THE APPLICATION OF
ALONZO FREEMAN FOR A WRIT OF
HABEAS CORPUS TO BRING UP THE
BODY OF HENRY FREEMAN, AN INFANT.

To the Supreme Court of the State of New York:

The petition of Alonzo Freeman, of the city of Syracuse, respectfully shows: That he is the husband of Celia Freeman, who also resides in said city but apart from your petitioner. That said Celia Freeman has the custody of an infant child of your petitioner and his said wife, named Henry Freeman, aged thirteen years.

That your petitioner is engaged in business as a master mechanic in said city and is able and willing to support said child; that he resides with his mother, the grandmother of said child, who is willing to take the care of said child so far as may be necessary, and that the petitioner is desirous that said child shall have a home with your petitioner and its grandmother. That his said wife has no means of her own for the support or education of said child.

WHEREFORE, Your petitioner prays a writ of habeas corpus to deliver said child from the custody of its mother, and that your petitioner may be awarded the custody of said child.

(Signature and verification as to pleading.)

2. Another form of petition.

SUPREME COURT — NEW YORK COUNTY.

THE PEOPLE OF THE STATE OF NEW YORK
ON THE RELATION OF ELLA SINCLAIR

v.

DANIEL A. SINCLAIR.

} 91 App. Div. 322.

To the Supreme Court of the State of New York, County of New York:

The petition of Ella Sinclair respectfully shows that your petitioner is over the age of twenty-one years; is now and has been for many years a resident of the borough of Manhattan, city of New York.

That your petitioner's infant son, Hugh Sinclair, now aged three years, was forcibly and wrongfully restrained and detained by him, against the wishes of your petitioner.

That said Hugh Sinclair has not been committed nor is he detained, by virtue of a mandate issued by a court or a judge of the United States, in a case where such courts or judges have exclusive jurisdiction under the laws of the United States, or have acquired exclusive jurisdiction by the commencement of legal proceedings in such a court.

That he has not been committed nor is he detained by virtue of the final judgment or decree of a competent tribunal of civil or criminal jurisdiction; or the final orders of such a tribunal, made in a special proceeding, instituted for any cause, or by virtue of an execution or other process issued upon such a judgment, decree or final order.

The cause or pretense of such restraint and detention, according to the best knowledge and belief of petitioner, is that the said defendant claims that he is entitled to have and hold the custody of such child against the wishes of your petitioner because he is his father.

Your petitioner further shows: That your petitioner intermarried with said defendant Daniel A. Sinclair, on or about the 2d day of June, 1896, at the city of New York, and since said date thereafter lived with said defendant as his wife up to the 2d day of July, 1903. That, until about four years ago, petitioner hired and paid the rent for places of abode occupied by them, and at the latter period, about four years ago, your petitioner purchased the house No. 809 Lexington avenue, borough of Manhattan, as a place of residence for herself and her family at the express solicitation of her family, and deponent furnished same throughout at her own exclusive expense; in which house she permitted the defendant to reserve for his own use an office.

That on July 2, 1903, said defendant deserted your petitioner and has never since provided for her, nor did he ever contribute to the support of petitioner since her marriage, nor to the support of said infant; so that the entire expense of said household, including living expenses and clothing, has been borne and paid exclusively by your petitioner.

That on and prior to the 7th day of August, 1903, your petitioner was temporarily sojourning with her said child at a country place at Pine Hill, Ulster county, N. Y.

That on said August 7, 1903, said defendant forcibly and with force and arms, armed with a revolver, a deadly weapon, while petitioner had said child in her custody, pointed said revolver and directed same at your petitioner and threatened to shoot her, if she attempted to interfere with or restrain him in such act, and thereupon assaulted your petitioner and seized said child, wresting him forcibly from her, and entered a carriage with said child, and brought him to New York city, all against the entreaties and wishes of your petitioner, and now restrains and detains him.

That said child is of very tender years; he was born March 30, 1900, and is now aged three years.

He was nursed from infancy by your petitioner and has always been under her supervision, care, custody and guidance, no other person having nursed or cared for him. And deponent verily believes that the interests and welfare of said child will be much better guarded and cared for, and his best interests subserved by continuing in her care and custody.

That your petitioner is amply responsible and has ample and sufficient means to maintain and educate said child and also to support herself. She is the owner of real as well as personal estate in this city. That said defendant has no property, and if he is in the receipt of any income, deponent has no knowledge of it, as he has never contributed to her support.

WHEREFORE, Your petitioner prays that a writ of habeas corpus issue directed to Daniel A. Sinclair commanding him to appear before this court, or one of the justices thereof, and that your petitioner may be awarded the custody of said child, Hugh Sinclair; also for such other and further relief as may be just.

No other application for this writ has heretofore been made to any other court or judge.

Dated, New York, August 13, 1903.

ELLA SINCLAIR,
Petitioner.

(Add verification.)

3. Return where person is not in custody of party to whom writ is directed.

(Title.)

To the Supreme Court of the State of New York:

The return of Celia Freeman alleges and shows to the court that the infant, Henry Freeman, is not and has not been at any time for three months last past under her control or in her custody.

That, as she is informed and believes, the said Henry Freeman is now at Litchfield, in the State of Connecticut, and your petitioner cannot produce the body of said Henry Freeman.

(Add verification.)

CELIA FREEMAN.

4. Petition for warrant to bring up prisoner.

(Title.)

The petition of Alonzo Freeman shows to the court that heretofore on his application a writ of habeas corpus issued out of this court, commanding Celia Freeman to bring up the body of Henry Freeman, an infant; that service of such process was duly made, and that Celia Freeman threatens to leave the State of New York and remove permanently with said Henry Freeman to the State of Connecticut. That said Celia Freeman obtained the custody of the said infant by forcibly taking him from the custody of his grandmother, and committed an assault in so doing. That she has informed several persons of her intention to leave the State, and has made preparation for her departure before the return day of said writ, and this petitioner has good reason to believe that she will remove said infant from the State before such return day. Wherefore, your petitioner prays that a warrant issue pursuant to the provisions of section 1271 of the Civil Practice Act, to bring up the said Henry Freeman before this court to be dealt with according to law.

(Add verification.)

ALONZO FREEMAN.

5. Warrant.

(Title.)

The People of the State of New York, to the Sheriff of the County of Ulster:

It appearing by the petition of Alonzo Freeman this day read and filed, that there is good reason to believe that Celia Freeman is about to remove the body of Henry Freeman, an infant, to the State of Connecticut, and out of the State of New York, before the return day of a writ of habeas corpus heretofore issued out of this court, commanding said Celia Freeman to bring up the said Henry Free-

man: We do, therefore, command you to bring forthwith before this court the body of said Henry Freeman, to be dealt with according to law, and also the body of the said Celia Freeman.

IN WITNESS WHEREOF, I have hereunto set my hand and caused
[L. S.] the seal of the court to be affixed.

JAMES A. BETTS,
Justice Supreme Court.

6. Warrant of attachment for disobedience to writ.

(Title.)

The People of the State of New York, to the Sheriff of the County of Ulster, in the State of New York:

WHEREAS, on the day of December,, a writ of habeas corpus was issued out of the Supreme Court, directed to Celia Freeman, commanding her to have the body of Henry Freeman before the Special Term of said court, to be held at the courthouse in the city of Kingston, on the day of December,, then to do and receive what should be then and there considered; and

WHEREAS, It appears by the affidavit of Thomas B. Johnson, filed this day, that service of such writ was duly made on said Celia Freeman on the day of December,; and,

WHEREAS, The said Celia Freeman has neglected, without sufficient cause shown by her, to obey said writ as prescribed by law, in that she has not appeared in said court in obedience to said writ, nor produced the body of said Henry Freeman, nor made return to said writ: You are, therefore, commanded to forthwith arrest and apprehend the said Celia Freeman, and bring her before the Supreme Court, at a Special Term thereof, to be held at the courthouse in the city of Albany, on the day of January,, at the opening of the court on that day, then and there to be dealt with according to law, and let this be your warrant.

WITNESS: Hon. James A. Betts, justice of the Supreme Court,
[L. S.] at the courthouse in Kingston, this day of
J. D. THOMPSON, J. D. WURTS,
Attorney for Petitioner. *Clerk.*

Indorsed — Granted this — day of December,, on application of Alonzo Freeman.
JAMES A. BETTS,
Justice Supreme Court.

7. Precept to bring up prisoner on disobedience to writ.

(Title.)

The People of the State of New York, to the Sheriff of the County of Ulster:

WHEREAS, A writ of habeas corpus was heretofore issued and served commanding Celia Freeman to bring the body of Henry Freeman before this court at a term thereon specified, and she neglected so to do, and failed to make return to said writ; and

WHEREAS, A warrant of attachment was, therefore, issued to the sheriff of Ulster county, commanding him to bring the said Celia Freeman before the court at this term thereof, to be dealt with according to law; and

WHEREAS, The said Celia Freeman has this day been brought before the court and failed to show sufficient cause for her neglect and disobedience of the writ, and still refuses to comply with the command thereof: Now, on motion of S. T. Hull, attorney for petitioner,

We do, therefore, command you forthwith to bring the said Henry Freeman before this court, to remain in your custody till discharged or remanded, as may hereafter be directed, and this shall be your warrant.

WITNESS: Hon. James A. Betts, justice of the Supreme Court,
[L. S.] this 12th day of January, 1911. J. D. WURTS,
Clerk.

Indorsed — Granted this 12th day of January, 1911, on application of Alonzo Freeman.

JAMES A. BETTS,
Justice Supreme Court.

F. Habeas corpus and certiorari to attack sufficiency of information.

1. Petition.

SUPREME COURT.

PEOPLE EX REL. GEORGE W. PERKINS

v.

JOSEPH F. MOSS ET AL.

187 N. Y. 410.

To Any One of the Honorable the Justices of the Supreme Court of the State of New York:

The petition of George M. Perkins respectfully shows that he is now imprisoned and restrained of his liberty in the city, county and State of New York, by Edward Reardon, a police officer of the city of New York, and that he is not committed by virtue of any process or mandate issued by any court of the United States, or by a judge thereof; nor is he committed or detained by virtue of the final judgment or decree of a competent tribunal of civil or criminal jurisdiction, or the final order of such a tribunal made in a special proceeding instituted for any cause except to punish him for contempt; nor by virtue of an execution or other process issued upon such a judgment, decree or final order.

The cause or pretense of the imprisonment or restraint, according to the best of the knowledge and belief of your petitioner, is that Joseph F. Moss, a city magistrate in said city, has issued a warrant or mandate, commanding that your petitioner be arrested and brought before him or some other magistrate of competent jurisdiction. A copy of the said warrant or mandate is hereunto subjoined.

And your petitioner further shows that his imprisonment and restraint is wholly illegal, and the said warrant or mandate is wholly void, in that no evidence of the commission of any crime or act justifying his arrest has been submitted to said magistrate, and that said magistrate was wholly without jurisdiction to issue the same.

WHEREFORE, Your petitioner prays that a writ of habeas corpus

issue directed to the said Edward Reardon, or to any other person by whom your petitioner may be imprisoned or restrained of his liberty, and that a writ of certiorari issue to said magistrate commanding him to certify fully and at large the cause of your petitioner's imprisonment as aforesaid.

Dated, March 29, 1906.
(Add verification.)

GEORGE W. PERKINS.
Petitioner.

2. Writ of habeas corpus.

(Title.)

The People of the State of New York, to EDWARD REARDON, or any other person having the custody of GEORGE W. PERKINS, Greeting:

We command you that you have the body of George W. Perkins, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said George W. Perkins is called or charged, before Hon. Samuel Greenbaum, or one of the other justices of the Supreme Court of the State of New York, at the county court house, in the county of New York, at Special Term, Part II, forthwith upon the service of this writ, to do and receive what shall then and there be considered concerning him, and have you then and there this writ.

WITNESS: Hon. Samuel Greenbaum, Justice of the Supreme
[L. s.] Court, the 28th day of March, 1906.

HAWKINS & DELAFIELD,
Relator's Attorneys.
Let the foregoing writ issue.

By the court,
PETER J. DOOLING,
Clerk.

SAMUEL GREENBAUM,
Justice Supreme Court.

3. Writ of certiorari.

(Title.)

The People of the State of New York, to the HON. JOSEPH F. MOSS, City Magistrate:

We command you that you certify fully and at large to Hon. Samuel Greenbaum or one of the other justices of the Supreme Court, at the court house in the county of New York, at Special Term, Part II, immediately upon the service of this writ, the day and cause of the imprisonment of George W. Perkins by you detained, as it is said, by whatsoever name the said George W. Perkins shall be called or charged; and have you then this writ.

WITNESS: Hon. Samuel Greenbaum, Justice of the Supreme
[L. s.] Court, on the 28th day of March, 1906.

HAWKINS & DELAFIELD,
Relator's Attorneys.
Let the foregoing writ issue.

By the court,
PETER J. DOOLING,
Clerk.

SAMUEL GREENBAUM,
Justice Supreme Court.

4. Return of peace officer under writ of habeas corpus.

(Title.)

To the Supreme Court of the State of New York:

I, Edward J. Reardon, pursuant to the command of a certain writ of habeas corpus, granted on the 28th day of March, 1906, and directed to Nicholas J. Hayes, sheriff of the county of New York, in the city of New York, and to Edward J. Reardon, a peace officer, do respectfully make return as follows: My name is Edward J. Reardon. I am a special officer of the municipal police force of the city of New York. On the 28th day of March, 1906, there was delivered to me for service a certain warrant of arrest, which said warrant of arrest was in words and figures following: (Recital of warrant hereinbefore set forth) and is now here produced upon return to this writ. Pursuant to the command of said warrant of arrest, I arrested the defendant therein named, to wit, George W. Perkins, the relator herein, and took him into my manual custody. Before arraigning the said George W. Perkins before the Hon. Joseph F. Moss, a city magistrate of the first division of the city of New York, pursuant to the command of the said warrant of arrest, I was served with a certain writ of habeas corpus, which is hereto annexed and made a part of this, my return.

Pursuant to the command of said writ, I produced the body of the said George W. Perkins before the Hon. Samuel Greenbaum, a justice of the Supreme Court of the State of New York, at the county court house, in the county of New York. This was done by me without arraigning the said George W. Perkins before any magistrate.

Neither when the said writ was served nor at any other time theretofore or thereafter did I have in my custody or under my power or restraint the person of the said relator, except as hereinbefore set forth.

And the foregoing is a full, true and complete return of all matters and things relating to the proceedings in reference to which the said writ of habeas corpus was issued, and is by me respectfully submitted to the Supreme Court as my return thereto.

Dated at the city of New York, this 28th day of March, 1906.

EDWARD J. REARDON.

(Writ of habeas corpus annexed.)

5. Return of magistrate to writ of certiorari.

(Title.)

To the Supreme Court of the State of New York:

I, Joseph F. Moss, a city magistrate of the first division of the city of New York, respectfully make return to the writ of certiorari heretofore, on the 28th day of March, 1906, issued out of the Supreme Court and directed to me, which said writ is hereto annexed, and made part of this return as follows:

1. I have not now, nor have I at any time heretofore, had in my custody the body of the relator, nor have I at any time heretofore, nor have I now, under my power and restraint, the body of the said relator, except as hereinafter set forth.

2. At all the times mentioned herein, I was, and now am, one of the city magistrates of the first division of the city of New York, duly appointed and qualified as such, and discharging the functions vested by law in me, as such magistrate. On the 28th day of March, 1906,

in the county of New York, one Darwin P. Kingsley, one Edmund D. Randolph and one Thomas A. Buckner, appeared before me, I then acting as such magistrate of the city of New York, and laid before me certain depositions in writing, charging the said George W. Perkins with the commission of a crime, to wit, the crime of grand larceny in the first degree, which said depositions the said Darwin P. Kingsley, Edmund D. Randolph and Thomas A. Buckner then and there subscribed before me as a magistrate as aforesaid, and I thereupon swore the said Darwin P. Kingsley, Edmund D. Randolph and Thomas A. Buckner to the truth of their depositions in the manner and form required by law. Said depositions are as follows, to wit: (Quoting said affidavits of Darwin P. Kingsley, Edmund D. Randolph and Thomas A. Buckner.) I was satisfied from these depositions that the crime complained of in said depositions had been committed, and that there was reasonable ground to believe that the defendant therein named, to wit, the relator in these proceedings, had committed it, and I, therefore, as such magistrate, issued a warrant against the said George W. Perkins, which said warrant of arrest was in words following, to wit: (Quoting said warrant.) Said warrant was then delivered to one Edward J. Reardon, a special officer of the municipal force of the city of New York. Further than is herein set forth, deponent has no knowledge in regard to any matters than this writ of certiorari, herein set forth, and makes the above as his return to said writ.

Dated at the city of New York, this 28th day of March, 1908.

JOSEPH F. MOSS.

(Writ of certiorari annexed.)

6. Answer to return to writ of habeas corpus.

(Title.)

By this his answer to the return made by Edward J. Reardon to the writ of habeas corpus heretofore issued herein, the relator, George W. Perkins, respectfully shows to this court: That the warrant referred to in the said return was issued by the Hon. Joseph F. Moss, a city magistrate, in the city of New York, upon certain depositions in writing made by Darwin P. Kingsley, Edmund D. Randolph and Thomas A. Buckner, which said depositions have been returned to this court by the said magistrate pursuant to the command of a certain writ of certiorari issued to such magistrate, and that the said depositions were the only evidence upon which such warrant was issued. This relator hereby refers to the said depositions as thus returned, and hereby makes the same a part of this answer in like manner as if the same were herein set forth at length.

And this relator further shows that the facts stated in the said depositions do not constitute a crime, and were insufficient in point of law to invest the said magistrate with jurisdiction to issue such warrant, and that the said magistrate was without jurisdiction to issue the same.

And this relator further avers and shows, upon information and belief, that the said warrant was unlawfully issued, and was and is void and of no effect, and that the same affords no lawful ground for the arrest or for the further restraint of this relator.

GEORGE W. PERKINS,
Relator.

(Add verification.)

7. Demurrer to return under writ of certiorari.

(Title.)

By this his answer to the return made by Hon. Joseph F. Moss, a city magistrate, to the writ of certiorari heretofore issued herein, the relator, George W. Perkins, respectfully shows that he is advised and appears upon the face of the said return that the evidence upon which the said magistrate acted in issuing the warrant in said return referred to was insufficient in point of law to justify the issuance of the said warrant, and that the said magistrate was without jurisdiction or authority to issue the said warrant, and that the said warrant was unlawfully issued and was and is wholly void.

GEORGE W. PERKINS,
Relator.

(Add verification.)

8. Order dismissing writ.

(Caption Special Term; title.)

The above-named relator, having heretofore presented his petition to this court verified on the 28th day of March, 1906, alleging that he had been arrested and that he was restrained of his liberty by Edward Reardon, a peace officer of the city of New York, under a warrant issued by Hon. Joseph F. Moss, a city magistrate, whereby it was directed that the relator be arrested upon a charge of grand larceny in the first degree, and further averring that the said warrant was unlawfully issued and that the relator was illegally restrained by virtue thereof. And a writ of certiorari having thereupon issued out of, and under the seal of this court, directed to the said Joseph F. Moss, city magistrate, and a writ of habeas corpus having in like manner issued to the said Edward Reardon; and the said Joseph F. Moss, city magistrate, as aforesaid, having made return to the said writ of certiorari, dated the 28th day of March, 1906, and the said Edward Reardon having produced the said relator, pursuant to the command of said writ of habeas corpus, and having made a return to the said writ, dated on the same day; and the relator having thereupon filed a traverse in the nature of a demurrer to the return made by the said city magistrate, and a traverse to the said return made by the said Edward Reardon to the said writ of habeas corpus; and the proceedings under the said writs having thereupon been consolidated by order of the court.

Now, on reading and filing the said petition, the aforesaid writs, the said returns thereto and the said traverses to such returns, and, after hearing Hon. William N. Cohen and Lewis L. Delafield in support of the said writs, and Hon. William Travers Jerome, district attorney, in opposition thereto.

And on motion of Hon. William Travers Jerome, district attorney, it is

Ordered, That the said writ of habeas corpus be, and the same hereby is, dismissed and that the said George W. Perkins be, and he hereby is, remanded to the custody of Edward Reardon, peace officer, as aforesaid.

SAMUEL GREENBAUM,
Justice Supreme Court.

G. Illegal commitment to state reformatory.

1. Petition.

SUPREME COURT.

PEOPLE EX REL. MAY CLARK

*agst.*THE KEEPER OF THE NEW YORK STATE
REFORMATORY FOR WOMEN AT BED-
FORD.

176 N. Y. 465.

*To the Hon. William J. Gaynor, Justice of the Supreme Court of the
State of New York:*

The petition of Amos H. Evans respectfully shows as follows:

1. One May Clark is now imprisoned and restrained of her liberty in the State Reformatory for Women at Bedford, N. Y., by the keeper thereof, and your petitioner is attorney for the said prisoner and makes this petition in her behalf.

2. The said prisoner has not been committed, and is not detained, by virtue of any judgment, decree, final order or process specified in section 1231 of the Civil Practice Act of the State of New York.

3. The cause or pretense of such imprisonment is not fully known to your petitioner, and the only cause or pretense for such imprisonment which your petitioner can assign, according to the best of his knowledge and belief, is as follows, to wit: That on the 31st day of May, 1902, at the first district city magistrates' court, in the borough of Manhattan, in the city of New York, she was committed to said reformatory by Leroy B. Crane, city magistrate, upon a complaint charging her with "disorderly conduct."

That, as your petitioner is informed and believes, there appears among the papers on file with the clerk of said court no record of any conviction of the relator of such offense or any other, or any evidence to warrant such conviction.

That deponent believes that said commitment was unlawful, and the detention of the relator is unjust and illegal, the said magistrate being without jurisdiction in the premises.

4. Your petitioner is unable to annex to this petition a copy of any mandate by virtue of which the prisoner is imprisoned and restrained, because your petitioner has been unable to demand and procure a copy of any such mandate in time to annex the same to this petition, although he has used reasonable diligence to procure such copy, but your petitioner believes that if there be any mandate by virtue of which the prisoner is restrained and imprisoned, a copy thereof will be annexed to the return to the writs for which your petitioner now prays.

5. The said imprisonment is illegal, because the mandate (if any there be), by virtue of which the said prisoner is detained, is not sufficient in form or substance, and does not sufficiently charge the prisoner with the commission of any act which warrants her imprisonment, and because no sufficient complaint has been made against the said prisoner charging her with the commission of any act which warrants her imprisonment, and because no evidence has been produced against the said prisoner sufficient to warrant her imprisonment, and

because the said prisoner is entitled to be discharged upon reasonable bail, and such right is denied to her.

WHEREFORE, Your petitioner prays that a writ of habeas corpus may issue, directed to the said keeper of said reformatory and to all and every person and persons, officer and officers, who may have the said prisoner in his or their custody, commanding him and them to have the body of the said prisoner before a justice of the Supreme Court of the State of New York, at such time and place as to your honor shall seem fit, together with the day and cause of her imprisonment and detention.

And that a writ of certiorari may issue, directed to Leroy B. Crane, city magistrate, commanding him to certify fully and at large to the said justice, at the same time and place, and to make full return before the said justice of all and every complaint, charge, affidavit, indictment, written or printed document, and the orders, proceedings, evidence, conviction and judgment in the premises, together with all things touching or in any manner concerning the same.

And that upon the return of the said writs, the said prisoner may be discharged or may have such relief as her circumstances shall require and as the said justice shall think fit to grant.

And your petitioner will ever pray, etc.

2. Return to writ of habeas corpus.

(Title.)

STATE OF NEW YORK, }
COUNTY OF WESTCHESTER, } ss.:

Katherine Bement Davis, being duly sworn, says that she is the superintendent of the New York State Reformatory for Women at Bedford, N. Y., and for a return to the writ of habeas corpus issued herein on the 4th day of June, 1902, states:

1. That at the time the said writ was served she had in her custody the said May Clark, and still holds the said May Clark in her custody.

2. That the authority by which deponent holds said May Clark, and the true cause of the restraint of the said May Clark, is a warrant of commitment duly made on the 31st day of May, 1902, by Leroy B. Crane, a city magistrate in and for the city of New York, in county of New York, committing the said May Clark to the custody of deponent and of the said New York State Reformatory for Women, after due trial and conviction, upon her plea of guilty upon a charge of being a public prostitute, the original of which commitment is hereunto annexed and made a part of this return.

(Add verification.)

(Annexed to the above was the warrant of commitment, the record of conviction and sentence of said May Clark to the New York State Reformatory for Women at Bedford, N. Y.)

3. Return to writ of certiorari.

(Title.)

CITY AND COUNTY OF NEW YORK, ss.:

I, Leroy B. Crane, the city magistrate named in the annexed writ, do certify and make return to the Supreme Court that on the 31st day of May, 1902, May Clark, named in said writ, was brought before

me at the first district magistrates' court in said city, charged upon complaint of Harold Lockwood, which complaint is hereto annexed, and made a part of this return. That upon trial in which said complainant Harold Lockwood was sworn and examined in the presence and hearing of said defendant and testified that said defendant did, at the time and in the public place mentioned in said complaint, on the 31st day of May, 1902, importune and solicit men for the purpose of prostitution upon the public street in the borough of Manhattan, city of New York, and that the defendant is in the habit of importuning and soliciting men for the purpose of prostitution upon the said streets at all hours of the night, and the said defendant having been called upon to answer, and being informed of her rights and of said charge, complaint and testimony, did plead guilty to the said charge.

I did thereupon convict her of being guilty of such disorderly conduct charged in said complaint, and as in my opinion tended to and might provoke a breach of the public peace. And being thereby duly convicted, she was thereupon committed to the State Reformatory for Women at Bedford, N. Y., pursuant to section 146 of chapter 546 of the Laws of 1896 of the State of New York, or thence to be delivered by due course of law.

Given under my hand at the first district magistrates' court, in the said city, this 4th day of June, 1902.

LEROY B. CRANE,
City Magistrate.

(Annexed to the foregoing return were the said complaint of said Harold Lockwood and the minutes of the oral examination and plea of said May Clark before said magistrate.)

4. Relator's demurrer.

(Title.)

The relator demurs to the returns made to the writs of habeas corpus and certiorari herein, upon the following grounds:

1. That it does not appear thereby that the relator was convicted of any offense which constitutes a crime under the laws of the State of New York.

2. That it does not appear thereby that the relator entered a plea of guilty before said committing magistrate of any offense which constitutes a crime under the laws of the State of New York.

3. That said magistrate was without jurisdiction and had no legal authority to try, convict or accept a plea of guilty from the relator of the offense alleged in the commitment, which is made a part of said return.

4. That said magistrate was without jurisdiction and had no legal authority to impose upon the relator the sentence set out in said warrant of commitment and to issue and make said warrant of commitment.

5. Said warrant of commitment is illegal in that it does not set out distinctly the crime of which the relator was convicted, the facts set out in said return being legally insufficient to detain the relator and deprive her of her liberty.

AMOS H. EVANS,
Attorney for Relator.

5. Order sustaining writs.

(Caption and title.)

Upon reading and filing the petition of Amos H. Evans, verified the 5th day of June, 1902, the writ of habeas corpus and the writ of certiorari duly allowed herein by the Hon. William J. Gaynor, justice of the Supreme Court, on the 5th day of June, 1902, the return to said writ of habeas corpus duly made by Katherine Bement Davis, superintendent of the State Reformatory for Women at Bedford, N. Y., and the return to said writ of certiorari duly made by Hon. Leroy B. Crane, city magistrate, and the demurrer to said returns, and after hearing Amos H. Evans, Esq., of counsel for the relator, in support of the said writs, and Henry G. Gray, Esq., deputy assistant district attorney, in opposition thereto, and

On motion of Amos H. Evans, Esq., it is

Ordered, That the said writs be, and the same hereby are, sustained, and it is further

Ordered, That the said relator be, and she hereby is, discharged from the custody of said superintendent of the State Reformatory for Women at Bedford, N. Y.

Enter:

WILLIAM J. GAYNOR,
Justice of the Supreme Court.

Granted June 14, 1902.

CHAS. P. HARTZHEIM,
Clerk.

H. Commitment for civil contempt.**1. Petition.****SUPREME COURT — BROOME COUNTY.**

IN THE MATTER OF THE APPLICATION OF CARRIE BELL DEPUE FOR A WRIT OF HABEAS CORPUS TO BRING UP THE BODY OF HER, THE SAID CARRIE BELL DEPUE.	} 185 N. Y. 60.
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To Hon. Robert S. Parsons, County Judge of Broome County:

The petition of Carrie Depue respectfully shows, that she is over twenty-one years of age and resides in Vestal, Broome county, N. Y., and is the widow of David D. Depue, who died in August, 1904 (the judgment debtor mentioned and described in an order, dated January 2, 1902, which adjudged petitioner guilty of contempt for failing and refusing to appear as a witness in a supplementary proceeding then pending against said David D. Depue, as a judgment debtor.)

That she is now a prisoner confined in the custody of Harry P. Worthing, sheriff of the county of Broome in the State of New York, and has been imprisoned in said jail since the 8th day of May, 1905.

That she is not detained by virtue of any mandate issued by a court or judge of the United States in a case where such courts or judges have exclusive jurisdiction by the commencement of legal proceedings in such a court; nor by virtue of a final judgment or decree of any competent tribunal of civil or criminal jurisdiction by a final order of such a tribunal made in such proceedings instituted for any cause; nor by virtue of an execution or other process issued on such a judg-

ment, decree or final order other than as stated hereinafter, wherein the reasons for your petitioner's imprisonment are set forth.

That the cause or pretense of your petitioner's imprisonment according to the best knowledge and belief of your petitioner is as follows: In or about the year 1900, the judgment creditors named in the order, a copy of which is hereto annexed, obtained a judgment against such judgment debtor, David D. Depue, now deceased, which was filed and docketed in Broome county clerk's office, an execution thereon issued against the property of said judgment debtor delivered to the sheriff and by him returned unsatisfied; thereupon proceedings supplementary to execution were instituted on said judgment against said judgment debtor and he was directed to appear before a referee named in the order instituting such proceedings.

Thereafter and while said proceedings were pending and while your petitioner was seriously ill and confined to her bed a subpoena in such proceeding was served upon her while she was in bed, requiring her to attend before said referee and be examined as a witness, as she is now informed, although at the time she was too ill to understand and did not understand what said paper so served upon her as aforesaid required her to do; that at that time she was under the care of Doctor Ard and that thereafter and while so ill and confined to her bed, she was served with another paper which she now believes to have been an order requiring her to appear before the county judge of Broome county to show cause why she should not be punished for contempt in failing to obey said subpoena. That she was afterward informed by her husband, said judgment debtor, that he had appeared before the Broome county judge and that said judge had fined her, this petitioner, for contempt in failing to obey the subpoena, which said fine was in the sum of ten dollars (\$10), and that he, said judgment debtor, had paid such fine, that the two papers above mentioned are the only papers ever served upon your petitioner in this proceeding, and that the foregoing is the only knowledge or information which she has ever had of or concerning such proceeding; that she has never at any time seen or had any communication with one A. P. Fish, has never employed him as her attorney and has never authorized anybody to employ him as her attorney nor to appear for or represent her, and that until she was arrested on May 8, 1905, she had no knowledge or information of any kind that said Fish had ever assumed to appear or act for or represent your petitioner.

Your petitioner further shows that the order of July 27, 1901, mentioned in the order under which your petitioner was arrested and is now confined, and a copy of which is hereto attached and made a part hereof was not served upon your petitioner and that she has never had any notice, knowledge or information that such an order was ever granted, made or issued and that she never had any notice, knowledge or information that she had been directed or required to appear before Harry C. Walker, Esq., or any one else on August 8, 1901, at 10 o'clock in the forenoon or at any other time.

That until this date she did not know and had no notice or knowledge that said Fish had appeared for her or assumed to represent your petitioner before said referee on August 8, 1901, or October 2, 1901, and that the only subpoena ever served upon your petitioner in this proceeding or in connection therewith was the subpoena served on or about the 15th day of May, 1900, and for the disobedience of

which subpoena the county judge of Broome county punished your petitioner by fining her ten dollars (\$10), which fine was paid, and that until this date, May 8, 1905, your petitioner had no knowledge or notice that said proceeding had been adjourned to October 24, 1901, or any other time, and did not know that she was required to appear on that date. Your petitioner further shows that said A. P. Fish is hopelessly insolvent.

Your petitioner further shows that no papers of any kind have been served upon her in this proceeding since July 18, 1901, and that she had no knowledge, notice or information of any kind, of the institution of this proceeding to punish her for contempt in failure to obey said order of July 27, 1901.

Your petitioner further shows that she has never intentionally disobeyed or intended to disobey any order, direction or mandate issued by any court or judge, and that she had acted innocently in this matter, and not with any intent or purpose upon her part of hindering or prejudicing the judgment creditors herein in the collection of their said claim, and that the first notice or knowledge she had that any claim was made that she had been guilty of contempt or was sought to be punished was when she was arrested May 8, 1905.

That attached hereto and made a part hereof is a copy of the order under and in pursuance of which your petitioner has been arrested and is being confined, as already stated. That your petitioner is advised by her counsel, Messrs. Hinman, Howard & Kattell, and verily believes that her imprisonment is illegal for the reason that no subpoena was served upon your petitioner requiring her to appear and be examined on August 8, 1901, nor at any time subsequent to the service of the first subpoena upon her, and that the order requiring her to appear and be examined as a witness on August 8, 1901, being the order of July 27, 1901, was illegal, void and of no effect.

Also, upon the ground that neither the County Court of Broome county nor the county judge thereof had or obtained any jurisdiction to grant the order of January 2, 1902, under which your petitioner was arrested and is being confined.

Also, upon the further ground that service of the order of July 27, 1901, requiring your petitioner to appear and be examined and for disobedience of which order she is now sought to be punished in contempt, was not served upon your petitioner personally and was not served upon her attorney nor upon any one who had appeared for her in this proceeding.

Also, upon the further ground that this proceeding is not properly entitled.

Also, upon the further ground that the amount of the fine imposed by said order of January 2, 1902, is exorbitant, unjust and illegal and was so imposed without any proper or sufficient proof or evidence of damage to the judgment creditors.

Your petitioner further shows that no prior or other application for a writ of habeas corpus to review said order of commitment has been made to any court or judge.

WHEREFORE, Your petitioner prays that a writ of habeas corpus may forthwith issue directed to Harry P. Worthing, sheriff of Broome county, commanding him, the said sheriff, forthwith to produce the body of your petitioner by him imprisoned and detained, together with the cause of such imprisonment and detention, before Hon.

Robert S. Parsons, county judge of Broome county, so that the cause of the imprisonment and detention of your petitioner may be inquired into, to the end that she may be discharged from confinement.

Dated, May 8, 1905.

CARRIE BELL DEPUE,
Petitioner.

(Add verification.)

Attached to the above petition was a duly certified copy of the order of July 2, 1902, punishing the petitioner for alleged contempt; also an undertaking in due and usual form in the penal sum of four hundred dollars (\$400) providing that said petitioner shall not escape, etc., executed and acknowledged by a sufficient surety, with justification in due form, which undertaking was duly approved by Hon. Robert S. Parsons, Broome county judge. An order was made directing that the writ issue.

2. Sheriff's return.

(Title.)

In obedience to the writ of habeas corpus hereto annexed, I certify and return that on the 8th day of May, 1905, and before the said writ came to me, the said Carrie Bell Depue was in my custody and detained by me in the county jail of Broome county under and by virtue of the order, a certified copy of which is hereto annexed, made by Hon. Robert S. Parsons, Broome county judge, ordering and adjudging that the said Carrie Bell Depue is guilty of contempt and directing that she stand committed to the Broome county jail until she shall have purged herself from such contempt; that the said Carrie Bell Depue is still in my custody under said order, all of which I certify, and have now here the body of said Carrie Bell Depue, as by said writ I am commanded.

Dated, May 8, 1905.

H. P. WORTHING,
Sheriff of Broome County.

(Annexed hereto were the writ of habeas corpus and a certified copy of the order committing said Carrie Bell Depue.)

3. Order discharging petitioner from custody and imprisonment.

(Title.)

(Recitals.)

Order and direct said Harry P. Worthing as sheriff of the county of Broome to forthwith release and discharge said Carrie Bell Depue from his custody and from further imprisonment under and by virtue of said order of January 2, 1902, made by said county judge, punishing said Carrie Bell Depue under and by which order she was held by said sheriff, which said order is hereby vacated and set aside, but without costs.

Dated, May 19, 1905.

ROBERT S. PARSONS,
County Judge of Broome County.

HABEAS CORPUS TO BRING UP PERSON TO TESTIFY.

Under the Code of Civil Procedure, sections 2008–2114, a writ of habeas corpus was issued for the purpose of bringing before the court a prisoner detained in a jail or prison, in order that he might testify as a witness in the action or special proceeding. The Civil Practice Act, however, abolishes the writ of habeas corpus for this purpose, although retaining it for the purpose of inquiring into the cause of detention of a prisoner. The same relief is now secured by means of a motion and order in the action in which the testimony is sought.¹

1. Civ. Prac. Act, §§ 415–420; Code Crim. Pro., § 10c.

HABITUAL DRUNKARD, APPOINTMENT OF COMMITTEE OF.

See COMMITTEE OF INCOMPETENT.

HABITUAL DRUNKARD, SALE OF REAL ESTATE OF.

See INFANT OR INCOMPETENT, SALE OF REAL ESTATE OF.

IDIOT, APPOINTMENT OF COMMITTEE OF.

See COMMITTEE OF INCOMPETENT.

IDIOT, SALE OF REAL ESTATE OF.

See INFANT OR INCOMPETENT, SALE OF REAL ESTATE OF.

IMPRISONMENT, DISCHARGE OF DEBTOR FROM.

See DEBTOR AND CREDITOR LAW.

INDIVIDUAL, CHANGE OF NAME OF.

See NAME OF INDIVIDUAL, PROCEEDINGS TO CHANGE.

INFANT OR INCOMPETENT, SALE OF REAL ESTATE OF.*

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- B. Civil Practice Act, § 1393. Security of committee or special guardian of incompetent.
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- D. Civil Practice Act, § 154. Security for infant or incompetent.

* For a further discussion of the matters referred to in this chapter, see Weed's Practical Real Estate Law; Aron's Gist of Real Property Law.

- E. Rules of Civil Practice, Rule 40. Qualifications of guardians ad litem and special guardians.
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- A. Petition for sale of real estate of infants.
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- D. Guardian's bond.
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- G. Referee's report.
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- K. Guardian's deed.
- L. Final report of guardian.
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ARTICLE I.

ACTION TO COMPEL PERFORMANCE.

A. Civil Practice Act, § 1384. Jurisdiction of Supreme Court over contracts of incompetents.

The supreme court shall have authority to decree and compel the specific performance of any bargain, contract or agreement which may have been made by any idiot, lunatic or habitual drunkard, while such person was capable to contract, and of any contract in relation to lands made by the ancestor of such person from whom such person inherits or takes as devisee or otherwise; and to direct the committee of such person to do and execute all necessary conveyances and acts for that purpose; and in case the person entitled to such conveyance is the committee of such incompetent person, the said court, upon the petition of such committee, may appoint some suitable and proper person to execute the said conveyance in the name of such incompetent person, upon payment by the vendee of any sum remaining due to such person upon said contract, or upon the fulfillment of the contract on the part of the party who contracted with the person represented by said committee.

B. Civil Practice Act, § 1385. Action to compel conveyance.

In either of the following cases, an action may be maintained against an infant, or a person incompetent to manage his affairs by reason of lunacy, idiocy or habitual drunkenness, to procure a judgment directing a conveyance of real property or of an interest in real property:

1. Where the infant or incompetent person is seized or possessed of the real property, or interest in real property, by way of mortgage, or only in trust for another.
2. Where a valid contract for the sale or conveyance of the real property or interest in real property has been made, but a conveyance thereof cannot be made by reason of the infancy or incompetency of the person in whom the title is vested.

C. Civil Practice Act, § 1386. Who may maintain action.

An action may be maintained, in a case specified in the last section, by a person entitled to the conveyance; and, also, in a case specified in subdivision second of that section, by the executor or administrator of the person who made the contract, or of a person who died seized or possessed of the real property or interest in real property, or by an heir or devisee of either of those persons, to whom the real property has descended or was devised. The action may be maintained by the committee of the lunatic or other incompetent per-

son; but in that case the court must appoint a special guardian for the incompetent person as required by law where an infant is defendant, and the proceedings are the same as in a like action against an infant.

D. Civil Practice Act, § 1387. Judgment; effect thereof.

A judgment directing such conveyance shall not be rendered, unless the court, after hearing the parties, is satisfied that the conveyance ought to be made. Upon rendering final judgment to that effect, the court has power to direct the guardian of the infant's property, or the committee of the property of the lunatic or other incompetent person, or a special guardian appointed in the action, to execute any conveyance, or to do any other act, which is necessary in order to carry the judgment into effect.

E. Action distinguished from special proceeding.

Sections 1385-1387 of the Civil Practice Act do not relate to a special proceeding in any sense in which the term is used, but expressly authorize an action to be brought and a judgment rendered. The provisions of subdivision 2 of section 1385, authorizing an action against an infant to procure a judgment directing a conveyance of real property, where a valid contract for the sale thereof has been made, have reference to a contract made by the ancestor of the infant and not to a contract made by a special guardian pursuant to an order of the court.¹ But, independently of the statutory provisions, a court of equity may have power to compel the execution of a conveyance of real estate on behalf of an infant or incompetent person. Section 1385 does not mean that only such actions as there are mentioned may be maintained against an infant or a lunatic or an habitual drunkard; therefore, an action for a separation on the ground of cruel and inhuman treatment may be begun against an habitual drunkard, although a committee has been appointed.²

The equitable power of the court to compel a vendor to execute a new conveyance in order to clothe the purchaser with a record title, where the former deed has been lost, is within the general jurisdiction of a court of equity.³ Specific performance against infant heirs may be had on an equitable title taken under an agreement to convey.⁴ Where a contract was made for the sale of lands by a party who died before its performance, leaving an only child as his heir-at-law, who was a lunatic, a court of equity may decree a specific performance of the contract, and direct the com-

1. *Danahy v. Fagan*, 63 Misc. 658, 117 N. Y. Supp. 300.

2. *Gregg v. Gregg*, 48 Hun, 452, 1 N. Y. Supp. 453.

3. *Kent v. Church of St. Michael*, 136 N. Y. 17.

4. *Peck v. Kirtz*, 15 St. Rep. 600.

mittee of the lunatic to execute all necessary conveyances for the purpose.⁵ Heirs of a vendor are bound to fulfil his contracts to convey to the extent of the estate that descends to them, and an infant heir is bound to convey, and the statute expressly gives power to compel a conveyance.⁶ Specific performance will be compelled between an infant and the surviving party to a contract for sale of lands in cases where it would have been decreed between the original parties, unless there are some intervening equities controlling the case.⁷ The court may decree a specific performance by the infant of the contract of his ancestor where the infant is a resident of this State, although the lands contracted to be conveyed are in another State.⁸

Section 1400 of the Civil Practice Act, limiting the disposition of the real estate of an infant or an incompetent person, only applies to special proceedings instituted under the Civil Practice Act, and does not curtail the power of the court to render judgments in an action where it has jurisdiction of the subject-matter and where the parties in interest are properly before it.⁹ Where the order of the court directs the infants merely to convey their interest in property for the purpose of fulfilling the contract of the ancestor, personal covenants inserted in a deed executed on their behalf are void. Neither infants or guardians appointed for that purpose can convey land except pursuant to the order of the court, and a deed executed without such order or beyond its terms is void.¹⁰ The guardian should execute the deed by subscribing the name of the infant by him, adding his own name as guardian; if only subscribed by the guardian as such, it is defective.¹¹

Upon the trial of an action to compel the specific performance of an agreement to renew a lease in which the defendant alleges that he is and has been for some time, by reason of paresis, an incompetent person, the exclusion of evidence that at the time fixed for the renewal he was mentally incompetent and unable to execute any paper and that he was unable to select any appraiser to determine the value of the premises as was provided in the lease is erroneous, although at that time no committee had been appointed of his person or estate, in a case where the plaintiff has

5. *Swartout v. Burr*, 1 Barb. 495.

6. *Hill v. Ressegieu*, 17 Barb. 162.

7. *Willard's Equity*, 269; cited, 1 Crary, 462.

8. *Sutphen v. Fowler*, 9 Paige, 280.

9. *Livingston v. Livingston*, 56 App. Div. 484, 67 N. Y. Supp. 789; *aff'd*, 166 N. Y. 601.

10. *Hyatt v. Seeley*, 11 N. Y. 52.

11. *Hyatt v. Seeley*, 11 N. Y. 52.

parted with nothing that operates to his prejudice; it is the duty of the court to take the evidence and protect the defendant's interests and to determine whether or not in such a case specific performance should be denied; it has ample power under section 1385 to carry out the provisions of the contract of renewal and at the same time protect the interests of the defendant.¹²

ARTICLE II.

APPLICATION TO DISPOSE OF REAL PROPERTY.

A. Infant or incompetent as ward of court.

1. Civil Practice Act, § 1390. Infant deemed a ward of court.

From the time of the filing of a petition, by or in behalf of an infant, praying for an order directing a conveyance, or a sale, mortgage or lease of his real property, or of an interest in real property, the infant is considered a ward of the court with respect to that real property or interest and the income and proceeds thereof.

2. Supervision over estates of infants.

The Supreme Court, succeeding to the powers of the former Court of Chancery, exercises general supervision and control over the estates of infants.¹³ From the time of the application the infant is to be considered the ward of the court so far as relates to the property affected, its proceeds, or income. The special guardian is an officer of the court, and so long as the proceeds remain in his hands, and until the infant arrives at majority and receives it, the court has control over it and over the proceeding. It may correct any irregularities or errors on the part of its officers in the proceedings so as to protect a party likely to suffer thereby.¹⁴ Where a special guardian takes a mortgage on the premises to secure a part of the purchase money, and afterward forecloses the mortgage, bids off the property, and takes a deed of it to himself personally, he takes title as trustee for his ward.¹⁵ The Supreme Court had jurisdiction to compel a guardian, who was appointed by the County Court to sell real estate, to pay over money in discharge of his trust,¹⁶ though it was formerly said that the sale of an

12. *Wurster v. Armfield*, 175 N. Y. 254.
256.

13. *Lefever v. Laraway*, 22 Barb. 167; *People v. Erbert*, 17 Abb. Pr. 395.

14. *Matter of Price*, 67 N. Y. 231.
See, also, *Matter of Matthews*, 27 Hun,

254.
15. *Dodge v. Thompson*, 13 Wkly. Dig. 104. See, also, *Valentine v. Bel-den*, 20 Hun, 537.

16. *Spellman v. Terry*, 74 N. Y. 448; *aff'd* 8 Hun, 205.

infant's real estate by a County Court does not constitute him a ward of the court.¹⁷ The filing of inventories and accounts by the special guardians will be specially enforced.¹⁸

B. Power of disposition depends on statutes.

There is no inherent power in a court of equity to direct the sale or mortgage of the real property of infants; its power is purely statutory.¹⁹ The proceedings in the Practice Act are hedged about by safeguards preventing inconsiderate actions by courts and by requiring security protect infants against the dishonesty of those who undertake to represent them, and proceedings instituted under those provisions are void when not taken in conformity with the statute. If the court had no jurisdiction to grant an order

17. *Stiles v. Stiles*, 1 Lans. 90.

18. *Matter of Seaman*, 2 Paige, 409.

19. *Losey v. Stanley*, 147 N. Y. 560; *Warren v. Union Bank of Rochester*, 157 N. Y. 260.

A private statute, authorizing a sale in a particular case, may be valid. *Cochan v. Van Surley*, 20 Wend. 365; *Brevoort v. Grace*, 53 N. Y. 245.

Lunatic.—The jurisdiction given to the court in case of a lunatic can only be exercised in the manner the statute directs; it being a special proceeding, an omission of a substantial requirement renders proceeding invalid. *Matter of Valentine*, 72 N. Y. 184. It was held in *Brasher v. Van Courtlandt*, 2 Johns. Ch. 242, 400, that the real estate of a lunatic might be sold for the payment of his debts upon an action by a creditor for that purpose without a petition by the committee, but the sale must be conducted under the direction of the court in substantially the same manner as if sold on such petition: In *Agricultural Ins. Co. v. Barnard* 96 N. Y. 525, it was held that the filing of a petition showing the existence of a valid outstanding debt against an insane person which requires a disposition of his real estate to enable his committee to pay vests the court with jurisdiction of the subject-matter under the act, and such jurisdiction is not divested

by subsequent irregularities unless steps are taken in violation of some express provision of the act, and that the general jurisdiction over the personal property of the insane person given by statute is limited only by its special requirements; further, that the recital in an order made by the court in such proceeding of the facts necessary to give jurisdiction is *prima facie*, and, if not affirmatively disproved, conclusive evidence of their existence. In *Hughes v. Jones*, 116 N. Y. 67, the history of the statutory procedure with regard to sale of real estate of lunatics and incompetents is fully discussed in the opinion, Vann, J., page 74 *et seq.*, in which he says, that by an early statute in England, the king had the custody of the lands of idiots. Subsequently, authority was given to the lord chancellor to issue a writ or commission to inquire as to idiocy or lunacy, stating the nature of the inquisition. He says, further: "Thus the law came to us from England, and after the revolution the care and custody of persons of unsound mind, and the possession of their estates, which had belonged to the king as a part of his prerogative, became vested in the people, who by an early act confided it to the chancellor, and afterward to the courts."

of sale, it is open to collateral attack for want of jurisdiction.²⁰ The statute must be strictly pursued, whatever jurisdiction the court may possess.²¹ Although the court before which the proceeding was taken was a court of general jurisdiction, still, as the proceeding does not fall within the ordinary procedure of the common law, its jurisdiction is specially limited and wholly dependent upon the statute, and no presumption can be indulged in favor of particular jurisdiction.²² The burden is upon one claiming under a title acquired at such a sale to show by affirmative evidence that every requirement necessary to give jurisdiction has been complied with.²³ The rule applies that in proceedings in derogation of common law by which the title of one is to be divested and transferred to another, every requisite of the statute having the semblance of benefit to the infant must be complied with, or the title will not pass.²⁴

Proceedings for the sale of an infant's interest in land are absolutely void if not instituted in good faith to sell to a real purchaser, as where they were instituted to transfer the title unincumbered by the infant's interest to his father, even though full value be paid for the infant's interest and no wrong was in fact intended. The statute is intended for the benefit of the infant and cannot be resorted to for the purpose of divesting the infant of title or curing a defect therein. Therefore, the purchaser of property from a father who has thus obtained the title may refuse to close the sale and have an action for the earnest money.²⁵

C. Jurisdiction of courts.

The Supreme Court, like the Court of Chancery, exercises general supervision and control over the estates of infants.²⁶ Under section 67 of Civil Practice Act, the County Court has jurisdiction of proceedings for the sale or other disposition of the real estate of infants. A County Court in exercising the authority conferred upon it by the statute, to order the sale of an infant's real estate within the county, has the same general powers as the old Court of Chancery,

20. *Losey v. Stanley*, 147 N. Y. 560.

21. *Ellwood v. Northrup*, 106 N. Y. 172; *Warren v. Union Bank of Rochester*, 157 N. Y. 260.

22. *Ellwood v. Northrup*, 106 N. Y. 172; *Warren v. Union Bank of Rochester*, 157 N. Y. 260.

23. *Ellwood v. Northrup*, 106 N. Y. 172.

24. *Battell v. Torrey*, 65 N. Y. 294.

25. *Weinstock v. Levison*, 14 N. Y. Supp. 65.

26. *LeFever v. Laraway*, 22 Barb. 167; *People v. Erbert*, 17 Abb. Pr. 395.

and the general rules of equity jurisprudence are applicable. The jurisdiction need not be exercised at a Special Term but the court is always open for that purpose, save as otherwise directed by statute.²⁷ The County Court has concurrent jurisdiction with the Supreme Court as to the care of the person and property of a lunatic who is a resident of the county, and where that court first acquires jurisdiction, it is exclusive of that of the Supreme Court with respect to any matter within its jurisdiction for which provision is made by the Code.²⁸ The statute requires the proceedings to be instituted before the court, and a judge of the court has no authority to entertain them.²⁹

D. When disposition may be ordered.

1. Civil Practice Act, § 1388. Application to dispose of real property or an interest therein.

In either of the following cases, real property or a term, estate or other interest in real property, of an infant in being, or the contingent interest therein of an infant not in being, or of a person incompetent to manage his affairs by reason of lunacy, idiocy or habitual drunkenness, or an inchoate right of dower in real property belonging to an infant or an incompetent person or the possibility that upon breach of a condition a right of re-entry will vest in or real property will revert to an infant or an incompetent person or his heirs solely or in common with others, may be sold, conveyed, mortgaged, released or leased as prescribed in the following sections of this article:

1. Where the personal property, together with the income of the real property, of the infant or incompetent person are insufficient for the payment of his debts or for the maintenance and necessary education of himself and his family.

2. Where the interest of the infant in being or the contingent interest of an infant not in being, or the interest of an incompetent person, require or will be substantially promoted by such disposition, on account of the real property or term, or estate, or other interest in real property being exposed to waste or dilapidation; or being wholly unproductive, or for the purpose of raising funds to preserve or to improve the same, or for other peculiar reasons, or on account of other peculiar circumstances.

3. Where an action might be maintained against the infant or incompetent person to procure a judgment directing the conveyance of the real property, or interest in real property, as prescribed in the preceding sections of this article.

4. Where the interest of the infant or incompetent person will be substantially promoted by releasing or joining with others in releasing for a valuable consideration the possibility that upon breach of a condition a right of re-entry will vest in or real property will revert to the infant or incompetent person or his heirs solely or in common with others. Such possibility is referred to in the following sections of this article as a possibility of reverter.

27. *Brown v. Snell*, 57 N. Y. 286.

28. *Kent v. West*, 33 App. Div. 112, 53 N. Y. Supp. 244.

29. *Matter of Wright, Peters & Co.*, 73 App. Div. 75, 76 N. Y. Supp. 775.

2. Civil Practice Act, § 1391. Appointment of committee of incompetent prerequisite to grant of application.

An application to sell, mortgage, release or lease real property, or an interest in real property, of a lunatic, idiot or habitual drunkard, cannot be granted unless a committee of his property has been appointed.

3. Civil Practice Act, § 1400. Sale contrary to will or conveyance prohibited.

Real property, or an interest in real property, shall not be sold, leased or mortgaged, as prescribed in this article, contrary to the provisions of a will by which it was devised, or of a conveyance or other instrument by which it was transferred, to the infant or incompetent person.

4. Interests subject to disposition.

In order to authorize a sale, the infants must have title to the property.³⁰ The term "real estate" includes every freehold estate and interest in lands, and where there is a vested remainder in fee there is a seizin in law within the statute, and the court has jurisdiction to order a sale.³¹ The present statute is very broad as to the interests which are subject to the proceeding. Under the early statutes, it was held that the proceeding would not lie to procure the disposition of a contingent or future estate of an infant.³²

Authority for the care and protection of equitable estates of infants is inherent in the court independently of any statutory provisions. The power conferred by statute relates only to lands of which the infant is seized and not to equitable interests.³³ Where an infant plaintiff in an action against a railway company for maintaining their railroad in front of his premises obtains a judgment which provides that the railroad company shall pay the value of the easement, a release given by the infant upon such payment is a valid instrument and capable of passing title.³⁴ The court may direct the sale of the infants' interest, including an estate, as heir-at-law, which could never vest in possession, but depends for its actual enjoyment upon the death of the heir before a life tenant, nor is it an objection that the same person who would take as heir is given another interest under the will.³⁵

30. *Baker v. Lorillard*, 4 N. Y. 257.

31. *Jenkins v. Fahey*, 73 N. Y. 355;
Matter of Haight, 14 Hun, 176.

32. Matter of Dodge, 40 Hun, 443;
Matter of Jones, 2 Barb. 22.

Unborn infants.—See *Bowman v. Tallman*, 28 How. Pr. 482, decided before the statute was in its present form.

33. *Anderson v. Mather*, 44 N. Y. 249.

34. *Germer v. Met. R. Co.*, 3 Misc. 429, 23 N. Y. Supp. 167, 52 St. Rep. 445.

35. *Matter of Asch*, 75 App. Div. 486, 78 N. Y. Supp. 561.

Where the petition, proofs, and all the papers show, without dispute or contradiction, that its sole purpose is to mortgage the property of an infant to pay the debt of another, and there is no proof or claim that the personal property and income of the infant are insufficient for the payment of all his own debts and for the necessary education of himself and family, but, on the contrary the proof tends to show that they are sufficient, the court does not acquire jurisdiction to direct his property to be mortgaged.³⁶

5. Exchange of lands.

No jurisdiction is given over the real estate of infants except that conferred by statute. The statute only gives the power to sell or mortgage, and thus the courts cannot authorize an exchange of infants' real estate.³⁷ The court has no authority to bring about a partial partition by exchanging with adults an undivided interest in lands severally owned in common.³⁸

6. Contrary to will or conveyance.

The court has no power to direct the sale of an infant's real estate, contrary to the terms of the will by which he derives title.³⁹ A sale contrary to a will or conveyance by which an infant acquires title is void.⁴⁰ But the provisions of the statute do not apply to a trust estate held by an infant.⁴¹ A sale of infants' lands is not contrary to the provisions of the will by which they were devised, because such will directs the property to be kept in trust for the infants during their minority, there being nothing in the will indicating that a sale would be contrary to its provisions.⁴²

7. Grounds for application.

Whenever it appears satisfactorily to the court that the situation of the infants as regards maintenance and education will be improved, the order will be made as in case of property exposed to waste and dilapidation or an unpro-

36. *Warren v. Union Bank of Rochester*, 157 N. Y. 260.

37. *Moran v. James*, 20 Misc. 235, 45 N. Y. Supp. 537; *aff'd*, 21 App. Div. 183, 47 N. Y. Supp. 486, holding that an infant cannot give a bond and mortgage to equalize the values of such exchanged property.

38. *Matter of Adderly*, 50 Misc. 189,

100 N. Y. Supp. 421.

39. *Mullen v. Shipman*, 6 Abb. N. C. 343.

40. *Matter of Turner*, 10 Barb. 552; *Forman v. March*, 11 N. Y. 544.

41. *Wood v. Mather*, 38 Barb. 473; *aff'd*, 44 N. Y. 249.

42. *Matter of Asch*, 75 App. Div. 486, 78 N. Y. Supp. 561.

ductive village lot.⁴³ It is a good ground for a sale that the expenses of a partition suit will thereby be avoided.⁴⁴ But the fact that a sale would increase the income of an adult tenant in common is not sufficient ground.⁴⁵ The court has power to authorize the mortgaging of the real property, estate, or other interest in real estate belonging to an infant, and a mortgage so authorized will cover whatever interest the infants have, whether that interest or estate is one in possession, or is a vested future estate. And this is true although the income and profits of the land are given to the executors in trust.⁴⁶ An infant having no personal estate or income from real estate may have an application to the court for the sale of the real estate for the infant's support and maintenance, and upon such sale the court should allow the infant's guardian for sums expended by him for the infant's support, if such guardian does not intend to donate the cost of living provided by him, for the infant's estate is liable for the moneys advanced for the necessities of life.⁴⁷

A sale of infant's real estate is sufficiently brought within that part of subdivision 3 of rule 295, excusing a statement of the otherwise required details of the infant's estate and circumstances in a case where the sale is sought in order to avoid partition, by allegations of the petition that executors who have a power of sale over all the real estate of the infant's ancestor are about to sell it, and that the "purchasers of said property will no doubt be strangers to said infant and apt to disregard in great measure her undivided interest, and may also bring an action against said infant to compel a partition of said property."⁴⁸

Where it appeared that an infant owned no personal estate, and had no means of support, and that his real estate was unproductive and that an application had been made for the sale of his real property and the application granted, it cannot be objected by the defendant refusing to take the title offered that the reason for the application was not fully set out in the petition as required by rule 297.⁴⁹

43. *Matter of Mason*, 1 Hopk. Ch. 122.

44. *Matter of Corydon*, 2 Paige, 566.

45. *Matter of Jones*, 2 Barb. Ch. 22.

46. *Craver v. Germain*, 17 Misc. 244, 40 N. Y. Supp. 1056.

47. *Hovell v. Noll*, 10 Misc. 547, 64 St. Rep. 123, 31 N. Y. Supp. 439.

48. *Blanchard v. Blanchard*, 33 Misc. 284, 67 N. Y. Supp. 478.

49. *Ryder v. Wood*, 29 St. Rep. 63, 8 N. Y. Supp. 422.

E. Petition.

1. Civil Practice Act, § 1389. Who must make application.

An application, in either of the cases prescribed in the last section, must be made by the petition of the general guardian or the guardian of the property of the infant; or by the committee of the property of the lunatic or other incompetent person; or by any relative or other person in behalf of either. Where the application is in behalf of an infant of the age of fourteen years or upwards, the infant must join therein.

2. Rules of Civil Practice, Rule 297. Contents of petition.

The petition in a proceeding to sell, convey, mortgage, release or lease the real property of an infant or incompetent must be verified and must state:

1. The name, age and residence of the infant or incompetent;
2. The grounds of the application;
3. If the application be for the purpose of paying the debts of the infant or incompetent, or for the maintenance and necessary education of himself or his family, or substantially promoting his interests by such disposition, other than a case where the application is made for the sale of an undivided interest of the infant or incompetent person in one or more parcels of land in order to avoid an action of partition on the part of his cotenants, or for the dower of a widow therein, the particulars and value of the real and personal property, and the amount of the income of the infant or incompetent person; the disposition which has been made of his personal property; and an account of the debts or demands, if any, existing against his estate. In the case specified in this subdivision where the application is made for the sale of an undivided interest of the infant or incompetent person, the petition must state the particulars and value of the real property in respect of which a sale is desired.
4. The name and residence of the committee or of the person proposed as the special guardian, the relationship, if any, which he bears to the infant, lunatic, idiot or habitual drunkard, and the security proposed to be given.
5. Whether any previous application has been made, and, if so, the time thereof, and what disposition was made of the same.

3. Who may make petition.

The mother, the uncle, and the general guardian have been held proper parties to present the petition.⁵⁰ And the fact that the petitioner is a creditor of the infant does not necessarily disqualify him.⁵¹ The statute does not prescribe any particular form to be observed by the person who presents the application as next friend, and if nothing appeared to the contrary, the court might properly assume that the ceremony was sufficiently observed, in getting the application before the court, to confer jurisdiction.⁵² A petition in proceedings for the sale of an infant's real estate, reciting that it is the petition of an infant under fourteen years of age, by his general guardian, and executed by the guard-

50. *Matter of Lansing*, 3 Paige, 265;
Matter of Whitlock, 32 Barb. 48;
O'Reilly v. King, 28 How. Pr. 408.

51. *O'Reilly v. King*, 28 How. Pr. 408.

52. *Aldrich v. Funk*, 48 Hun, 369.

ian on behalf of the infant and verified by the guardian, although throughout the instrument the infant and not the guardian is described as the petitioner, is the petition of the guardian.⁵³ The court will not direct a general guardian against his objection to lease an infant's property for saloon purposes in order to obtain a better rent, when a personal liability might thereby devolve upon such guardian.⁵⁴

4. Particulars of property.

A petition for the sale of property of an infant, which gives only the assessed value and is silent as to the real or market value, is insufficient in that respect.⁵⁵ A petition for leave to sell the undivided interest of an incompetent person in land to avoid an action of partition on the part of cotenants, or for the dower of a widow therein, is not defective because of failure to state the particulars and value of the real and personal property, and the amount of the income of the incompetent person, the disposition made of her personal property and an account of the debts or demands, if any, existing against her estate. When enough is shown in the petition to answer the statutory requirements, the adequacy or inadequacy of the reasons for the sale must be determined by the court that hears the application.⁵⁶

The failure of such a petition to state the facts and particulars concerning the real and personal property of the infant, his income, and the debts against his estate, renders it defective, even where the interest sought to be sold thereunder is an undivided one, where there is no allegation that the sale of the interest is necessary to avoid an action for partition, nor any allusion to the possibility of such an action, and it does not appear that the court has found from the facts stated in the petition, with or without additional proof, that the sale was necessary to avoid an action of partition, and such defect justifies the purchaser at a sale thereunder in refusing to complete his purchase.⁵⁷

5. Joinder of infant in petition.

The provision of section 1389, requiring an infant over fourteen years of age to join in a petition to sell his lands, is jurisdictional, and the sale is void if he does not join. A

53. *Matter of Hopkins*, 33 App. Div. 615, 53 N. Y. Supp. 1051.

54. *Matter of Stafford*, 3 Misc. 107, 51 St. Rep. 833, 22 N. Y. Supp. 707.

55. *Title Guarantee & Trust Co. v.*

Rudershausen, 164 N. Y. Supp. 15.

56. *Harrison v. Higgins*, 218 N. Y. 556.

57. *Matter of Hopkins*, 33 App. Div. 615, 53 N. Y. Supp. 1051.

petition made solely by the general guardian or the guardian of the property or by a relative or friend of an infant fourteen years of age is not sufficient to give validity to the sale.⁵⁸

F. Place and notice of application.

1. Rules of Civil Practice, Rule 295. Place of application.

If an application be made to the supreme court to sell, convey, mortgage, release or lease the real property of an infant or incompetent, the petition must be presented at a term held within the judicial district in which the property, or a part thereof, is situated.

2. Rules of Civil Practice, Rule 296. Notice of application.

If an application to sell, convey, mortgage, release or lease the real property of an incompetent affect the interest of an incompetent person who has been committed to a State institution and is an inmate thereof, notice of such application must be given to the attorney-general and to the superintendent, acting superintendent, or State officer having jurisdiction over the institution where the incompetent person is confined.

ARTICLE III.

APPOINTMENT OF GUARDIAN.

A. Civil Practice Act, § 1392. Application by husband to release inchoate right of dower of incompetent.

Where an application is made to release an inchoate right of dower, application must be made by the husband of the lunatic, idiot or habitual drunkard and may be made before or after a committee has been appointed, except that application may be made by the committee of the property of the lunatic, idiot or habitual drunkard in any case where, at the time of the application, the property to which the inchoate right of dower attaches has already been sold by the husband, and the wife has not joined in the conveyance or otherwise released her inchoate right of dower. When the application is made by the husband, the court may appoint him special guardian, and he must give security for the faithful performance of the trust.

B. Civil Practice Act, § 1393. Security of committee or special guardian of incompetent.

Upon an application to sell, mortgage, release or lease real property, or an interest in real property of a lunatic, idiot or habitual drunkard, if it is made by the committee, the committee must give security conditioned for the faithful discharge of his trust; for the paying over and investing of, and accounting for, all moneys received by him in the special proceeding, according to the direction of any court having authority to give directions in the premises; and for the observance of the directions of the court in relation to the trust. If the application is made by any other person, an order must be made thereupon requiring the committee to show cause why he should not give such security. If, after hearing the committee, the court is of the opinion that there is a probable cause

58. *Rosenfeld v. Miller*, 131 App. Div. 282, 115 N. Y. Supp. 692.

for granting the application, it may make an order requiring the committee to give such security; or, if the committee so elects, or fails to give security as directed in the order, it may appoint a suitable person to be the special guardian of the incompetent person with respect to the proceedings, who must thereupon give such security.

C. Civil Practice Act, § 1394. Special guardian for infant.

Upon an application to sell, mortgage, release or lease real property or an interest in real property of an infant, the court must appoint a suitable person to be the special guardian of the infant with respect to the proceedings, who must thereupon give security for the faithful performance of his trust. Any trust company authorized by the laws of this state to act as general guardian of the estate of an infant without giving security may be appointed such special guardian and in such case the court in the order of appointment may dispense with the giving thereof.

D. Civil Practice Act, § 154. Security for infant or incompetent.

Where in the course of an action or proceeding security shall be required for protecting the interests of an infant, lunatic, idiot or habitual drunkard it shall be in the form of a bond of an approved surety company, or the bond of individuals secured by an approved mortgage on real estate, in an amount double that of the property involved, including the interest or income during the minority of the infant or during the incompetency as the case may be, and approved as to form and sureties by the court in which the action or proceeding is pending or by a judge thereof. Upon a breach of the condition of any such bond, the court must direct it to be prosecuted for the benefit of the person injured.

E. Rules of Civil Practice, Rule 40. Qualifications of guardians ad litem and special guardians.

The following qualifications shall be required of a guardian ad litem of an infant in an action and of a special guardian of an infant or incompetent in a proceeding:

1. He shall be the general guardian of the infant, or a person fully competent to understand and protect the rights of the infant or incompetent;
2. He shall have no interest adverse to that of the infant or incompetent nor be connected in business with the attorney or counsel of any adverse party, nor shall he be nominated by any person having an adverse interest;
3. He shall be of sufficient ability to answer for any damage which may be sustained by his negligence or misconduct, and such ability shall be shown by affidavit stating facts in respect thereto;
4. Any trust company authorized by the laws of the state to act as a general guardian without giving security may be appointed;
5. The written consent of the proposed guardian, duly acknowledged, shall be filed;
6. It shall be the duty of every attorney or officer of the court to act as the guardian of an infant defendant in any suit or proceeding against him whenever appointed for that purpose by an order of the court.

F. Rules of Civil Practice, Rule 41. Security of guardians ad litem and special guardians.

1. Except in a case specially prescribed by law, a guardian ad litem or special guardian shall not be permitted to receive money or property other than costs and expenses allowed to the guardian by the court, until he has given sufficient security, approved by a judge of the court or a county judge, to account for and apply the same under the direction of the court; provided, however, that where the money or the value of such property does not exceed one hundred dollars, security may be dispensed with in the discretion of the court.

2. Such security shall be a bond to the infant or incompetent conditioned for the faithful discharge of the trust, for the paying over and investing of and accounting for all moneys received by the guardian and for the observance of any provision of law or of the rules and the directions of the court in relation to the trust. New or additional security may be required by the court at any time.

3. Where a trust company authorized by the laws of this state to act as general guardian of the estate of an infant without giving security, is appointed as guardian ad litem or special guardian of an infant, the order of appointment may dispense with the giving and filing of any security.

4. This rule does not apply to a general guardian of an infant who has been appointed guardian ad litem or special guardian, but at any time the court may require the general guardian to give additional security for the faithful discharge of his trust before receiving money or property of the infant under a judgment or order in the action or proceeding.

G. Who is qualified.

The general guardian of the infant is a proper person to be appointed special guardian for sale of his real estate.⁵⁹ A cotenant of the infant, who has a claim against the latter's share, is hardly a proper person to be appointed special guardian;⁶⁰ but the fact that the relative petitioning for his own appointment as special guardian was a creditor of the infant, and that his claim grew out of a volunteer expense so incurred, does not raise a jurisdictional question. Any error of the court in this respect is to be corrected by appeal or by a direct proceeding to vacate.⁶¹ A national bank authorized to act in certain specified trust capacities is a "suitable person" within the meaning of section 1394 to be appointed special guardian.⁶² Where an order appointing a special guardian has been fraudulently obtained, it and all subsequent orders and proceedings founded thereon may be set aside, annulled, and vacated, and the proceedings declared void.⁶³

59. *Matter of Wilson*, 2 Paige, 412;
Matter of Lansing, 3 Paige, 265.

60. *Matter of Tillotsons*, 2 Edw. Ch. 113.

61. *Battell v. Torrey*, 65 N. Y. 294.

62. *Matter of Mollineaux*, 109 Misc. 75, 179 N. Y. Supp. 90.

63. *Clark v. Underwood*, 17 Barb. 202.

H. Bond.

The security cannot be dispensed with, although the petition sets forth the inability of the infants to procure such security.⁶⁴ The bond required of the special guardian, by section 1394, is an absolute necessity; and, therefore, where the court orders that a bond, theretofore given by the special guardian as guardian of the property of the infant in the court of the surrogate, shall be deemed a sufficient bond in the proceeding for the sale of the real estate, the latter proceeding is void.⁶⁵ The sureties on the bond of a committee of a lunatic given under section 1375 are not liable for the failure of such committee to pay over moneys illegally received on the sale of the real estate of a lunatic, for had such proceedings been regular, a bond would have been required under section 1393 and the sureties on this would have been liable.⁶⁶

Where real estate was ordered sold for the benefit of five infants, the guardian giving each infant a separate bond, it was held that the sureties should qualify in the aggregate penalties of the several bonds.⁶⁷ A bond of a guardian is not void because it was given before an application was made to the court in the matter, especially where the approval and filing were subsequent to the application.⁶⁸ The court may, when making the order of reference, also approve the guardian's bond, where the order appointing the special guardian and fixing his bond also appoints the referee.⁶⁹ Before an action can be maintained at law against the sureties upon a bond given upon the appointment of a special guardian, the guardian must be called to account and ordered to pay over by a court of competent jurisdiction, but the sureties are not necessary parties to the proceedings in which the order for payment is made.⁷⁰

While it may be, as a general rule, that a surety upon the bond is not liable until the remedies against his principal

64. *Matter of Thorne*, 1 Edw. Ch. 507.

65. *Blanchard v. Blanchard*, 33 Misc. 285, 67 N. Y. Supp. 478.

66. *Johnson v. Ayres*, 18 App. Div. 495, 46 N. Y. Supp. 132.

Under the Act of 1874 authorizing the mortgaging of real estate of an insane person for the payment of a debt, it was not necessary that the committee should execute a bond for money which should come into his

hands. It was within the discretion of the court whether to require a bond or not. *Agricultural Ins. Co. v. Barnard*, 96 N. Y. 525.

67. *Anonymous*, 4 How. Pr. 414.

68. *Center v. Sproat*, 22 Hun, 146.

69. *Title Guarantee & Trust Co. v. Rudershausen*, 164 N. Y. Supp. 15.

70. *Brown v. Balde*, 3 Lans. 283; *aff'd*, as *Brown v. Snell*, 57 N. Y. 286.

are exhausted and the extent of the liability ascertained by an accounting, when it appears that an accounting cannot possibly change the facts upon which the liability of the surety depends, the infant will not be compelled to resort to it before bringing suit upon the bond.⁷¹ The rule that an action cannot be maintained upon the bond of a guardian against his sureties until after an accounting in equity by the guardian has no application in a case where an infant sues a guardian personally for a specific fraud. Such action is an action for damages for fraud and conspiracy, and it is not an action either against the principal or sureties of the bond.⁷² Where the guardian is cited and fails to appear, and an order is made fixing a sum in his hands, an action can be maintained against his sureties.⁷³

It is a breach of the condition of a bond where the special guardian fails to make and file a report of the actual disposition of the remainder of the moneys after paying out the sums directed by the court. There is no warrant for the application of such moneys except the express authority of the court.⁷⁴ It is no defense by one refusing to take title to an infant's real estate that the bond of the special guardian was directed to be filed in the wrong office, if such bond was filed in the proper place.⁷⁵

ARTICLE IV.

REFERENCE.

A. Civil Practice Act, § 1395. Reference to inquire into the application.

Upon the presentation of the petition, and the filing of the bond or undertaking where the filing of such a bond or undertaking shall be necessary, the court must make an order appointing a suitable person a referee to inquire into the merits of the application. The referee must examine into the truth of the allegations of the petition, hear the allegations and proofs of all persons interested in the property, or otherwise interested in the application, and report his opinion thereupon, together with the testimony, with all convenient speed.

B. Civil Practice Act, § 1396. Final order.

Upon the filing of the referee's report, and after examining into the matter, the court must make a final order upon the application. In a proper case, a final order confirming the referee's report must direct that the real property, or term, estate, possibility of reverter or other interest in real property, or a

71. Long v. Long, 142 N. Y. 546.

72. Koch v. Lefrois, 61 Hun, 207,
40 St. Rep. 563, 15 N. Y. Supp. 930.

73. Center v. Sproat, 22 Hun, 146.

74. Hunt v. Hunt, 58 N. Y. 666.

75. Ryder v. Wood, 29 St. Rep. 64,
8 N. Y. Supp. 4.

part thereof, or an inchoate right of dower therein, as is necessary or as justice requires, be mortgaged, let for a term of years, sold, released or conveyed by the special guardian appointed as prescribed in this article or by the committee of the property of the lunatic or other incompetent person. The final order must also contain such directions respecting the time, manner and conditions of the sale, release or conveyance directed thereby, as the court thinks proper to insert therein.

C. Rules of Civil Practice, Rule 298. Report of referee.

The referee appointed in a proceeding to sell, convey, mortgage, release or lease real property, or an interest therein, of an infant or incompetent, must report whether a sale, mortgage, release or lease of the premises, or any and what portion thereof, would be beneficial to the infant, lunatic, idiot or habitual drunkard, and the reasons therefor, and whether the infant, lunatic, idiot or habitual drunkard is in absolute need of some and what portion of the proceeds of such sale, mortgage or lease, for a purpose specified in the petition, in addition to what he might earn by his own exertions. Such referee shall ascertain also and report the value of the property, or interest, to be disposed of, specifically, as to each separate lot or parcel, with the incumbrances, if any, thereon, and whether there is any person entitled to dower or a life estate, or estate for years, in the premises, and the terms and conditions on which it should be sold.

The referee's report shall give such further facts as are necessary or proper on the application.

The facts in relation to the value of the property or interest to be disposed of, required to be ascertained and reported upon by the referee, must be proven on such reference by the testimony of at least two disinterested persons, in addition to that of the petitioner, and the report shall not refer to the petition, or any other papers, as evidence of fact.

D. Necessity of reference.

The requirement of the statute as to reference is substantial, and cannot be dispensed with. An omission to refer constitutes a fatal defect in proceedings under the statute. A purchaser under such defective proceedings may move to have his title perfected by new or amended proceedings or to have the purchase money refunded.⁷⁶ A proceeding to sell an infant's real property, being in derogation of the common law, must strictly comply with the statute. If in such proceeding there was no order of reference, the proceeding is absolutely void. Although the record of such proceeding shows the confirmation of the report of a referee, the proceeding is invalid where the attorney who conducted it testifies that although he prepared an order of reference, it was never signed by a judge. A title acquired upon such sale is not marketable.⁷⁷

76. *Battel v. Torrey*, 65 N. Y. 294;
Matter of Valentine, 72 N. Y. 174.
 Compare *Matter of McIlvaine*, 15 Abb.
 Pr. 91.

77. *Hegeman v. Stearns Realty Co.*,
 117 App. Div. 754, 102 N. Y. Supp.
 1025.

E. Report of referee.

The referee's report should give such further facts as are necessary or proper on the application. The facts in relation to the value of the property should be proved on such reference by evidence of at least two disinterested persons, in addition to that of the petitioner, and the report should not refer to the petition or any other paper for a statement of fact. Under the chancery practice, it was sufficient for the referee to briefly state the facts, and state that he found the allegations of the petition to be true.⁷⁸ If the disposition is for the payment of the infant's debts, the report should state the objects for which the avails are to be applied.⁷⁹ The report of a referee is not binding upon the court.⁸⁰ The finding of a referee that certain claims are valid against the estate of an incompetent in proceedings by his committee for leave to sell his real estate is not a judgment; and, in an action against the committee on such claim, the finding of the referee is not conclusive, and the plaintiff must prove such claim by proper evidence.⁸¹

F. Final order.

An order directing the sale of real estate of infants, though binding on them so as to protect the purchaser, does not settle the rights of the infants among themselves.⁸² Where the referee reported that the infant owned an undivided one-half of the premises, and that was the belief of parties during the proceedings, and a sale was ordered, made, and confirmed, and it was determined on ejectment that the infant owned only one-third of the premises, the special guardian may be required to refund a proper proportion of the purchase money.⁸³ The purchaser under such proceedings has a right to a determination of their invalidity in case of a statutory omission, and the proceedings should be amended, or new proceedings taken, or the money paid should be refunded.⁸⁴ An order directing the real estate of an infant to be mortgaged for the payment of its debts should contain a statement of the objects to which the avails are to be applied, and should not refer to any other paper for a specification of such object.⁸⁵

78. *Matter of Morrill*, 4 Paige, 44.

79. *Matter of Lampman*, 22 Hun, 241.

80. *Matter of Wyckoff*, 50 Misc. 190, 100 N. Y. Supp. 417.

81. *Sheldon v. Mirick*, 144 N. Y. 502.

82. *Davis v. DeFreest*, 3 Sandf. 456.

83. *Matter of Price*, 67 N. Y. 231.

Effect of discovery of lost will.—
See *Cole v. Gourlay*, 79 N. Y. 527.

84. *Matter of Valentine*, 72 N. Y. 184.

85. *Matter of Lampman*, 22 Hun, 241.

ARTICLE V.**AGREEMENT FOR CONVEYANCE AND CONVEYANCE.****A. Civil Practice Act, § 1397. Report and confirmation of agreement and of conveyance.**

Before a sale, mortgage, release or lease can be made pursuant to the final order, the special guardian or the committee must enter into an agreement therefor, subject to the approval of the court, and must report the agreement to the court under oath. Upon the confirmation thereof by the order of the court, he must execute, as directed by the court, a deed, mortgage, release or lease. Where the final order directs the execution of a conveyance in the first instance for the purpose of fulfilling a contract, or because the property is held by way of mortgage, or in trust only, the guardian or committee executing the conveyance must report the conveyance to the court under oath.

B. Civil Practice Act, § 1398. When particular estates to be included in sale.

Where the real property, or the estate, term or other interest in real property, directed to be sold, is subject, absolutely or contingently, to a right of dower or an estate for life, or is subject to an estate for years, in the whole or any part thereof, the person having the prior right or estate may manifest in writing his consent, either to receive from the proceeds of the sale a gross sum to be fixed according to the principles of law applicable to annuities, in satisfaction of his right or estate, or to have a proportionate share of the proceeds of the sale invested, and the interest thereof paid to him, from the time of the investment or of the commencement of his right or estate, as justice requires, until the determination of his right or estate. Upon filing the consent with the clerk, the final order, in the discretion of the court, may direct a sale of the entire property to which the right or estate attaches. In such a case, the court, after the sale, must ascertain the value of the right or interest of the person so consenting; and the final order either must direct the payment, from the proceeds of the sale, of the gross sum so ascertained as the value, or the investment of a just proportion of the proceeds and the payment to him of the interest thereof. But such a gross sum shall not be paid, nor shall such an investment be made, until an effectual release of the right or estate of the person so consenting, executed to the satisfaction of the court, and duly acknowledged or proved, and certified, in like manner as a deed to be recorded in the county, has been filed with the clerk.⁸⁶

86. A release of curtesy, executed under section 1398, running to either of the two prospective purchasers, and obtained from the father by the special guardian without any payment made by the purchasers, but upon the parol understanding between the guardian and the father that his curtesy should follow and attach to the proceeds of the sale when made, confers no right

on said purchasers. The absence of the consent in writing of the father, and holder of the prior estate, to accept a gross sum or have a proportionate share of the proceeds invested for his benefit was excused where it was evident that he was willing that this should be done. *Matter of Baird*, 30 Misc. 668, 64 N. Y. Supp. 331.

C. Civil Practice Act, § 1399. When reversionary estates to be included in sale.

Where the interest of the infant, or of the lunatic or other incompetent person, consists of a right of dower or an estate for life, or for years, the final order may authorize the special guardian or committee to join, with the person or persons holding the reversionary estate, in a conveyance of the property to which the interest attaches, so as to release the right of dower, or fully convey the particular estate, on receiving from the proceeds of the sale a gross sum in satisfaction of that interest, or a proportionate part of the proceeds, to be invested until the determination of the particular estate; and, in either case, to be ascertained as prescribed in the last section. Where a proportion of the proceeds is so received by the guardian or committee for investment, the final order must provide for the investment thereof until the determination of the particular estate, and then for the payment thereof to the person entitled thereto.

D. Civil Practice Act, § 1401. Effect of deed, mortgage, release or lease.

A deed, mortgage, release or lease made in good faith, as prescribed in this article, either upon an application in behalf of the infant or an incompetent person, or pursuant to the directions contained in a judgment rendered against him, has the same validity and effect as if executed by the person in whose behalf it was executed, and as if the infant was of full age or the lunatic, idiot, or habitual drunkard was of sound mind and competent to manage his or her affairs. The same shall be valid and effectual to vest in any purchaser or purchasers any interest therein of any infant not in being at the time of the said sale, and any mortgage so executed shall be a valid lien and charge upon the contingent interest of any infant not in being at the time of the execution and delivery of the same. A release of an inchoate right of dower as authorized by this article shall have the same effect as if the wife had joined with the husband in a deed or conveyance of the property affected thereby and had duly acknowledged the same in the manner required by law to pass the estate of married women.

E. Contract with purchaser.

It is requisite that the special guardian enter into an agreement in writing, with the purchaser of real estate, stating the terms of sale.⁸⁷ Under earlier statutes, it was held that a report of the conveyance was not necessary in a proceeding to mortgage the real estate of an incompetent person,⁸⁸ though necessary in the case of an infant's real estate;⁸⁹ but the present statute seems to require the agreement in all cases. Other owners may join with the infant in the contract.⁹⁰ The word "enter" in section 1397 means "enter into a written agreement"; but before the statute, the guardian might make a verbal contract to sell,⁹¹ but it has been held that the section does not specifically require

87. *Matter of Hazard*, 9 Paige, 365.

90. *O'Reilly v. King*, 28 How. Pr.

88. *Agricultural Ins. Co. v. Barnard*, 408.

96 N. Y. 526, rev'g 26 Hun, 302.

91. *Hardie v. Andrews*, 13 Civ. Pro.

89. *Battell v. Torrey*, 65 N. Y. 294. 413.

that the agreement of sale should be written; and, if it is confirmed by the court, it is sufficient, if oral.⁹²

F. Conveyance.

Where a special guardian appointed in a proceeding for the sale of infants' real estate dies, after having made a contract for the sale of the property involved in the proceeding pursuant to an order of the court therein and before having executed a conveyance of the property, such conveyance may be executed by a successor of the special guardian appointed in the proceeding; and an action to compel such conveyance is unnecessary.⁹³ A mortgage of the real property of a lunatic must be executed in strict compliance with sections 1393 and 1397 of the Civil Practice Act; and, where there is a failure in these respects, neither the good faith, nor the fairness, of the transaction can be accepted as a substitute for the positive requirements of the statute. A mortgage upon the real property of a lunatic, made without authority from the court, and executed and acknowledged, as individuals, by persons who have been appointed a committee of his person and estate, and who are merely described in the mortgage as "committee of the estate," creates no lien upon the real property of the lunatic.⁹⁴

Where infant's real estate is subject to a right of curtesy in their father, a contract for its sale for a specified sum subject to such right of curtesy is more favorable than one for a larger sum which is burdened with a proviso that the father shall have curtesy in the proceeds. Where it appears that a release of the right of curtesy in infants' lands was made without consideration and under a parol agreement that the curtesy should follow the proceeds of the sale, a contract for the sale of such lands "subject to the life estate by right of curtesy" will not be approved until the purchaser has consummated the purchase of the curtesy.⁹⁵

A deed reciting the appointment of a guardian for infants, in which they were named as parties of the first part without the guardian's name being mentioned, and which is executed and acknowledged by the infants and by the guardian without the addition of his title to his signature, indicating the character in which he was acting, is not such a conveyance

92. *Blanchard v. Blanchard*, 33 Misc. 284, 67 N. Y. Supp. 478. 63 N. Y. Supp. 822; modified, 57 App. Div. 630, 68 N. Y. Supp. 1136.

93. *Danahy v. Fagan*, 63 Misc. 658, 117 N. Y. Supp. 300. 95. *Matter of Baird*, 30 Misc. 663, 64 N. Y. Supp. 331.

94. *Corbin v. Dwyer*, 30 Misc. 488,

as the purchaser is bound to accept.⁹⁶ But where an order of chancery adjudged that the special guardian who signed the petition should execute a sufficient conveyance of the interest of the infants and a deed was executed by him in his own name, as special guardian, the names of the infants appearing in the deed, it was held to be in proper form, and that it was not necessary to have it executed in the names of the infants.⁹⁷

A special guardian appointed to sell infant's real estate cannot convey such property to himself; where he has done so in good faith, the defect may be cured by opening the proceeding and conveying to a third person.⁹⁸ The conduct of a special guardian of infants in selling their real estate to his wife is not to be commended; but where it appears that the sale was confirmed by the court in which the proceeding was instituted, with full knowledge upon its part of all the facts, the title cannot, after the lapse of twenty-six years and long after all of the infants have become of age, be questioned.⁹⁹ Where the mother of an infant petitioned for the sale of its interest in real estate in which the petitioner also had an interest and bought the child's interest at the sale, it was held that merely on the ground of the relations of the parties, and without alleging fraud, the buyer of the property from the mother was entitled to rescind the contract of sale, recover back his deposit, and be reimbursed for counsel fee and disbursements in examining the title, from the vendor.¹

ARTICLE VI.

DISTRIBUTION OF PROCEEDS.

A. Civil Practice Act, § 1402. Proceeds of sale deemed real property.

A sale of real property, or of an interest in real property other than a possibility of reverter, of an infant or incompetent person, made as prescribed in this article, does not give to the infant or incompetent person any other or greater interest in the proceeds of the sale than he or she had in the property or interest sold. Those proceeds are deemed property of the same nature as the estate or interest sold until the infant arrives at full age or the incompetency is removed. The proceeds of the release of a possibility of reverter shall be deemed and treated as if they were proceeds of real property of which the infant was seized and possessed.

96. *Matter of Hyatt*, 11 N. Y. 52.

97. *Cole v. Gourlay*, 79 N. Y. 527.

98. *Buderus v. Immen*, 20 Wkly. Dig. 88.

99. *Strauss v. Bendheim*, 162 N. Y. 469.

1. *Feller v. Mitchell*, 53 Misc. 486, 103 N. Y. Supp. 269.

B. Civil Practice Act, § 1403. Disposition of proceeds generally; accounting.

The court, by order, must direct the disposition of the proceeds of such a sale, mortgage, release or lease. It must direct the investment of any portion thereof belonging to the infant or incompetent person which is not needed for the payment of debts, or the safe-keeping, or the immediate maintenance and education of himself or his family, or for the preservation or improvement of his real property or his interest in real property. It must require a report, under oath, of the disposition and investment thereof to be made as soon as practicable, and must compel periodical accounts to be rendered thereafter by each person who is intrusted with the proceeds or any part thereof.

Where the portion of the proceedings arising upon such sale which belongs to an infant, residing within or without the state does not exceed one hundred and fifty dollars, and the father or mother, or both, of such infant be living, the court may direct that the same be paid over, for the use and benefit of such infant, to such father or mother.

C. Civil Practice Act, § 1404. Disposition of proceeds exceeding five hundred dollars.

If the proceeds of the sale of real property, or interest in real property, of an infant, exceed five hundred dollars, and the guardian has not given security by mortgage upon real estate, he shall bring the proceeds into court, or invest the same under the direction of the court, for the use of the infant; and the guardian shall be entitled to receive only so much of the interest or income thereof, from time to time, as may be necessary for the support and maintenance of the infant, without the order of the court.

D. Civil Practice Act, § 1405. Payment of proceeds of sale of property of nonresident infant.

In the case of an infant residing without the state, and having in the state or country where he or she resides a general guardian or person duly appointed under the laws of such state or country to the control, and entitled by the laws of such state or country to the custody, of the money of said infant, the court, upon satisfactory proof of such facts and of the sufficiency of the bond or security given by such general guardian or person in such state or country, by the certificate of a judge of a court of record of such state or country, or otherwise, may direct that the portion of such infant arising upon a sale pursuant to this article shall be paid over to such general guardian or person.

E. Civil Practice Act, § 1406. Debts of infant or incompetent to be paid equally.

In the application of money arising from a sale, mortgage or lease made for the purpose of paying debts, as prescribed in this article, the special guardian of the infant or the committee of the property of the incompetent person must pay all debts, in equal proportion, without giving a preference to a debt founded upon a specialty or upon which judgment has been taken.

F. Civil Practice Act, § 1407. Contingent interest in proceeds of infant not in being.

In case by any contingency; infants not in being may thereafter become possessed of any interest in premises sold, mortgaged or leased pursuant to this article, the court, in case of a sale, shall cause the proceeds of the sale, after paying the costs and expenses of the same, to be placed at interest for the benefit of the persons who are or who ultimately may be entitled to the same, and shall not authorize the distribution of the same in advance of said contingency, except upon a petition of some person entitled thereto and upon filing a bond in such penalty as the court shall direct, with two or more sureties approved by the court, and conditioned that in case of any contingency by which any infant not then in being shall thereafter become entitled to any of the proceeds of the sale, that said petitioner will pay to said person or persons his or their proportionate share of the money so paid over to said petitioner; and in the case of the mortgaging of said real estate, the proceeds of the same, after paying costs and expenses, shall be paid out and disbursed under the direction of the court only for the purpose of paying lawful charges thereon, or repairing, improving, building upon or otherwise enhancing in value any real estate so mortgaged as aforesaid.

G. Civil Practice Act, § 1408. Disposition of proceeds in case of death of infant or incompetent.

If the infant should die before arriving at full age, or the incompetent person should die before the incompetency is removed not leaving any personal property, or not leaving sufficient personal property to pay funeral expenses and expenses that may be necessary or necessarily incurred, then in either or each case, the proceeds are to be deemed personal property so far as may be necessary to pay the funeral and other necessary expenses. The proceeds are to be paid, upon order of the surrogate's court or court having jurisdiction of the estate of the deceased, to an administrator appointed by the surrogate to administer upon decedent's estate, and after paying all funeral expenses and expenses of administration and any indebtedness, the remainder, if any there be, upon the order of the surrogate, shall be paid into the hands of the trustee who held the same, to be distributed as the law directs.

H. Civil Practice Act, § 1409. Proceedings upon release of inchoate right of dower.

Where an inchoate right of dower is released as prescribed in this article and such release is to accompany a sale by the husband of the property to which the inchoate right of dower attaches, the court shall make an order requiring one-third of the amount realized on the sale of the property to which the inchoate right of dower attached to be invested by the special guardian, or paid into the court to be held for the benefit of the husband during his life and upon his death for the benefit of the wife during her life, or the court may direct said amounts to be paid to the husband upon his giving a bond in the penalty of at least double the amount so received for such release, with at least two sureties, who shall justify in double the amount of such penalty, conditioned for the repayment as the court shall direct by his executors or administrators of such amount upon the death of the husband. Where an inchoate right of dower is released as prescribed in this article, and, at the time of the application, the property to which the inchoate right of dower attaches has already been sold by the husband, and the wife has not joined in the conveyance or

otherwise released her inchoate right of dower, the court shall make an order that, as the consideration for the release, or as part of the consideration therefor, there be paid to the special guardian or into the court an amount to be fixed by the court as equal to one-third of the fair market value of the property, to be invested by the special guardian or held by the court for the benefit of the person making such payment during the life of the husband, and upon his death for the benefit of the wife during her life, and upon her death to be returned to the person making such payment or to his executors, administrators or assigns; or in lieu of such payment, the court may allow a bond to be given in the penalty of at least double the amount so fixed as equal to one-third of the fair market value of the property, with at least two sureties, who shall justify in double the amount of such penalty, conditioned for the payment as the court shall direct, upon the death of the husband leaving the wife surviving, of the said sum so fixed as equal to one-third of the fair value of the property, to be held for the benefit of the wife during her life and upon her death to be returned to the person giving such bond or to his executors, administrators or assigns.

I. Rules of Civil Practice, Rule 299. When proceeds of sale of real property of infant may be paid to general guardian.

No money arising from the sale of the real estate of an infant shall be paid over to his general guardian, except so much thereof, or of the interest or income, from time to time, as may be necessary for his support or maintenance, unless such guardian shall give a bond, in the penalty of double the amount to be paid to him, with sufficient surety, to be approved by the court. If, however, such money shall exceed the sum of five hundred dollars, the court must require the guardian to give a bond of a surety company authorized to do business in this state or a bond secured by a mortgage on improved and unincumbered real property within this state of the value of the penalty of the bond.

J. Rules of Civil Practice, Rule 300. Limitation on costs and fees in proceedings to dispose of real property of infant.

If the infant's interest in the property do not exceed one thousand dollars, the whole costs, including disbursements, shall not exceed twenty-five dollars and the expense of a surety bond, if one be required, and referee's fees not exceeding ten dollars. If several infants be interested in the same premises as tenants in common, the application in behalf of all shall be joined in the same petition, although they may have several general guardians; and there shall be but one reference to ascertain the propriety of a sale as to all, and but one bill of costs shall be allowed.

K. Proceeds as real property.

The doctrine that the sale of an infant's real estate gives him no greater interest in the proceeds than he had in the property is a general principle of equity jurisprudence, and will be enforced. If the infant die under age, the proceeds will be subject to the same law of succession as the property which produced them.² The object of the statute is to

² Matter of McKay, 37 Misc. 590, Y. Supp. 332; Sweezy v. Thayer, 175 N. Y. Supp. 1069; Matter of Dept. of Public Parks, 89 Hun, 529, 35 N. Y. Supp. 286.

preserve, during the infant's minority, the character of the property in reference to the statutes regulating descents and distribution. But the character thus impressed upon the proceeds ceases when the infant arrives at his majority and obtains possession of the fund.³ Section 1402 is to be construed to mean that such equitable reconversion continues during the entire lifetime of a person who is an incurable idiot and does not end at his majority. Upon the death of such idiot his personal property goes to his next of kin, but the proceeds of the sale of lands go to his heirs, although his minority had expired.⁴ If the interest of an infant's real estate has been alienated by proceedings under this title, the proceeds by virtue of section 1402 are still deemed real property, and the court has power to follow such proceeds in the hands of a depositor in trust for heirs.⁵

Section 1408, providing for the payment of the proceeds of the real property of an infant after his death to an administratrix, does not apply to the proceeds of an infant's real property sold under a judgment of partition. This section applies only to a case where property is sold because the income is not sufficient for the payment of the infant's debts or maintenance.⁶ Where the shares of several infants were determinable fees, with executory devises to the survivors, and the whole estate in the land was sold, it was held, on the death of one of the infants, by which the devise over of her share would have taken effect if the land had not been converted, that her share of the proceeds must be paid to the executory devisees, and that her personal representatives had no right to such share.⁷

Under section 1402 the proceeds of the sale of a lunatic's real estate retain the nature of real estate until the recovery of the insane person, and consequently if the lunatic die, they pass to his heirs.⁸ Moneys received by the committee of a lunatic from a railroad company for the deed of an easement in the lunatic's property retain their character of real estate, and the lunatic's heirs are entitled thereto.⁹ Proceeds of real estate, inherited by an incompetent and subsequently sold by

3. *Forman v. Marsh*, 11 N. Y. 544.
See, also, *Matter of Finch*, *Clarke*, 538.

4. *Matter of McMillan*, 126 App. Div. 155, 110 N. Y. Supp. 622.

5. *Hentz v. Philips*, 23 Ab. N. C. 15, 6 N. Y. Supp. 19.

6. *Flynn v. Lynch*, 23 Civ. Pro. 369.

7. *Davison v. DeFreest*, 3 Sandf.

456.

8. *Walrath v. Abbott*, 75 Hun, 445, 59 St. Rep. 641, 27 N. Y. Supp. 529; *Matter of Department of Public Works*, 89 Hun, 529, 35 N. Y. Supp. 332.

9. *Ford v. Livingston*, 140 N. Y. 162, 55 St. Rep. 254.

his committee under the statute, are real estate in the hands of his administratrix and the Surrogate's Court has no jurisdiction over them, where the personal estate of the incompetent is insufficient to pay his debts and funeral expenses, except to pay therefrom the balance of said debts and funeral expenses and remand the remainder to his committee.¹⁰

L. Payment to general guardian of infant.

The court is required to consider the infant as its ward and care for its real property, and in case of a sale, see to it that the proceeds are properly invested, except such portions thereof as may be necessary for the maintenance and education of the infant or his family, and such other purposes as are specifically mentioned in the statute.¹¹ Where the bond of the general guardian required him to "faithfully discharge the trust reposed in him and obey the lawful directions of the surrogate touching the trust and to render a just and true account of all moneys and other property received by him," it was held that they were liable for the proceeds of real estate sold under an order of the County Court made pursuant to the report of a referee in a proceeding instituted to procure the sale, to the effect that they were absolutely necessary for the support and maintenance of the ward in addition to what he was able to earn by his own exertions, which proceeds were paid over to the guardian without requiring from him additional security.¹²

M. Payment of debts.

Where an order is made requiring the special guardian of an infant to mortgage its real estate and apply the proceeds thereof to the payment of certain specified debts, he cannot, after having received the money, refuse to pay any of the debts, on the ground that the infant is not liable for it. When the guardian renders an account of his proceedings, and procures an order confirming the report without notice to the creditor whose claim he has refused and neglected to pay, such order furnishes him no protection, and the same will, on application to the creditor, be vacated and the guardian directed to pay him the amount in his hands, applicable to the payment of his claim, with interest from date of order of confirmation.¹³ Where a special guardian applied the pro-

10. *Matter of Reeve*, 38 Misc. 409, 55 App. Div. 454, 67 N. Y. Supp. 97, 77 N. Y. Supp. 936.

13. *Matter of Lampman*, 22 Hun,

11. *Allen v. Kelly*, 171 N. Y. 1. 237.

12. *Allen v. Kelly*, 171 N. Y. 1, rev'g

ceeds of real estate of his ward to payment of debts of the father of the ward, of whom the guardian was the administrator, and from whom the land came to the infant, the act was held to be unwarranted in the absence of authority from the court.¹⁴

N. Committee of lunatic.

A committee of a lunatic has no power to change the manner of payment of the purchase price of real estate sold for a lunatic, except upon order of the court.¹⁵ Where it was objected that the avails of the property of a lunatic mortgaged by the committee upon order of the court must be disposed of pursuant to section 1403, it was held, in a cause of action for money loaned and for the enforcement of a lien upon these avails, that the judgment of the court in the action would be as authoritative as an order under section 1403, and that if the plaintiff's views were sustained the avails of the mortgage were not strictly the property of the lunatic, although in the hands of his committee.¹⁶

Where a committee of two incompetent children, a brother and a sister, whose father died intestate owning certain real property, conveyed the property to their mother pursuant to statute at its full value, and the mother executed a mortgage for the purchase price, and thereafter she died, devising the property to her two children, and thereafter the son died intestate, without issue, and subsequently his sister died intestate, without issue, without any part of the principal of the mortgage having been paid; it was held, in an action brought by the heirs of the sister for the sale and distribution of the property, that no fraud was practiced on the children and as between them and the purchaser a valid title was transferred; that the sale was valid as to their heirs, there being no evidence that the transfer was collusive, or made with intent to effect a change of inheritance from the heirs of their father to the heirs of their mother; that an undivided one-half of the property was devised by the mother to her daughter subject to the mortgage; that the mortgage was to be deemed real estate for the purpose of distribution; that the deed and mortgage were simultaneous in point of time and constituted a single transaction, and that the mother acquired no greater interest than the equity of redemption; and that to the extent of the mortgage the proceeds of the sale would be treated as not having belonged to the mother, and

14. *Hunt v. Hunt*, 58 N. Y. 666.

16. *Parmenter v. Baker*, 24 Abb. N.

15. *Walrath v. Abbott*, 75 Hun, 445, C. 109, 8 N. Y. Supp. 70.
27 N. Y. Supp. 529, 59 St. Rep. 641.

if there was a surplus, one-half of such surplus shall be distributed as having been devised to the daughter by her mother.¹⁷

O. Costs.

The sections of the Civil Practice Act regarding proceedings for the sale of the real property of an infant are silent upon the costs allowable in such proceedings and they are governed by Rule 300 of the Rules of Civil Practice.¹⁸ Where, by the report of the special guardian in proceedings for the sale of the undivided interests of several infants in certain real estate, it appears that the net value of the interest of each infant is less than \$1,000, the whole costs, including disbursements,¹⁹ cannot exceed \$25, and referee's fees cannot exceed \$10, except that the expense of a surety bond may be included.²⁰

ARTICLE VII.

FORMS.

A. Petition for sale of real estate of infants.

To the Court of the:

The petition of A. B. and E. F. respectfully shows:

I. That A. B. is an infant over the age of fourteen years, and became of the age of years on the day of, 19.., and resides at, in the county of and State of New York, with, who is the father (or general guardian, or other relative of said infant). That C. D. is an infant under the age of fourteen years, and became of the age of years on the day of, 19.., and resides at, in the county of and State of New York. That E. F. is the father (guardian or other relative) of C. D. and resides at, in the county of, in the State of New York.

II. That (if the infants have no general guardian). That said A. B. and C. D. have no general guardian.

III. That said A. B. and C. D. have personal property to the value of dollars, as follows: (Insert statements as to the personal property of infants.)

IV. That said A. B. and C. D. have real property and an interest therein in the town of, county of and State of New York, which said real property, or the interest of said defendants therein, leave to sell as herein asked, and that said premises are bounded and described as follows: (Insert description of premises.)

17. *Ferry v. Dunham*, 136 App. Div. 61, 119 N. Y. Supp. 722.

18. *Matter of Molinari*, 82 Misc. 663, 144 N. Y. Supp. 217; *Matter of Mathews*, 27 Hun, 255.

19. *Matter of Molinari*, 82 Misc. 663, 144 N. Y. Supp. 217.

20. *Matter of Molinari*, 82 Misc. 663, 144 N. Y. Supp. 217.

V. That the interest of said infants in said real property is as follows: (State the interest of the infants and make allegations as to rights of dower, or curtesy therefrom.)

VI. That the value of the above described real property is dollars and that the annual income from same is dollars, and the annual income of said infants therefrom is dollars, and that the entire annual income of said infants from their real and personal property is dollars; and that said infants have no other real property of which the sale is desired in these proceedings. (If the infants have other real property, make allegations as to such property and the reasons for not selling the same.)

VII. That the following are the debts and payments existing against the estate of said infants: (State debts of infants.)

VIII. That the reasons which render the sale of said premises necessary are that the above-mentioned personal property and the income of the real property are insufficient to pay the debts of said infants, and for the maintenance and necessary education of said infants, and that their interests will be substantially promoted by the sale of said real property, on account of the following facts: (State the facts, showing the promotion of the infants' interest by the sale.)

IX. That, of the town of, county of, State of New York, has offered and is willing to pay for the conveyance of said property the sum of dollars, on receiving the deed therefor, and that same is the highest sum which your petitioner can with reasonable diligence obtain for the interest of said infants in said property.

X. That G. H., who resides at, in the county of, in the State of New York, and who is a of the said infants, is a competent person to be appointed special guardian by this court, for the purpose of selling the interests of said infants in said real estate, and that I. J., of, and K. L., of, are proposed as sureties for the said G. H., as special guardian, to join with him in a bond in such penalty and upon such conditions as may be required.

XI. That no previous application has been made for the sale of said real estate, or any part thereof. (If previous application has been made, state the disposition thereof.)

WHEREFORE, Your petitioners pray that the interests of said infants in said real estate may be sold by and under the direction of this court; and that said G. H., or some other suitable person, may be appointed special guardian of said infants with respect to these proceedings; and that such other and further proceedings and relief may be had in the premises as may be proper and necessary.

Dated, day of, 19..

(Signed)

A. B.
E. F.

STATE OF NEW YORK, }
COUNTY OF } ss.:

A. B. and E. F., the petitioners above named, being duly sworn, say that the foregoing petition, signed by them, is true to the knowledge of the deponents except as to the matters therein stated to be alleged upon the information and belief, and that as to those matters they believe it to be true.

(Signed) A. B.
 E. F.

Sworn to before me, this day }
of, 19.. }

.....,

.....

I HEREBY CONSENT to be appointed the special guardian of the infant named in the foregoing petition.

(Signed) E. F.

STATE OF NEW YORK, } ss.:
COUNTY OF, }

On this day of, 19.., before me personally appeared E. F., to me known to be the same person described in and who executed the above consent, and he duly acknowledged to me that he executed the same.

.....,

.....

B. Petition for sale of real estate of incompetent.

To the Court of:

The petition of M. N., the committee of the person and estate of O. P., a lunatic (or idiot, or habitual drunkard), respectfully shows:

I. That, pursuant to the proceedings duly had in the Court, your petitioner was, by an order of the Court, made on the day of, 19.., duly appointed committee of the person and property of O. P., incompetent person.

II. That after such appointment your petitioner as such committee duly made out and verified an inventory of the estate of said O. P., both real and personal property, and has therein stated the value thereof and the amount of rents and profits of the said real estate, and the debts owing by the said lunatic, a copy of which is hereby annexed.

III. That it appears from said inventory, that the said incompetent owns certain real estate bounded and described as follows: (Insert description): and that said real estate is of the value of dollars, and that the income therefrom is the sum of dollars annually.

IV. That, as appears from said inventory, the value of the personal estate of said incompetent, at the time of the appointment of the petitioner, was dollars, and that since his appointment your petitioner has disposed of and spent the following items of personal property (make statement as to disposition of personal property):

and that the personal estate of said incompetent at this time does not exceed the sum of dollars, and that the income therefrom is as follows: (Make statements as to income from personal property.)

V. That the following is an account of the debts and payments now existing against the estate of said lunatic: (Make list of debts.)

VI. That the interests of said incompetent will be substantially promoted by making the sale of his interest in the above-described property for the following reasons: (Insert allegations as to grounds of application.)

VII. That no previous application has been made for the sale of the interest of said incompetent in said real estate. (If application has been made, state disposition thereof.)

WHEREFORE, Your petitioner prays that, by an order of this court, he may be authorized and empowered to sell so much of the real estate of said incompetent, as may be necessary for the payment of his debts, and that he have such other and further relief as may be proper.

(Signed) M. N.

(Verification.)

C. Order appointing special guardian.

(Caption.)

..... COURT — COUNTY OF

IN THE MATTER OF THE APPLICATION FOR
THE SALE OF THE REAL PROPERTY OF
A. B. AND C. D., INFANTS,

On reading and filing the petition of A. B., an infant over the age of fourteen years, and E. F., the father (or other relative) of, an infant under the age of fourteen years, verified the day of, 19.., praying for the sale of certain real property, therein described, and for the appointment of G. H., of, county of, New York, as special guardian of said infants, for the purpose of conducting the said sale, and on reading and filing the consent of the said G. H., annexed to said petition, to become such special guardian; and it satisfactorily appearing to the court that there is reasonable ground for the application,

Now, therefore, on motion of, attorney for the petitioners,

It is Ordered, That G. H., of, county of, and State of New York, be, and he hereby is, appointed special guardian of said infants with respect to these proceedings, upon his filing with the county clerk of county, a bond of an approved surety company, of the penal sum of dollars, or a bond of individuals secured by an approved mortgage on real estate, in the sum of dollars, approved as to its form and sureties by this court; and conditioned for the faithful discharge of his trust and for paying over and investing of and accounting for all moneys received by such special guardian; and for the observance of any provisions of law and the rules and directions of the court in relation to the trust.

D. Guardian's bond.

KNOW ALL MEN BY THESE PRESENTS:

That we, G. H., special guardian, residing at, in the county of, New York, by occupation, and I. J., surety, residing at, county of, New York, by occupation, and K. L., surety, residing at, in the county of, New York, by occupation, are held and firmly bound unto A. B. and C. D. of the county of, New York, infants under the age of twenty-one years in the sum of dollars, to be paid to the said infants, their heirs, executors, administrators, or assigns, for which payment well and truly to be made, we bind ourselves and our heirs, executors, administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the day of, in the year one thousand nine hundred and

WHEREAS, On the day of, 19..., the bounden G. H. was, by order of court, duly appointed special guardian of the above-named infants, with respect to certain proceedings for the sale of the real property of said infants.

Now, THEREFORE, The condition of this obligation is such, that if the said G. H. shall well and faithfully discharge the trust reposed in him as such special guardian, and shall pay over and invest and account for all moneys received by him, in such proceeding, according to the direction of any court having authority to give directions in the premises and shall well and faithfully observe all provisions of law, and rules and directions of the court in relation to said trust, then this obligation to be void, otherwise to remain in full force and virtue.

Dated at, N. Y., this day of, 19...
G. H. [L. S.]
I. J. [L. S.]
K. L. [L. S.]
(Acknowledgment.)
(Verification.)
(Approval.)

E. Certificate on filing a bond.

(Title.)
I,, county clerk, of county, do hereby certify that the bond (and mortgage, if required), required by the order of this court, made in the above-entitled proceeding on the day of, 19..., to be given by G. H., the special guardian named therein, has been duly executed and acknowledged and approved by Hon., judge of this court, has been filed in my office pursuant to said order.
Dated the day of, 19...
.....
Clerk.

F. Order appointing referee.

(Title.) (Caption.)
The petition of A. B., infant, under the age of fourteen years, and E. F., the father (or other relative), of C. D., an infant under the age of fourteen years, duly verified on the day of, 19...,

praying for the sale of certain real property of said infants, having been duly presented and filed in the above-entitled proceeding on the day of, 19.., and the court thereupon having made an order on the day of, 19.., appointing G. H., special guardian of said infants with respect to the proceedings herein upon his filing with a bond therein mentioned and described, and said bond having been duly approved, and it appearing by a certificate of the clerk of this court that said bond has been duly filed with said clerk on the day of, 19..

Now, THEREFORE, The motion of, attorney for said petitioners,

It Is Ordered, That Q. R. of, New York, counsellor-at-law, be and he hereby, is appointed the referee to inquire into the merits of said application and to examine into the truth of the allegations of said petition; hear the allegations and proofs of all persons interested in this application or the property, and report his opinion thereupon, together with the testimony taken before him with all convenient speed; and also to report whether a sale, mortgage, or lease of said property, or any and what portion thereof, would be beneficial to the infant (idiot or habitual drunkard), and the reasons therefor, and whether the infant, lunatic, idiot, or habitual drunkard is in absolute need of any and what portion of the proceeds of the sale, mortgage or lease, for the purpose specified in the petition, in addition to what he may earn by his own exertions; and also report the value of the property, or interest to be disposed of, specifically, as to each separate lot or parcel, with the incumbrances, if any, thereon; and whether there is any person entitled to dower, or a life estate, or estate of years, and the terms and conditions on which it should be sold and also to report such further facts as are necessary or proper on the application. The facts in relation to the value of the property or interest to be disposed of shall be proved on such reference by the testimony of at least two disinterested persons in addition to that of the petitioners, and the report of the referee shall not refer to the petition, or any other papers, as evidence of fact.

G. Referee's report.

(Title.)

To the, Court of:

I, Q. R., the referee duly appointed in the above-entitled proceeding, by an order of this court on the day of, 19.., do hereby respectfully report that before any testimony was taken, or proceedings were had upon such reference, I took the referee's oath, as required by law, and there was produced before me a clerk's certificate, as required by said order that the requisite security had been duly filed, which said oath and certificate are annexed to this report.

That upon such reference I was attended by, the attorney for said petitioners and by G. H., special guardian of said infants, and that I have examined into the truth of the allegations of the petition herein and have heard the proofs and allegations of all persons interested in the property, or otherwise interested in this application.

I do further report that the allegations of said petition in my opinion have been sufficiently proved and that all the material facts stated therein are true, and that the sale of the real estate, belonging to said infants, which is particularly described in said petition, will be beneficial to the said infants; and that the particular reasons for my opinion are as follows: (State reasons.)

I do hereby further report that the value of said real estate is the sum of dollars and that the value of the interests of the infants hereby petitioned be disposed of is the sum of dollars; and that the value of each separate lot is as follows: (Insert the value of parcels.)

I do further report that said infants are in absolute need of some portion of the proceeds of said sale, to wit (state the portion of proceeds needed), for the purpose of (state purpose), in addition to what they may earn by their own exertions.

I do further report that the debts to be paid are as follows: (List the debts.)

I do further report that is entitled to dower in said premises, or life estate, or estate of years in said premises. (State facts as to such interests.)

I do further report that the terms and conditions upon which said premises should be sold are as follows: (State terms.)

That hereto annexed is the testimony taken by me upon such reference and the same is herewith returned.

All of which is respectfully submitted.

Dated at, county of, this day of 19...

(Signed) Q. R.
Referee.

H. Order upon referee's report.

(Title.)

(Caption.)

On reading and filing the report of Q. R., the referee, duly appointed herein by an order of this court, which said report is dated day of, 19.., from which report it satisfactorily appears to this court that the interests of said infants will be promoted by the sale of their interests in the real property described in the petition, and that said sale is required by the interests of said infants and is necessary and proper for the reasons stated in said report.

Now, THEREFORE, On motion of, attorney for said petitioners,

It Is Ordered, That the said report be, and the same hereby is, confirmed and that said G. H., special guardian, be, and he hereby is, authorized and empowered and directed to contract for the sale of the interests of said infants in and to said real estate, subject to the approval of this court, at a price not less than the sum specified by said referee in his report, as the value of said interests and upon the terms and conditions specified in said report. (Insert other directions of the court, as to the time, manner and conditions of the sale and conveyance.)

It Is Further Ordered, That before said sale is made, pursuant to this order, that said G. H. enter into an agreement therefor, and that said G. H. report to this court, under oath, the conditions of the agreement so made by him.

I. Report of special guardian's agreement to sell.

(Title.)

To the , Court of :

In pursuance of an order of the court made in the above-entitled matter on the day of , 19.., authorizing and empowering me, as the special guardian of A. B. and C. D., infants, named in this proceeding, to contract for the sale and conveyance of all the right, title and interests of said infants in and to the real estate mentioned and described in the petition in this matter, I do hereby respectfully report as follows:

That I have entered into a written agreement, subject to the approval of this court, for the sale of all right, title and interest of the above-named infants in and to the premises specifically described in the petition in this matter with S. T. of , county of , upon the following terms and conditions:

The said S. T. shall pay therefor, the sum of dollars as follows : (State the terms and conditions of sale.) and

I do further report that the above terms are the best terms upon which I could sell such property, and that in my opinion the premises are an ample security for the payment of the balance of the purchase money not paid down and the interest therein.

All of which is respectfully submitted.

Dated at , this day of , 19...

(Signed) G. H.

Special Guardian.

STATE OF NEW YORK, }
COUNTY OF , } ss.:

G. H., being duly sworn, says he is the special guardian named in the foregoing report; that he has read the foregoing report by him subscribed and knows the contents thereof, and that the facts therein stated are true to his own knowledge.

(Signed) G. H.

Sworn to before me, this day }
of , 19... }

.....

.....

J. Order confirming guardian's report as to conveyance.

(Title.)

(Caption.)

On reading and filing the report of G. H., as special guardian of the above-named infants made in pursuance of the order of this court, which report is dated the day of , 19.., stating that in pursuance of said order he has entered into a written agreement, subject to the approval of this court with S. T., for the sale of all the right, title and interest of said infants in and to the real estate mentioned in said order and specifically described in the petition, upon certain terms and conditions as specified in said report.

Now, THEREFORE, On motion of , attorney for the petitioners,

It Is Ordered, That said report and the agreement of conveyance therein mentioned be, and the same hereby is, approved, ratified and confirmed.

It Is Further Ordered, That said special guardian, in the name of and on behalf of said infants, do execute, acknowledge and deliver to the said S. T. a good and sufficient deed of all the estate, right, title and interest of said infants in and to the premises aforesaid and particularly described in the petition in this proceeding, upon his complying with the terms and conditions upon which, by the said agreement, such deed was to be delivered.

It Is Further Ordered, That out of the purchase money, said special guardian shall pay to the attorney for the petitioners the sum of dollars for the cost and expense of this proceeding and that the balance of the proceeds shall be disposed of as follows: (Insert directions as to payment.)

It Is Further Ordered, That said special guardian shall, as soon as practicable, report to this court, under oath, the disposition of the proceeds of such sale.

K. Guardian's deed.

This indenture, made this day of, 19.., between A. B. and C. D., infants under the age of twenty-one years in the county of, New York, by G. H., their special guardian, party of the first part, and S. T., of, county of, New York, party of the second part.

WHEREAS, A petition was heretofore presented to the court on behalf of the above-named infants, praying for the sale of the right, title and interest of the said infants in certain real estate, therein and hereinafter specifically described; and,

WHEREAS, Such proceedings were afterward duly had in said court upon the said petition, that by an order of said court, made on the day of, 19.., the said G. H. was duly appointed the special guardian of said infants with respect to said proceedings, upon his giving the security therein required; and said security having been duly approved and filed; and,

WHEREAS, By another order of said court made on the day of, 19.., the matter was duly referred to the referee to inquire into the merits of the application and examine into the truth of the allegations of said petition; and,

WHEREAS, Said referee did, on the day of, 19.., duly make his report thereupon, together with testimony taken by him upon such reference; and,

WHEREAS, By another order of this court, made on the day of, 19.., the said referee's report was duly confirmed and the said G. H. was authorized and empowered and directed to contract for the sale and conveyance of all the right, title and interest of said infants in said real estate, subject to the approval of the court, at a price not less than that specified in said report; and,

WHEREAS, In pursuance of the last-mentioned order, the said G. H., as special guardian, did afterwards make his report, dated the day of, 19.., stating that he had entered into an agreement of sale to convey, subject to the approval of this court, to S. T., all the right, title and interest of said infants in and to the said real estate, upon the terms and conditions mentioned in said last-mentioned order, to wit: For the sum of dollars, upon the following terms: (insert terms of sale), and

WHEREAS, By another order of the said court made on the . . . day of, 19.., it was ordered that the report of said special guardian, and the agreement therein mentioned, be ratified and confirmed, and that the said special guardian execute, acknowledge and deliver the deed of said premises to said S. T., the part of the second part in this conveyance, upon his complying with the terms of said sale; and,

WHEREAS, The said S. T., the party of the second part, has fully complied with the terms of said agreement of sale;

Now, Therefore, This indenture witnesseth, that the said parties of the first part, by G. H., said special guardian as aforesaid, by virtue of the power of authority conferred upon him by the several orders above mentioned, and in pursuance of the statute in such case made and provided, for and in consideration of the sum of dollars to him in hand paid, at or before the ensealing and delivery of these presents, by the said party of the second part, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, remised and conveyed and by these presents doth grant, bargain, sell, remise and convey unto the said party of the second part, his heirs and assigns, forever, all the right, title and interest of the said infants in and to (insert description of property).

Together with the appurtenances thereto belonging; to have and to hold the same unto said party of the second part, his heirs and assigns forever.

IN WITNESS WHEREOF, The said parties of the first part have, by their special guardian aforesaid, hereunto set their hands and seals the day and year first above written.

A. B. [L. S.]
C. D. [L. S.]
By G. H. [L. S.]

Special Guardian.

STATE OF NEW YORK, }
COUNTY OF } ss.:

On this day of, in the year one thousand nine hundred and, before me, the subscriber, personally appeared, to me personally known to be the same person described in and who executed the foregoing instrument as guardian, of and for the infants therein named and to me known to be said guardian, and he duly acknowledged that he executed the same as such guardian and for such infants, as aforesaid.

.....
.....

L. Final report of guardian.

(Title.)

To the Court of:

I, G. H., the special guardian in the above matter, having, by order of this court, made on the day of, 19.., been authorized, empowered and directed, to execute, acknowledge and deliver, in the name of said infants, to S. T., of, the conveyance of the interest of said infants in the real property mentioned and described in the petition in these proceedings, for the

sum of not less than dollars, do hereby respectfully report as follows:

That I have executed and delivered such deed, as in and by such order directed,

That I have received from the said purchasers the sum of dollars,

That out of said sum of dollars, I have paid the sum of dollars to, the attorney for the petitioner for the costs and expenses of these proceedings, including the referee's fees, and that I have disposed of the residue of said sum as directed by this court, as follows: (Insert disposition of residue.)

All of which is respectfully submitted.

(Signed) G. H. [L. s.]

(Verification.)

M. Final order of confirmation.

(Title.)

(Caption.)

On reading and filing the final report of G. H., the special guardian of A. B. and C. D., infants, duly verified on the day of, 19.., by which it appears that he has executed and delivered the deed of the interest of said infants in and to premises, particularly described in the petition in these proceedings, to S. T., and has received therefor the sum of dollars, as directed by this court, and that he has disposed of the proceeds of such sale as follows: (State disposition of proceeds.)

NOW, THEREFORE, On motion, of, attorney for the petitioners,

It Is Ordered, That the said report and all things contained therein be, and they hereby are, ratified and confirmed.

INSOLVENT DEBTORS.

See DEBTOR AND CREDITOR LAW.

JOINT DEBTORS.*

ARTICLE I.

Joint debtors in general.

- A. All joint debtors to be joined.
- B. Effect of judgment against one of joint debtors.
- C. Judgment against one of several partners.
- D. Death of joint debtor.

ARTICLE II.

When defendants are not all served.

- A. Civil Practice Act, § 1197. Action against defendants jointly indebted when all are not served.
- B. Civil Practice Act, § 1198. Effect of judgment in such action.
- C. Civil Practice Act, § 1199. Execution; indorsement; enforcement.
- D. Civil Practice Act, § 1200. Judgment, how docketed; effect of docketing.
- E. Offer of judgment.
- F. Successful defense by defendant served.
- G. Judgment against defendant not served.
- H. Effect of judgment.
- I. Execution.

ARTICLE III.

Charging defendant not personally summoned.

- A. Civil Practice Act, § 1185. Action to charge defendants not personally summoned; provisional remedies.
- B. Civil Practice Act, § 1186. Complaint in action against defendants not summoned.
- C. Civil Practice Act, § 1187. Answer in action against defendants not summoned.
- D. Civil Practice Act, § 1188. Judgment and costs in action against defendants not summoned.
- E. Nature of action.
- F. When action may be maintained.
- G. Defenses.

ARTICLE IV.

Composition by one of joint debtors.

- A. Debtor and Creditor Law, § 230. Compositions by joint debtors.
- B. Debtor and Creditor Law, § 231. Right of action against joint debtor where there has been a composition.
- C. Debtor and Creditor Law, § 232. Defenses by joint debtor who has not compounded.
- D. Debtor and Creditor Law, § 233. Action by joint debtor against compounding debtor.
- E. Civil Practice Act, § 531. Satisfaction of judgment after composition by joint debtor.
- F. Release of one as release of all.
- G. Satisfaction of obligation.
- H. Partnership.

* For a further discussion of matters referred to in this chapter, see B., C. & G. Consolidated Laws.

ARTICLE I.

JOINT DEBTORS, IN GENERAL.

A. All joint debtors to be joined.

While the rule is subject to exceptions, it is the general principle that all persons jointly liable on the same instrument must be joined as defendants in an action thereon.¹ A complaint in an action upon a contract of guaranty signed by the defendant and others in which it is not alleged that the others are within one of the exceptions to the general rule is defective.² But in an action against one of several joint contractors to recover for services, if the defendant fails to object to the non-joinder of his co-contractor, a recovery may be had.³ At common law it was the rule that, in an action against several defendants upon an alleged joint contract, the plaintiff must fail unless he establishes the joint liability of all the defendants, but this rule is no longer the rule of procedure in this State.⁴ Where two or more are sued as joint debtors and plaintiff fails to establish a joint liability against all, judgment may be had against one if only one is liable.⁵ Where one of two joint debtors has removed from and continues to reside out of the State, the running of the Statute of Limitations against the claim is suspended as to him, but not as to the debtor who remains within the State.⁶

B. Effect of judgment against one of joint debtors.

A judgment against one of several joint debtors in an action against him alone is a bar to an action against the other joint debtors.⁷ Where the holder of a joint promissory note takes judgment by confession, for the whole amount, against one of the makers, the liability of the other makers

1. Third Nat. Bank of St. Louis v. Graham, 174 App. Div. 503, 161 N. Y. Supp. 159.

2. Third National Bank of St. Louis v. Graham, 174 App. Div. 503, 161 N. Y. Supp. 159.

3. Douglas v. Leonard, 17 N. Y. Supp. 591, rev'g 14 N. Y. Supp. 274.

4. Stedeker v. Barnard, 102 N. Y. 327.

Admission of liability.—Where, in an action on a joint liability for goods sold, the proof showed only the admission of liability by one defendant, he disputing the amount due, it was

held that a nonsuit was proper. Martin v. Crehan, 15 N. Y. Supp. 449, 39 St. Rep. 652, distinguishing Brumskell v. James, 11 N. Y. 294.

5. Lapinsky v. Colish, 61 Misc. 319, 320, 113 N. Y. Supp. 733; Owen v. Conner, 33 St. Rep. 144, 11 N. Y. Supp. 352.

6. Brewster v. Bates, 81 Hun, 294, 30 N. Y. Supp. 780.

7. Utica City National Bank v. Penwarden, 180 App. Div. 448, 167 N. Y. Supp. 680; Sinclair v. Hollister, 16 N. Y. Supp. 529, 41 St. Rep. 349.

is discharged by the judgment, the note as to all having been merged therein.⁸ A judgment entered by default against one or more co-sureties or joint debtors in an action brought against all is a bar to the further prosecution of the action against the others. The entry of such judgment, however, is not a bar on the right of action against one of those against whom it was entered where the default is subsequently vacated as to him and he is allowed to answer.⁹ Where one of two or more makers of a promissory note is an accommodation maker, the effect of the judgment on a note recovered against him alone is to sever the joint liability of the makers and to render him alone liable thereupon.¹⁰

C. Judgment against one of several partners.

It is provided in section 1201 of the Civil Practice Act that where, for any cause, one or more partners have not been joined as defendants in an action upon a partnership liability, and final judgment has been taken against the persons made defendants therein, the plaintiff, if the judgment remains unsatisfied, may maintain a separate action upon the same demand against each omitted partner, setting forth in the complaint the facts specified in this section as well as the facts constituting his cause of action upon the demand. This section refers only to an action for partnership liability and is not applicable where the complaint in an action negatives the idea of any partnership liability, and is framed upon the theory that defendant was the individual purchaser of the goods.¹¹ Where, in an action upon a promissory note made by the defendants as copartners and in their firm name, it appears from the complaint that the defendants made the note payable to their own order and then indorsed the same and delivered it to the plaintiff for value, a judgment in a prior action by the plaintiff against one of the defendants, founded upon the same note, is a bar.¹²

D. Death of joint debtor.

In the case where one of the joint obligors dies his representatives are discharged at law if he is a mere surety, and the survivors alone can be sued; but where the joint obligors

8. *Candee v. Smith*, 93 N. Y. 349.

9. *O'Hanlin v. Scott*, 89 Hun, 44,
35 N. Y. Supp. 32, 69 St. Rep. 227.

10. *Smith v. Osborne*, 31 Hun, 390.

11. *N. Y. Fastener Co. v. Wilatus*,

65 App. Div. 467, 73 N. Y. Supp. 67.

12. *Utica City National Bank v. Penwarden*, 180 App. Div. 448, 167 N. Y. Supp. 680.

were all principal debtors or received some benefit from the joint obligation, courts of equity will enforce the obligation against the representatives of a deceased obligor upon the ground that it is morally and equitably just that the estate should be made to respond.¹³ Upon the death of one of several defendants, in an action upon a joint liability, the suit should be continued against the surviving defendants. The death of one of several partners jointly liable does not abate the action, and it must be continued against the survivors alone, as it is not generally proper in an action at law to join the legal representatives of a deceased joint debtor as defendants with the surviving debtors.¹⁴

In an action against two copartners upon their copartnership contract, where the summons is served upon one of them and he dies before service upon the other, the action does not abate, as the cause of action survives, but may proceed against the survivor and no leave is necessary therefor. In such a case the plaintiff need not make the personal representatives of the deceased copartner parties, as the surviving partner is primarily liable and the plaintiff could only maintain an action against them in case the surviving partner should be insolvent.¹⁵

Where, pending a suit against three, one died, and judgment by default was entered against the others, and afterward the administrator of deceased was substituted as defendant, it was held that a new action should have been brought, based on the original debt, the death of one debtor, the appointment of his representative, and insolvency of the survivors.¹⁶

ARTICLE II.

WHEN DEFENDANTS ARE NOT ALL SERVED.

A. Civil Practice Act, § 1197. Action against defendants jointly indebted when all are not served.

In an action wherein the complaint demands judgment for a sum of money against two or more defendants alleged to be jointly indebted upon contract, if the summons is served upon one or more but not upon all of the defendants, the plaintiff may proceed against the defendant or defendants upon whom it is served, unless the court otherwise directs; and, if he recovers final judgment, it may be taken against all the defendants thus jointly indebted.

13. *Richardson v. Draper*, 87 N. Y. 337.

14. *Voorhis v. Childs' Executor*, 17 N. Y. 354; *Fine v. Richter*, 3 Abb. (N. S.) 385; *Richter v. Poppenhausen*, 42 N. Y. 373. See *Masten v. Black-*

well, 8 Hun, 313; *Organ v. Wall*, 19 Hun, 184.

15. *Latz v. Blumenthal*, 50 Misc. 407, 100 N. Y. Supp. 527.

16. *Masten v. Blackwell*, 8 Hun, 313.

B. Civil Practice Act, § 1198. Effect of judgment in such action.

Such a judgment is conclusive evidence of the liability of each defendant upon whom the summons was personally served or who appeared in the action. Where it is taken against a defendant upon whom the summons was served by publication or without the state, pursuant to an order for that purpose, he or his representative, on application, upon good cause shown and upon just terms, must be allowed to defend after final judgment, at any time within one year after personal service of written notice thereof, or, if such a notice has not been served, within seven years after the filing of the judgment-roll. As against such a defendant who is allowed to defend after judgment, or as against a defendant not summoned, it is evidence only of the extent of the plaintiff's demand, after the liability of that defendant has been established by other evidence.

C. Civil Practice Act, § 1199. Execution; indorsement; enforcement.

An execution upon such a judgment must be issued, in form, against all the defendants; but the attorney for the judgment creditor must indorse thereupon a direction to the sheriff containing the name of each defendant who was not summoned and restricting the enforcement of the execution, as prescribed in this section. An execution against the person issued upon such a judgment shall not be enforced against the person of a defendant whose name is so indorsed thereupon. An execution against property issued upon such a judgment shall not be levied upon the sole property of such a defendant; but it may be collected out of personal property owned by him jointly with the other defendants who were summoned, or with any of them, and out of the real and personal property of the latter, or of any of them.

D. Civil Practice Act, § 1200. Judgment, how docketed; effect of docketing.

Where a judgment has been taken against two or more defendants jointly indebted upon contract and the summons has been served upon one or more of the defendants but not upon all of them, the clerk with whom the judgment-roll is filed must write upon the docket opposite or under the name of each defendant upon whom the summons was not served the words "not summoned"; and a like entry must be made by each county clerk with whom the judgment is afterwards docketed. The judgment does not, by virtue of its being docketed, bind any real property or chattel real owned by such a defendant. But this section does not affect the plaintiff's right of action to charge the judgment upon any real property.

E. Offer of judgment.

There is no statutory authority allowing one joint debtor or partner to make an offer in behalf of his joint debtor or copartner. This section, allowing judgments to be entered in form against both joint debtors when only one is served, does not relate to judgments entered upon offers.¹⁷ A joint judgment against joint debtors cannot be entered on an offer, and the action is not capable of severance so that a separate

¹⁷ *Garrison v. Garrison*, 67 How. Civil Practice Act.
Pr. 271. And see section 542 of the

judgment can be taken against a defendant who makes the offer.¹⁸

F. Successful defense by defendant served.

If the defendant served establishes a personal defense, such as infancy, no judgment can be entered against those not served.¹⁹ Where a number of defendants are sued upon a joint liability, and some defend while one fails to answer, judgment cannot be taken until the defense is disposed of.²⁰ But where one defendant in an action upon a joint contract, where all are served, sets up an equitable defense peculiar to him, the court may give judgment for the plaintiff against the other defendants and for one defendant against the plaintiff.²¹ There may be a separate judgment against those found liable, and a nonsuit as to the others.²²

G. Judgment against defendant not served.

In an action against several joint debtors, if the summons is served upon one or more or if they appear in the action, judgment is taken against all of the defendants jointly liable.²³ It is not proper to enter the judgment against only those who were served.²⁴ Thus in an action against partners on a partnership obligation, the plaintiff is entitled to judgment against all of the partners, upon proof that they constitute the partnership.²⁵ In such a case, to entitle plaintiff to a judgment against a defendant not served, it must be shown he was a partner.²⁶ The fact that the partner who is served had assumed and agreed to pay the partnership lia-

18. *Bannerman v. Quackenbush*, 7 Civ. Pro. 428; *aff'd*, 9 Civ. Pro. 108. See *contra*, *Emery v. Emery*, 9 How. 130; *Pardee v. Haynes*, 10 Wend. 630.

19. *Leggett v. Boyd*, 6 Wend. 500.

20. *Catlin v. Latson*, 4 Abb. Pr. 248.

21. *Barker v. Cocks*, 50 N. Y. 689.

22. *Fielden v. Lahens*, 6 Abb. (N. S.) 341; *Stimson v. Van Pelt*, 66 Barb. 151; *Clegg v. Cramer*, 32 Hun, 163; *Barth v. Amberg*, 9 St. Rep. 522.

23. *Yerks v. McFadden*, 141 N. Y. 136; *Sternberger v. Bernheimer*, 121 N. Y. 194; *Abromovitz v. Markowitz*, 58 Misc. 231, 108 N. Y. Supp. 1044; *Priessenger v. Sharp*, 39 St. Rep. 260, 14 N. Y. Supp. 372; *Stannard v. Mat-tice*, 7 How. Pr. 4; *Lahey v. Kington*, 13 Abb. Pr. 192; *Northern Bank v. Wright*, 5 Rob. 604; *Saxton v. Dodge*, 46 How. Pr. 467.

24. *Abromovitz v. Markowitz*, 58 Misc. 231, 108 N. Y. Supp. 1044; *Decker v. Kitchen*, 26 Hun, 173; *Nelson v. Bostwick*, 5 Hill, 37; *Niles v. Battershall*, 18 Abb. Pr. 161.

Amendment of judgment.—Where, in an action against three partners, summons was served on two, judgment entered against two by default, and execution issued against the joint property of all, and returned unsatisfied, it was held that an order was proper correcting the judgment *nunc pro tunc*, so as to make it against all. *Produce Bank v. Morton*, 67 N. Y. 199.

25. *Pruyn v. Black*, 21 N. Y. 300; *Staiger v. Theiss*, 19 Misc. 170, 43 N. Y. Supp. 292; *Brandagee v. Cleary*, 152 N. Y. Supp. 628.

26. *Crandall v. Beach*, 7 How. Pr. 271.

bilities is of no avail.²⁷ But, if the judgment is entered against each of the defendants instead of a joint judgment against all of them, the judgment is merely irregular and will not be set aside unless the motion therefor is made within a year.²⁸ The courts will not allow the provisions of the statute, as to service upon joint debtors, to be made the means of obtaining a judgment against a firm through the collusion of a partner with the plaintiff. A judgment so entered will be promptly set aside.²⁹ All partners must be served with a summons in a suit of foreclosure of a mortgage in order that the purchaser may obtain a marketable title.³⁰

H. Effect of judgment.

A judgment rendered against all joint debtors upon service on one or more is not, as against those not served, even *prima facie* evidence of indebtedness, which must be rebutted. It has no effect upon him beyond allowing execution to be collected of the personal property, which he owns as partner with the other defendants, nor does it affect the extent of his liability further than that in the new action plaintiff may recover less, but cannot recover more than the judgment.³¹ Where the service was on one defendant only who made default, and judgment was entered in form against all, the court subsequently, upon the application of the one not served, may permit him to come in and defend.³² A joint debtor not served with summons may appear voluntarily, where a personal judgment is demanded against him.³³ In an action against joint debtors service of summons on one authorizes judgment against all, which may be enforced by execution against the joint property, although the other defendants are not served and do not appear in the action.³⁴

I. Execution.

An omission to indorse on the execution against partners the name of the partner not served does not make the execution void, but it may be amended by an order of the court.³⁵

27. *Brandagee v. Cleary*, 152 N. Y. Supp. 628.

28. *Judd v. Linseed Oil Co.*, 76 N. Y. 543.

29. *Everson v. Gehrman*, 1 Abb. Pr. 167; *Griswold v. Griswold*, 14 How. Pr. 446; *Bridenbecker v. Mason*, 16 How. Pr. 203.

30. *Liebert v. Reiss*, 174 App. Div. 308, 160 N. Y. Supp. 535.

31. *Oakley v. Aspinwall*, 4 N. Y.

514.

32. *Ford v. Whitbridge*, 9 Abb. Pr. 16.

33. *McLoughlin v. Bieber*, 26 Misc. 145, 56 N. Y. Supp. 805; rev'd, 41 App. Div. 561, 58 N. Y. Supp. 790.

34. *Yerks v. McFadden*, 141 N. Y. 136.

35. *Crane v. Cranitch*, 52 St. Rep. 515, 23 N. Y. Supp. 320.

ARTICLE III.**CHARGING DEFENDANT NOT PERSONALLY SUMMONED.****A. Civil Practice Act, § 1185. Action to charge defendants not personally summoned; provisional remedies.**

After the recovery of a judgment against joint debtors, under a complaint demanding judgment for a sum of money against two or more defendants alleged to be jointly indebted upon a contract, an action may be maintained by the judgment creditor against one or more of the defendants who were not summoned in the original action, to procure a judgment charging his or their property with the sum remaining unpaid upon the original judgment. For the purpose of obtaining an order of arrest, an injunction order or a warrant of attachment, the action is regarded as being founded upon the contract upon which the original judgment was recovered. *

B. Civil Practice Act, § 1186. Complaint in action against defendants not summoned.

The complaint in such an action must be verified, must contain an allegation that the judgment has not been paid, and must state the sum remaining unpaid thereupon at the time of the verification.

C. Civil Practice Act, § 1187. Answer in action against defendants not summoned.

The defendant's answer in such action is restricted to defences or counterclaims which he might have made in the original action if the summons therein had been served upon him when it was first served upon a defendant jointly indebted with him; objections to the judgment; and defences or counterclaims which have arisen since it was rendered.

D. Civil Practice Act, § 1188. Judgment and costs in action against defendants not summoned.

Where the judgment in such action is in favor of the plaintiff, it must determine the sum remaining unpaid upon the original judgment; and it may be docketed, and an execution may be issued thereupon, as if it was a judgment for the sum so remaining unpaid, and the costs, if any. Costs must be awarded as if the action was brought upon the original contract and the sum so remaining unpaid had been recovered therein.

E. Nature of action.

The old Code of Procedure contained provisions of similar import to those now contained in sections 1185–1188 of the Civil Practice Act. Under the Code of Procedure, the proceedings to charge a defendant not served were held to be proceedings in the original action at the foot of the judgment, and were deemed a continuance of the action. But, under the provisions of the Code of Civil Procedure and under the Civil Practice Act, the remedy is not a proceeding in the former action, but is a new action.³⁶ The remedy

³⁶ *Hofferberth v. Nash*, 117 App. Div. 284, 102 N. Y. Supp. 317.

under the Code of Procedure was held to be cumulative and not to take away any other remedy.³⁷

F. When action may be maintained.

The action mentioned in section 1185 of the Civil Practice Act can be maintained only as against one or more of the several defendants named in the original summons who were not served.³⁸ An additional defendant cannot be brought in.³⁹ It is necessary that judgment should have been entered against all of the defendants as joint debtors. Where the same judgment is entered against two or more parties, they are, with reference to said judgment, joint debtors.⁴⁰ An action on a judgment against the defendants therein, entered in form against them jointly, is presumptively an action against joint debtors.⁴¹ The remedy applies to a case where there is a joint agreement of two to deliver up securities, and a wrongful conversion and judgment recovered.⁴² An action may be brought under this section, after the recovery of a judgment against joint debtors, although the defendants served have appealed.⁴³ A transfer of ownership of the judgment is no defense to a proceeding under this section. The assignee may be brought in by motion as plaintiff or he may continue the action in the name of the original plaintiff.⁴⁴ A motion to amend the complaint at the trial to show that defendant was not served in the prior action should be granted when it is manifest that plaintiff attempted to state the cause of action under the section; but a failure of the

37. *Lane v. Salter*, 51 N. Y. 1. See, also, *Dean v. Eldridge*, 29 How. Pr. 218; *Prince v. Cujas*, 7 Robt. 76.

38. *Harper v. Bangs*, 18 How. Pr. 457.

39. *Freeman v. Barrowcliffe*, 44 Super. Ct. 313; *Organ v. Wall*, 19 Hun, 185.

40. *Barnes v. Smith*, 16 Abb. Pr. 420.

41. *Stahl v. Stahl*, 2 Lans. 60.

42. *Austin v. Randon*, 44 N. Y. 63.

43. *Morey v. Tracey*, 92 N. Y. 581.

Death of defendant after appeal.—

A summons in an action against two joint debtors was served upon one of them only, and after a verdict rendered against him the entry of judgment was stayed on appeal; the defendant died, and the court on notice made an order vacating the stay so as to permit plaintiff to enter a judg-

ment *nunc pro tunc*, of the date of the verdict, which was done and a memorandum of defendant's death entered thereon. In a subsequent action to charge the defendant who had not been served with the judgment, held, that such entry of judgment was authorized, as the parties were both principal debtors; that the death of one of them did not discharge their joint liability and the separate liability of the estate of the deceased. In such case the judgment in the original action is evidence against the defendant sought to be charged, to the extent of plaintiff's demand, and all plaintiff is bound to do is to establish the joint liability of the defendant with the party originally served. *Long v. Stafford*, 103 N. Y. 274.

44. *Merchant's Bank v. Waizfelder*, 14 Hun, 47.

court to grant such proper amendment does not entitle the defendant to a reversal of the judgment for the plaintiff.⁴⁵

G. Defenses.

The judgment is not conclusive evidence of the liability of the defendant or the amount of the debt.⁴⁶ A joint debtor can make the same defense in an action to charge him with the amount remaining unpaid on a judgment against his firm on service on his copartners alone that he could have made in the original action, if the summons had been served upon him therein.⁴⁷

Where a lessor, a corporation, brings an action against one of the two joint sureties upon a lease and recovers judgment against him, the fact that in such an action the defendant surety set up the defense of *ultra vires* and was defeated thereon will not preclude the other surety, when sued by the lessor under the provisions of section 1185, from setting up that defense. The adjudication in the first action may be *stare decisis* in the second action, but it is not *res judicata*.⁴⁸ But the defendant is restricted to such defenses and counterclaims as he might have made in the original action; objections to the judgment; and defenses or counterclaims which have arisen since it was rendered. The provision of the Practice Act reserving to a defendant not originally served, but sought to be charged with the judgment, the right to make objections to the judgment, refers simply to the objections going to the validity and binding efficacy of the judgment, such as a party to the judgment might take.⁴⁹ Plaintiff's irregularities in practice do not affect the jurisdiction of the court, and are waived by failure of the joint debtors to take the objections at the proper time.⁵⁰

Where a plaintiff has obtained judgment against joint debtors, one of whom has not been served with the summons, an action brought pursuant to section 1185 against such defendant is not barred, so long as the judgment remains in force.⁵¹ A debtor not originally served cannot set up that the statute of limitations has run since the judgment.⁵² The satisfaction of the original judgment is a good defense.⁵³

45. *Hofferberth v. Nash*, 117 App. Div. 284, 102 N. Y. Supp. 317.

46. *Richardson v. Case*, 3 Civ. Pro. 295.

47. *Richardson v. Case*, 3 Civ. Pro. 295.

48. *Bath Gas Light Co. v. Rowland*, 84 App. Div. 563, 82 N. Y. Supp. 841; aff'd on opinion below, 178 N. Y. 631.

49. *Long v. Stafford*, 103 N. Y. 274.

50. *Decker v. Kitchen*, 26 Hun, 173.

51. *Long v. Stafford*, 3 St. Rep. 87; *Maples v. Macker*, 22 Hun, 228; aff'd, 89 N. Y. 146.

52. *Kramer v. Schatzkin*, 27 Misc. 206, 57 N. Y. Supp. 803; *Broadway Bank v. Luff*, 51 How. Pr. 479; *Gibson v. Vanderzee*, 47 How. Pr. 231.

53. *Burkè v. Phillips*, 20 Misc. 413, 45 N. Y. Supp. 1024.

ARTICLE IV.**COMPOSITION BY ONE OF JOINT DEBTORS.****A. Debtor and Creditor Law, § 230. Compositions by joint debtors.**

A joint debtor may make a separate composition with his creditor. Such a composition discharges the debtor making it; and him only. The creditor must execute to the compounding debtor a release of the indebtedness or other instrument exonerating him therefrom. A member of a partnership cannot thus compound for a partnership debt, until the partnership has been dissolved by consent or otherwise. In that case the instrument must release or exonerate him, from all liability incurred by reason of his connection with the partnership.

(See B., C. & G. Consol. L., 2nd Ed., p. 1683.)

B. Debtor and Creditor Law, § 231. Right of action against joint debtor where there has been a composition.

An instrument making a composition with a creditor does not impair the creditor's right of action against any other joint debtor, or his right to take any proceeding against the latter; unless an intent to release or exonerate him, appears affirmatively upon the face thereof.

(See B., C. & G. Consol. L., 2nd Ed., p. 1686.)

C. Debtor and Creditor Law, § 232. Defenses by joint debtor who has not compounded.

Where a joint debtor including a partner has compounded, a joint debtor who has not compounded, may make any defense or counterclaim, or have any other relief, as against the creditor, to which he would have been entitled, if the composition had not been made.

(See B., C. & G. Consol. L., 2nd Ed., p. 1686.)

D. Debtor and Creditor Law, § 233. Action by joint debtor against compounding debtor.

A joint debtor, including a partner, who has not compounded may require the compounding debtor to contribute his ratable proportion of the joint debt, or of the partnership debts, as the case may be, as if the latter had not been discharged.

(See B., C. & G. Consol. L., 2nd Ed., p. 1687.)

E. Civil Practice Act, § 531. Satisfaction of judgment after composition by joint debtor.

An instrument specified in section two hundred and thirty of the debtor and creditor law, executed by a creditor releasing or discharging a compounding joint debtor, is deemed a satisfaction-piece for the purpose of discharging, as prescribed in section four hundred and ninety-nine of this act, the docket of a judgment, recovered upon an indebtedness released or discharged thereby, as far as the judgment affects the compounding debtor. Where the docket of a judgment is discharged thereupon, a special entry must be made upon the docket to the effect that the judgment is satisfied as to the compounding debtor only.

F. Release of one as release of all.

At common law the release of one of several joint debtors operated as a release of all. It was held under the Revised Statutes that a release of one joint debtor would discharge all, unless it referred to the statute,⁵⁴ but under the present statute a creditor may release one and reserve his cause of action against the others.⁵⁵ A compromise with one of several joint debtors may be valid, although it is made out of the State.⁵⁶

Where thirteen persons gave a joint and several promissory note in payment for a horse and at the time of the delivery of the note one of the makers made a payment equal to his share of the note which payment was indorsed generally upon the note but a receipt was given stating that the amount received was in full payment of one share in the horse, it was held that there was no release of the other joint makers.⁵⁷

It is not necessary that a release, to be effectual, shall follow the precise language of the statute. The composition is effectual although the instrument omits to state that the compounding debtor is thereby released from all liability where it appears by it that it was executed pursuant to said provision and it is shown that there was no other partnership debt owing to the creditor.⁵⁸ Where a release of one of two joint debtors contains an express provision that it shall not affect or impair claim of the creditor against the other debtor, the latter is not discharged.⁵⁹ Where the instrument relied on does not by its terms exonerate the defendant from

54. *Hoffman v. Dunlap*, 1 Barb. 185; *Cornell v. Masten*, 35 Barb. 157. *Contra*, as to agreement not under seal, *Irvine v. Milbank*, 15 Abb. (N. S.) 378; *Honezzer v. Wellstein*, 47 Super. Ct. 175.

55. *Booth Bros. v. Baird*, 83 App. Div. 495, 82 N. Y. Supp. 432; *Marx v. Jones*, 36 Hun, 290; *Hood v. Hayward*, 26 Abb. Pr. N. S. 271, 35 St. Rep. 229, 20 Civ. Pro. 47, 124 N. Y. 1.

Where the indorsers of a promissory note before it became due entered into a composition agreement with their creditors, and the bank holding the note, with knowledge of the composition, received, retained and receipted for checks in part payment from the committee of the creditors, from which

it was only entitled to share in assets upon becoming bound by the composition agreement, it was held that the indorsers, under section 230 of the Debtor and Creditor Law, could compel the bank to release them from liability on the note, as by sharing in the assets it became subject to the provisions of the statute. *Matter of Camra*, 169 App. Div. 604, 155 N. Y. Supp. 411.

56. *Saxton v. Dodge*, 46 How. Pr. 467.

57. *Hillas v. Fuller*, 143 N. Y. Supp. 15.

58. *Harbeck v. Pupin*, 123 N. Y. 115, 33 St. Rep. 220.

59. *Whitmore v. The Judd Linseed and Sperm Oil Co.*, 124 N. Y. 565.

an indebtedness for which action is brought under the statute, such effect cannot be given to it by evidence aliunde.⁶⁰

A release, containing no reservation, operates to discharge all the joint tortfeasors; but, where the instrument expressly reserves the right to pursue the others, it is not technically a release, but a covenant not to sue, and they are not discharged.⁶¹

A release under seal of certain defendants from liability under a judgment for fraud and deceit, expressly reserving the plaintiff's rights against the other defendants, does not discharge the latter. A release with such a reservation will be construed as a covenant not to further pursue the party who has been released. Upon the rendition of the judgment defendant's obligation to plaintiff was transferred technically into a contract liability to which sections 230 and 233 of the Debtor and Creditor Law apply.⁶²

A creditor, seeking in a court of equity to maintain his right to enforce securities given to him, does not have his equitable rights cut off by taking a judgment by confession against one of the joint debtors.⁶³ A judgment against several for negligence is a joint obligation as to relatives of one of several joint debtors.⁶⁴ So is the statutory joint and several liability of stockholders.⁶⁵ But the liability of a principal and surety is not "joint" within the meaning of section 230 of the Debtor and Creditor Law.⁶⁶

G. Satisfaction of obligation.

The satisfaction of the cause of action is to be distinguished from a release of one debtor from liability. If the cause of action is satisfied there remains nothing for any of the debtors to pay.⁶⁷ The satisfaction of a claim by one joint tortfeasor is a bar to an action against another; and a partial satisfaction by one is proper to be shown by another in mitigation of damages.⁶⁸ Where a plaintiff recovers a verdict

60. *Abbott v. Royce*, 20 St. Rep. 694, 3 N. Y. Supp. 503.

61. *Gilbert v. Finch*, 173 N. Y. 455; *Walsh v. N. Y. C. & H. R. R. Co.*, 204 N. Y. 58; *Commercial National Bank v. Taylor*, 64 Hun, 499, 46 St. Rep. 417, 19 N. Y. Supp. 533. See, also, *Warner v. Brill*, 195 App. Div. 64, 185 N. Y. Supp. 586. Compare *Newman v. Stuckey*, 10 N. Y. Supp. 760, 32 St. Rep. 876.

62. *Mecum v. Becker*, 164 App. Div.

852, 149 N. Y. Supp. 974; aff'd, 215 N. Y. 691.

63. *Remington Paper Co. v. O'Dougherty*, 36 Hun, 79; aff'd, 99 N. Y. 673.

64. *Irvine v. Milbank*, 14 Abb. (N. S.) 408; aff'd, 15 Abb. (N. S.) 378.

65. *Harries v. Platt*, 21 Hun, 132.

66. *Matter of Browne*, 35 Misc. 363, 71 N. Y. Supp. 1034.

67. *Coonley v. Wood*, 36 Hun, 559.

68. *Knapp v. Roche*, 94 N. Y. 329.

against two defendants jointly liable for different amounts, if the one against whom the larger recovery is had satisfies the judgment against him, such satisfaction operates to release the other debtor, except so far as the sheriff might be entitled to fees by reason of an actual levy on the property of the latter.⁶⁹

H. Partnership.

After the dissolution of a partnership, a creditor of the firm can release one of the partners from liability without releasing the others.⁷⁰ But, if the partnership has not been dissolved, the situation is not within the purview of the statute. Where the plaintiff, in an action brought against the members of a co-partnership which had never been dissolved, to recover rent of premises hired by them, executes and delivers to one of the co-partners, in consideration of his appearing at the trial, a release under seal of and from all claims against him individually and as co-partner upon the obligation in suit, such release operates to discharge the other co-partners.⁷¹

A release executed by a person who had recovered a judgment against all of the members of the firm upon a partnership transaction to one of the judgment debtors, under section 230, applies to the interest in the firm assets as well as to the individual property of such judgment debtor, and after the execution of such release an assignee of the judgment taking the same with knowledge of the release is not entitled to have a receiver appointed of the property acquired.⁷² A judgment in favor of the defendant, in an action against one of the members of a firm upon a partnership debt, is not a bar to a subsequent action upon such claim against both co-partners, unless a release is executed by the creditor to the partner making a separate composition of a firm debt, such partner remains liable for the whole debt in an action to recover it.⁷³

69. *Breslin v. Peck*, 38 Hun, 623. See, also, *Lord v. Tiffany*, 98 N. Y. 412; *Conde v. Hall*, 92 Hun, 335, 37 N. Y. Supp. 411.

70. *Seifke v. Minden*, 40 Misc. 631, 83 N. Y. Supp. 71; *Kaplan v. Shapiro*, 53 Misc. 606, 103 N. Y. Supp. 922.

71. *Finch v. Simon*, 61 App. Div. 139, 70 N. Y. Supp. 361.

72. *Hunter v. Hunter*, 67 App. Div. 470, 73 N. Y. Supp. 886.

73. *McCormick v. Barton*, 19 Misc. 625, 44 N. Y. Supp. 393.

JOINT TENANTS. ACTION BY.

See REAL PROPERTY, PROVISIONS RELATING TO.

JUDGMENT, ACTION ON.

- A. Civil Practice Act, § 484. Limitation of action upon judgment.
- B. Purpose of statute.
- C. What constitutes an action on a judgment.
- D. Judgments within limitation.
- E. Assignee or representative of judgment creditor.
- F. Foreign judgments.
- G. Judgment of courts not of record.
- H. Effect of failure to procure consent of court.
- I. When consent granted.
- J. Computation of ten years' time.
- K. Defenses to action.

A. Civil Practice Act, § 484. Limitation of action upon judgment.

Except in a case where it is otherwise specially prescribed in this act, an action upon a judgment for a sum of money, rendered in a court of record of the State, cannot be maintained between the original parties to the judgment, unless, either

1. Ten years have elapsed since the docketing of such judgment, or,
2. It was rendered against the defendant by default for want of an appearance or pleading and the summons was served upon him otherwise than personally; or
3. The court in which the action is brought has previously made an order granting leave to bring it. Notice of the application for such an order must be given to the adverse party, or the person proposed to be made the adverse party, personally, unless it satisfactorily appears to the court that personal notice cannot be given with due diligence, in which case notice may be given in such a manner as the court directs.

B. Purpose of statute.

The purpose of the statute is to prevent a multiplicity of suits and the accumulation of costs.¹ A party may not further vex another with suits upon the cause of action he has once established, or upon the judgment.² But the only statutory restrictions to an action upon a judgment for a sum of money, rendered in a court of record of this State, are contained in section 484 of the Civil Practice Act.³ A plaintiff may revive his rights by a suit upon the judgment which he may prosecute with the permission of the court, and having obtained a new judgment he is in the same position that he was before the ten years began to run.⁴

1. Harris v. Clark, 65 Hun, 361, 20 N. Y. Supp. 232, 47 St. Rep. 780.

2. Badlam v. Springsteen, 41 Hun, 162.

3. Saxe v. Peck, 139 App. Div. 419,

124 N. Y. Supp. 14.

4. Importers and Traders' National Bank of N. Y. v. Quackenbush, 143 N. Y. 567.

C. What constitutes an action on a judgment.

A proceeding relating to joint debtors is not an action on a judgment, and hence is not within the limitations of this statute.⁵ Nor is an action in the nature of a creditor's bill.⁶ The setting up of a judgment as a counterclaim is not an action upon the judgment within the meaning of this section. A judgment may be set up by way of counterclaim, although an action could not be maintained thereon.⁷

D. Judgments within limitation.

Apart from any statutory regulation, a plaintiff may sue upon a final order made in a special proceeding establishing of record the fact of an indebtedness to him, and nothing in this section, declaring conditions under which action upon a judgment rendered by a court of record of this State may be maintained, suggests that a party so suing must find his right within the terms of said section, which is restrictive merely upon the common-law right to sue upon a judgment obtained within the jurisdiction at any time and at once.⁸

Where a defendant has been permitted to open a judgment recovered against him by default and defend, the judgment to stand as security, and the action has been thereafter referred, no action upon such judgment can be maintained after the death of the defendant against his administrator, as the judgment is not final nor enforceable by execution, and the cause of action is still open to defenses.⁹

It is only a judgment for a sum of money that can be sued upon under the provisions of this section. The fact that it is necessary to bring an action, not only to establish the right of recovery, but to fix the amount thereof, shows that the judgment in question is not embraced within the provisions of this section.¹⁰

A final decree in an action for divorce which provides for the payment of alimony by installments is a judgment for the payment of money within the meaning of section 484 of the Civil Practice Act.¹¹

5. *Baldwin v. Roberts*, 30 Hun, 163; *Lane v. Salter*, 51 N. Y. 1.

6. *Catlin v. Dougherty*, 12 How. Pr. 457.

7. *Wells v. Henshaw*, 3 Bosw. 625; *Cornell v. Donovan*, 3 St. Rep. 261; *Clark v. Story*, 29 Barb. 295.

8. *Fenlon v. Paillard*, 46 Misc. 151, 93 N. Y. Supp. 1101.

9. *MacDougall v. Hoes*, 27 Misc. 590, 58 N. Y. Supp. 209.

10. *Matter of Van Beuren*, 33 App. Div. 158, 53 N. Y. Supp. 349.

11. *Farquhar v. Farquhar*, 172 App. Div. 242, 158 N. Y. Supp. 194; *Shepherd v. Shepherd*, 51 Misc. 418, 100 N. Y. Supp. 401.

E. Assignee or representative of judgment creditor.

The statute affects only an action between the original parties to the judgment, and an assignee thereof may bring an action thereon without procuring the consent of the court, although ten years have not elapsed since the docketing of the judgment.¹² Nor does the statute affect an action brought by the personal representative of one in whose favor a judgment has been rendered.¹³ One who has acquired title to a judgment of a court of this State, by virtue of an assignment from a foreign administrator of the judgment creditor, may maintain an action thereon in his own name without first obtaining leave of the court to sue.¹⁴

F. Foreign judgments.

The statute does not apply to a judgment rendered in a foreign state. The provisions of section 484 do not apply to a judgment rendered in a Federal court, sitting in New York, but an action may be maintained thereon as if it were a foreign judgment.¹⁵ A judgment of the United States Circuit Court, though docketed in a County Court, still remains a judgment of that court, and an action can be brought thereon without first obtaining leave from the court.¹⁶

G. Judgment of courts not of record.

Section 484 of the Civil Practice Act applies only to judgments recovered in courts of record.¹⁷ A somewhat similar result is reached by section 320 of the Justice Court Act, which forbids the granting of costs in an action on a judgment of a justice of a peace within five years after the rendering thereof, except in certain cases.¹⁸ Where a justice's judgment has been docketed in the County Court, it has been thought leave to sue must be obtained from that court.¹⁹

12. *Saxe v. Peck*, 139 App. Div. 419, 124 N. Y. Supp. 14; *McButt v. Hirsch*, 4 Abb. 441; *Tufts v. Braisted*, 1 Abb. 83; *Springsteen v. Gillett*, 30 Hun, 265; *Knapp v. Valentine*, 67 St. Rep. 582, 24 Civ. Pro. 331, 33 N. Y. Supp. 712; *citing Smith v. Britton*, 45 How. Pr. 428; *Wheeler v. Dakin*, 12 How. Pr. 533; *Hedges v. Conger*, 10 St. Rep. 42; *Carpenter v. Butler*, 29 Hun, 251; *Freeman v. Dutcher*, 15 Abb. N. C. 431.

13. *Koenig v. Wagener*, 126 App. Div. 772, 111 N. Y. Supp. 116; *Wheeler v. Dakin*, 12 How. Pr. 537; *Smith v.*

Button, 45 How. Pr. 428; *aff'd*, 2 T. & C. 498.

14. *Carpenter v. Butler*, 29 Hun, 251.

15. *Morton v. Palmer*, 14 N. Y. Supp. 912, 39 St. Rep. 236, 21 Civ. Pro. 94.

16. *Goodyear Vulcanite Co. v. Friselle*, 22 Hun, 174.

17. *Harris v. Steiner*, 30 Misc. 624, 62 N. Y. Supp. 752.

18. See *Harris v. Clark*, 65 Hun, 361, 47 St. Rep. 780, 20 N. Y. Supp. 232.

19. *Lyon v. Manly*, 32 Barb. 51.

H. Effect of failure to procure consent of court.

The defendant in an action upon a judgment cannot raise the question as to whether leave to sue should have been obtained under this section before bringing the action, where that defense was not raised by demurrer or answer. A failure so to take objection waives it.²⁰ The objection cannot be raised for the first time at the trial where the defendant has omitted to plead the failure to procure the consent.²¹ Where it is admitted that the object of an action instituted in plain violation of section 484 upon a judgment by default was to increase the amount of the judgment so that supplementary proceedings could be instituted thereunder, the entry of the second judgment is unauthorized, but the defendant has no standing in court except to move to open his default.²² The proper remedy, where an action is brought without leave, has been said to be a motion to set aside the summons and complaint. On such a motion, leave to sue should not be granted *nunc pro tunc*, but plaintiff should be left to a motion for leave,²³ although, in a proper case, leave to bring the action may be given *nunc pro tunc*.²⁴

I. When consent granted.

Where there is a conflict of evidence as to amount of a judgment the court will allow a suit to be brought.²⁵ But leave to sue upon a judgment should not generally be granted until it is about to expire, for it does not serve to protect any right of the judgment creditor, and is prejudicial to the debtor in that he will be liable for additional costs. But where a defendant is sued for conversion of goods the court may grant him leave to bring an action to offset a prior judgment in his favor against the plaintiff on the acceptance of a draft accompanied by a bill of lading for the same goods, or to plead such judgment as a counterclaim to the action for

20. *Brush v. Hoar*, 14 Civ. Pro. 297; *German Savings Bank v. Carrington*, 14 Wkly. Dig. 475.

Setting aside judgment.—The bringing of an action upon a judgment without obtaining leave of the court is not a mere irregularity which is waived by the omission of the defendant to raise the objection, but the omission to obtain such leave renders the judgment invalid, and it will be set aside upon the application of an administrator of the deceased judgment creditor sixteen years after its entry. *Farish v. Austin*, 25 Hun, 430.

21. *Knapp v. Valentine*, 67 St. Rep. 582, 33 N. Y. Supp. 712, citing *German Savings Bank v. Carrington*, 14 Wkly. Dig. 475; aff'd, 89 N. Y. 632; *Farish v. Austin*, 25 Hun, 430.

22. *Myers v. Klein*, 95 Misc. 546, 159 N. Y. Supp. 877.

23. *Finch v. Carpenter*, 5 Abb. Pr. 225.

24. *Church v. Van Buren*, 55 How. Pr. 489.

25. *Montrait v. Hutchins*, 49 How. Pr. 105. See *Van Etten v. Hasbrouck*, 4 St. Rep. 803, 806.

conversion.²⁶ If the former judgment is invalid, the leave will be denied.²⁷ The leave, if granted, may allow a suit in a court other than that in which the judgment was obtained.²⁸

J. Computation of ten years' time.

The ten years' period mentioned in the statute runs from the docketing of the judgment, not from the recovery thereof.²⁹

K. Defenses to action.

A judgment in favor of a plaintiff, upon an issue raised by defendant's answer, is conclusive in an action on such judgment.³⁰ It is no defense to an action upon a judgment that defendants were induced to consent to its entry by a promise that it should not be used against them.³¹

26. *Rando v. National Park Bank of New York*, 137 App. Div. 190, 121 N. Y. Supp. 1048.

27. *Force v. Gower*, 23 How. Pr. 294; *Hanover Fire Ins. Co. v. Tomlinson*, 3 Hun, 630; *Fiske v. Anderson*, 33 Barb. 71.

28. *National Mech. Bank v. Usher*,

1 Sweeny, 403.

29. *Underhill v. Phillips*, 30 App. Div. 238, 51 N. Y. Supp. 801.

30. *Patrick v. Shaffer*, 94 N. Y. 423.

31. *Greene v. Hallenbeck*, 32 Hun, 469. See, however, *Richardson v. Trimble*, 38 Hun, 409.

JUDGMENT CREDITOR'S ACTION.*

ARTICLE I.

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ARTICLE II.

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 - 2. Civil Practice Act, § 1190. To what county execution must have issued.
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* For a further discussion of the matters referred to in this chapter, see Weed's Practical Real Estate Law; Thomas on Mortgages; Collier on Bankruptcy.

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ARTICLE I.

INTRODUCTORY.

A. Definition. Civil Practice Act, § 7, subd. 6.

A "judgment creditor's action" is an action brought by a judgment creditor to aid the collection of a judgment for a sum of money or directing the payment of a sum of money.¹

B. Classes of judgment creditors' action.

There seem to be six actions, more or less similar, which may be said to be "judgment creditors' actions."

First.—The action authorized by sections 1185–1888 of the Civil Practice Act, whereby a judgment creditor who has secured a judgment against several persons jointly liable brings a subsequent action against one or more of such debtors who were not served with summons in the original action. This action is discussed in another chapter of this work.²

Second.—The action authorized by sections 1189–1196 of the Civil Practice Act for the discovery of assets of the judgment debtor and the satisfaction of the judgment.

Third.—The remedy in equity, who has not been superseded by the Civil Practice Act, which may be invoked to aid a judgment creditor.

Fourth.—An equitable right of action by a judgment creditor who has issued an execution in aid of the execution.

Fifth.—The action authorized by sections 922 and 943 of the Civil Practice Act in aid of a warrant of attachment.

Sixth.—The action authorized by section 19 of the Personal Property Law and section 268 of the Real Property Law, whereby an executor, administrator, receiver, assignee or trustee is authorized to disaffirm an act done by the deceased or insolvent person whom he represents, or a creditor, in some cases, is authorized to maintain an action to set aside a fraudulent transfer of a deceased without first procuring a judgment on his claim.

C. Effect of Bankruptcy Act.

The number of judgment creditor actions brought in the State courts was very materially lessened by the passage of the Bankruptcy Act by Congress in 1898. That act, section 67,

1. An action by a receiver in supplementary proceedings has been held not to be a judgment creditor's action within the meaning of the statute.

Foley v. Ronalds, 190 App. Div. 93, 179 N. Y. Supp. 227.

2. See Joint Debtors.

subdivision e, provides, among other things, that all conveyances, transfers or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory or District in which such property is situate, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt. In 1903, however, the section was amended by adding the words, "For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction." This amendment confers jurisdiction to set aside fraudulent conveyances in a large class of cases upon the State courts. The effect of the amendment is considered, Collier on Bankruptcy (12th ed.), 1072.

The State courts have concurrent jurisdiction with the Federal courts of an action under the bankruptcy acts to recover property transferred to a creditor by an insolvent as a preference, or the value of such property, and, when an action is brought in the State court, the trial and procedure in the action are to be governed by the laws of the State.³

D. County Court.

The County Court has no jurisdiction, even by consent of the parties, of an action to set aside certain transfers of real estate alleged to have been made in fraud of creditors, where the plaintiff asks for the appointment of a receiver and for an accounting of moneys and the judgment sought will not affect all of the defendants in the same way.⁴

ARTICLE II.

WHEN ACTION CAN BE MAINTAINED.

A. Action under Civil Practice Act.

1. Civil Practice Act, § 1189. Judgment creditor's action for discovery and satisfaction.

When an execution against the property of a judgment debtor issued out of a court of record, as prescribed in the next section, has been returned wholly or partly unsatisfied, the judgment creditor may maintain an action against

3. *Stern v. Mayer*, 99 App. Div. 427,
91 N. Y. Supp. 292.

4. *Ertrachter v. Locust Building Co.*,
102 Misc. 368, 169 N. Y. Supp. 879.

the judgment debtor and any other person to compel the discovery of any thing in action or other property belonging to the judgment debtor, and of any money, thing in action or other property due to him, or held in trust for him; to prevent the transfer thereof or the payment or delivery thereof to him or to any other person; and to procure satisfaction of the plaintiff's demand. Where the execution was issued as prescribed in section eleven hundred and nine of this act, and a defendant not summoned in the original action is made a defendant in an action brought under this section, personal property owned by him jointly with the defendants summoned or with any of them may be applied to the satisfaction of the plaintiff's demand as prescribed in this article.⁵

2. Civil Practice Act, § 1190. To what county execution must have issued.

To entitle the judgment creditor to maintain an action as prescribed in the last section, the execution must have been issued as follows:

1. If, at the time of the commencement of the action the judgment debtor is a resident of the State, to the sheriff of the county where he resides.
2. If he is not then a resident of the State, to the sheriff of the county where he has an office for the regular transaction of business in person; or, if he has no such office within the State, to the sheriff of the county where the judgment-roll is filed, unless the execution was issued out of a court other than the court in which the judgment was rendered; in which case, it must have been issued to the sheriff of the county where a transcript of the judgment is filed.

3. When action lies.

A creditor's bill lies to obtain discovery from debtors of certain book accounts concealed, withheld and transferred in fraud of creditors, although the same relief may be obtained by supplementary proceedings.⁶ The creditor, after the remedy against the tangible property of the debtor has been exhausted by the return of an execution unsatisfied, can come into equity for the purpose of obtaining a discovery and payment out of the property of the debtor, which could not otherwise be reached, and that it is the duty of the court to extend the remedy to every case coming within the spirit and intent of the statutory provision.⁷

4. Necessity of judgment.

The judgment creditor's action outlined in sections 1189-1196 cannot be maintained by one who is not a judgment creditor; a mere contract creditor cannot maintain the action.⁸ Moreover, he should have issued an execution on

5. Section "eleven hundred and nine."—The reference in this statute to section eleven hundred and nine seems to be an error; section eleven hundred and ninety-nine was doubtless intended.

6. *Hart v. Albright*, 18 N. Y. Supp. 718.

7. *Gleason v. Gage*, 7 Paige, 121, citing *Hadden v. Spader*, 20 Johns. 554.

8. *Cornell v. Savage*, 49 App. Div. 429, 63 N. Y. Supp. 540; *National Bank v. Wetmore*, 42 Hun, 359.

Judgment declaring debt a lien.—The rule which precludes a court of

the judgment and had the same returned unsatisfied.⁹ He should have procured the judgment at the time of the commencement of the action, for the subsequent rendering of a judgment in his favor will not avail him.¹⁰ An action brought by a creditor before judgment to reach the equitable assets of his debtor, where his insolvency has been shown, cannot be maintained.¹¹ The statute does not authorize an action on a judgment rendered in a United States court.¹² Where a creditor has recovered a judgment in another State, his right to maintain a creditor's action in this State does not accrue until a recovery of judgment here.¹³

5. Judgment debtor not served with process.

It is the rule that the action cannot be maintained against a judgment debtor not served with process.¹⁴ Since a judgment obtained by service by publication upon a non-resident can, under section 520 of the Civil Practice Act, be enforced only against the property which has been levied upon, by virtue of the warrant of attachment, at the time the judgment is entered, a creditor's bill will not lie upon such a judgment, since an execution as required under section 1189, as a condition precedent to the right to maintain the action, cannot be issued.¹⁵

6. Necessity of return of execution.

The return of an execution unsatisfied is essential to give the court jurisdiction of a judgment creditor's action;¹⁶ an

equity from entertaining jurisdiction of an action to set aside a fraudulent conveyance at the suit of a contract creditor renders a judgment erroneous so far as it declares such a debt a lien upon the property. *Carpenter v. Osborn*, 102 N. Y. 552.

9. See, *infra*, subdivision 6.

10. *Wiggins v. Armstrong*, 2 Johns. Ch. 144; *Brinkerhoff v. Brown*, 4 Johns. Ch. 671; *Williams v. Brown*, 4 Johns. Ch. 682; *Moran v. Dawes*, Hopk. Ch. 365; *Lawton v. Levy*, 2 Edw. 197.

11. *Briggs v. Oliver*, 68 N. Y. 336.

12. *Tarbell v. Griggs*, 3 Paige, 207; *Davis v. Bruns*, 23 Hun, 648.

13. *Weaver v. Haviland*, 68 Hun, 376, 52 St. Rep. 311, 22 N. Y. Supp. 1012; *aff'd*, 142 N. Y. 534.

14. *Galle v. Todd*, 21 Civ. Pro. 152, distinguishing *Bates v. Plonsky*, 2 Civ. Pro. 389.

15. *Capital City Bank v. Parent*, 20 Civ. Pro. 38, 34 St. Rep. 826, 12 N. Y. Supp. 234.

16. *Adee v. Bigler*, 81 N. Y. 849; *Ester v. Wilcox*, 67 N. Y. 264; *Allyn v. Thurston*, 53 N. Y. 622; *Geery v. Geery*, 63 N. Y. 252; *Crippen v. Hudson*, 13 N. Y. 161; *Voorhees v. Howard*, 4 Abb. Ct. App. Dec. 504; *Beardsley v. Foster*, 36 N. Y. 561; *Forbes v. Woller*, 25 N. Y. 434; *Sullivan v. Miller*, 106 N. Y. 636; *Lichtenburgh v. Hertfelder*, 103 N. Y. 302; *National, etc. v. Wetmore*, 42 Hun, 359; *Andrew v. Vanderbilt*, 37 Hun, 468; *Bowe v. Arnold*, 18 Wkly. Dig. 326; *Gardner v. Lansing*, 28 Hun, 415; *Genesee*

execution issued after suit brought is insufficient.¹⁷ It is the general rule that a creditor's bill cannot be maintained until an execution has been issued and returned unsatisfied. And it has become the settled rule in this State not to dispense with these preliminaries, although it may be made to appear by evidence that no benefit could result to the creditors from them.¹⁸

An action to satisfy a judgment against a defendant out of the proceeds of a life insurance policy issued to him cannot be regarded as a creditor's action, where it appears from the complaint that an execution on the judgment is still outstanding.¹⁹ But if the execution is returned after an attempt in good faith to collect, the action may be commenced before the expiration of sixty days from the date of its issue.²⁰ And the action may be commenced the same day that the execution is returned, so long as it is after the return.²¹ A levy under an execution, after the death of a judgment debtor, is not sufficient to sustain a creditor's suit on return of the execution unsatisfied.²²

7. Proper county for execution.

In order to maintain a judgment creditor's action under the Civil Practice Act, the judgment creditor must have issued an execution to the proper county as required by section 1190.²³ The action cannot be maintained unless execu-

River, etc. v. Mead, 18 Hun, 303; Kerr v. Dilderie, 26 Wkly. Dig. 70; Jacobstein v. Abrams, 41 Hun, 272; Briggs v. Van Buren, 19 Wkly. Dig. 216; Albany City, etc. v. Gaynor, 67 How. Pr. 421; Taylor v. Bowker, 111 U. S. 115.

Trust income.—"A creditor of the beneficiary of a trust, created by a person other than the beneficiary, to receive the rents and profits of real and personal estate, cannot maintain an action under section 98, to reach the surplus of such rents beyond the sum necessary for the education and support of the beneficiary, unless he has recovered a judgment against such beneficiary and an execution issued thereon has been returned wholly or partly unsatisfied. The fact that the beneficiary of the trust is without the jurisdiction of the court will not excuse the creditor's omission to

obtain a judgment and issue an execution." Dittmar v. Gould, 60 App. Div. 94, 69 N. Y. Supp. 708. See, also, Sherman v. Tucker, 60 App. Div. 127, 69 N. Y. Supp. 850.

17. McCullough v. Colby, 5 Bosw. 477.

18. Jewett v. Maytham, 59 Misc. 56, 59, 109 N. Y. Supp. 1000.

19. Marks v. Equitable Life Assur. Soc., 109 App. Div. 675, 96 N. Y. Supp. 551.

20. Kanuth v. Bassett, 34 Barb. 31; Billhofer v. Henbach, 15 Abb. 143; Field v. Hunt, 24 How. 463; Forbes v. Waller, 25 N. Y. 430; Renaud v. O'Brien, 35 N. Y. 99.

21. Murtha v. Curley, 90 N. Y. 372.

22. Prentiss v. Bowden, 8 Misc. 420, 60 St. Rep. 444, 28 N. Y. Supp. 666; aff'd, 145 N. Y. 342.

23. See Maher v. Carman, 38 N. Y. 26.

tion has been issued to the proper county.²⁴ The plaintiff is not excused from showing that the execution was issued as required by section 1190 merely because he is a receiver appointed in supplementary proceedings.²⁵ Where a debtor against whom a judgment has been entered in one county resides in a foreign country and has no office in this State for the regular transaction of business in person the judgment creditor by filing a transcript of the judgment in another county and by issuing execution thereon, which is returned unsatisfied, is not entitled to maintain a judgment creditor's action in the latter county.²⁶ A judgment creditor's action is maintainable to set aside as fraudulent a conveyance of land in a county in which the judgment is not docketed.²⁷

8. Exhaustion of effort to collect judgment.

Under section 1189 authorizing suit by a creditor to reach assets of his debtor in possession of third persons after the return unsatisfied of an execution, an action may be commenced to set aside a fraudulent conveyance by a judgment debtor on the return of an unsatisfied execution, without further attempt to collect the judgment.²⁸ Proceedings supplementary to execution are not a necessary preliminary to the action.²⁹ A judgment creditor of a *cestui que trust* may maintain an action to charge the trust property with the payment of his judgment without alleging that the receiver of the property of the judgment debtor, appointed in proceedings supplementary to execution, instituted upon the judgment, has refused to bring such action.³⁰

9. Property which can be reached.

Sections 1191 *et seq.* of the Civil Practice Act contain provisions as to the property which may be reached in the proceeding.³¹ The scope of the action seems not to be limited

24. *Genesee River Nat. Bank v. Mead*, 18 Hun, 303.

25. *Pendleton v. Friedman*, 135 App. Div. 420, 119 N. Y. Supp. 994. *Compare Hyatt v. Dusenbury*, 12 Civ. Pro. 132.

26. *Demuth v. Kemp*, 159 App. Div. 422, 144 N. Y. Supp. 690; *aff'd*, 216 N. Y. 757.

27. *Lanahan v. Caffrey*, 40 App. Div. 124, 57 N. Y. Supp. 724.

28. *Baker v. Potts*, 73 App. Div. 29,

76 N. Y. Supp. 406.

29. *Pope v. Cole*, 55 N. Y. 124. A creditor's suit may be maintained while supplementary proceedings are pending. *Taylor v. Persee*, 15 How. Pr. 417; *Gere v. Dibble*, 17 How. Pr. 31; *Bennett v. McGuire*, 5 Lans. 183.

30. *Ullman v. Cameron*, 105 App. Div. 159, 93 N. Y. Supp. 976.

31. See, *infra*, Art. VIII, Judgment and Effect.

to personal property, and property not specifically set forth in the complaint may be recovered.³²

Where a will creates a trust in personal property during the life of testator's wife, and directs the trustees upon the wife's death to divide the property equally and pay it to his son and daughter if they are then living, there is a gift to the son of a contingent future interest, which is "property" within the meaning of section 1189, and it may be reached by a judgment creditor of the son through a suit in equity.³³

The rule that a judgment creditor seeking to reach personal property which has been conveyed by the debtor must commence his action while the execution is in the hands of the sheriff does not apply where the property sought to be subjected is a chose in action, under section 1189.³⁴

B. Action under equity powers of court.

1. General jurisdiction of equity.

If a judgment debtor has made a fraudulent transfer of his property, the creditor has three remedies, any one of which he may pursue.³⁵ He may proceed to sell the real estate under his judgment, and the purchaser will have the right to impeach the fraudulent conveyance in an action at law to recover the premises.³⁶ Or he may bring an action in equity before the return of the execution in aid of the execution.³⁷ Or he may bring a suit in equity to set aside the fraudulent conveyance.³⁸ It is not essential to an action by a

32. *Koellhoffer v. Peterson*, 82 Misc. 180, 143 N. Y. Supp. 353.

33. *National Park Bank of New York v. Billings*, 144 App. Div. 536, 129 N. Y. Supp. 846; *aff'd*, 203 N. Y. 556.

34. *Delvalle v. Hyland*, 15 N. Y. Supp. 901, 40 St. Rep. 924.

35. *Bergen v. Carman*, 79 N. Y. 153; *Erickson v. Quinn*, 15 Abb. (N. S.) 166.

36. **Both remedies.**—The plaintiff, pending the action, and without waiving or abandoning the lien of his judgment, may proceed to sell the debtor's lands on execution under his judgment; having done so, he may still proceed with the creditor's action to obtain a judgment removing the cloud upon title. *Erickson v. Quinn*, 15 Abb. Pr. (N. S.) 166; memorandum, 50 N. Y. 697.

37. See, *infra*, Art. II-C, Action in

aid of execution.

38. "There are two classes of cases where a plaintiff is permitted to come into this court for relief, after he has proceeded to judgment and execution at law without obtaining satisfaction of his debt. In one case the issuing of the execution gives to the plaintiff a lien upon the property, but he is compelled to come here for the purpose of removing some obstruction fraudulently or inequitably interposed to prevent a sale on the execution. In the other, the plaintiff comes here to obtain satisfaction of his debt out of property of the defendant, which cannot be reached by execution at law. In the latter case his right to relief here depends upon the fact of his having exhausted his legal remedies, without being able to obtain satisfaction of his judgment." *Beck v. Burdett*, 1 Paige Ch. 305.

judgment creditor to set aside a fraudulent transfer by his debtor, that an execution should be outstanding at the time the creditor's suit is brought, but it is enough if execution has been returned unsatisfied.³⁹

Judgment creditors having a lien on land which their creditors have fraudulently transferred may enforce it by a sale of the land under execution, or sue in equity to have the transfers made declared void and to compel an accounting by the fraudulent transferees to the extent of the judgment.⁴⁰

It is a very familiar head of equity jurisdiction to set aside, at the suit of the judgment creditor, conveyances by the debtor, which have been interposed to defraud such creditor, and which, if allowed to stand, would embarrass his remedy.⁴¹ The power of a court of equity is not necessarily limited by provisions of the Civil Practice Act in reference to the judgment creditors' actions, nor is it limited to actions involving a question of fraud.⁴² But, if the object of the suit is to reach choses of action or equitable assets, it has been thought that the remedy is limited by the statute.⁴³

Where in a suit to set aside transfers of property upon the ground that they were made to hinder and delay creditors, it appears that the action is not brought in good faith, that the alleged fraudulent grantor is the real party in interest seeking to set aside the transfers made to his wife and children and devoted by them to the payment of his creditors, he now being estranged from them, and that the transfer in no way injured the interests of his creditors, the complaint should be dismissed.⁴⁴

2. Necessity of lien.

In order to maintain an action to set aside a fraudulent conveyance of real property, the creditor bringing the action must first procure a judgment on his claim so that he would

39. *Haswell v. Lincks*, 87 N. Y. 637; *Bowe v. Arnold*, 31 Hun, 256.

40. *Hillyer v. LeRoy*, 179 N. Y. 369; *Holland v. Grote*, 193 N. Y. 262.

41. *Hendricks v. Robinson*, 2 Johns. Ch. 283; *McCullough v. Colby*, 5 Bosw. 477; *North Am. Fire Ins. Co. v. Graham*, 5 Sandf. 197; *Edmeston v. Hyde*, 1 Paige, 637.

42. *Chautauqua County Bank v. White*, 6 N. Y. 236; s. c., 19 N. Y. 369; *National Tradesmen's Bank v. Wetmore*, 124 N. Y. 241; *Koechl v. Leibinger & Oehm Brewing Co.*, 26

App. Div. 579, 50 N. Y. Supp. 568; *Creteau v. Foote & Thorn Glass Co.*, 54 App. Div. 168, 66 N. Y. Supp. 370; *Stetson v. Hopper*, 60 App. Div. 277, 70 N. Y. Supp. 170; *Hubbard v. United Wireless Telegraph Co.*, 62 Misc. 538, 115 N. Y. Supp. 1016.

43. *Del Valle v. Hyland*, 15 N. Y. Supp. 901, 40 St. Rep. 924; *Fox v. Moyer*, 54 N. Y. 125; *Shaw v. Dwight*, 27 N. Y. 244.

44. *Lynch v. Jones*, 179 App. Div. 613, 166 N. Y. Supp. 1047.

have a lien against the property.⁴⁵ A simple contract creditor cannot maintain the action.⁴⁶ The debt must be ascertained by judgment, even though the debtor died insolvent.⁴⁷ A judgment obtained against the personal representatives of the deceased is not a lien on the land, and an action cannot be maintained on it to set aside a fraudulent conveyance.⁴⁸

The necessity for docketing the judgment cannot be dispensed with by an averment that the defendant has no real estate.⁴⁹ But it is not necessary that the judgment should exist prior to the alleged fraudulent transfer.⁵⁰ Where more than ten years have elapsed since the docketing of the judgment, a new lien upon the land must have been acquired, by the levy of an execution thereon, to enable a judgment creditor to maintain the action.⁵¹ An action in the nature of a creditor's suit cannot be maintained by a creditor of an extinct corporation, to reach funds of the corporation, without a valid judgment and execution, or without first exhausting his remedy against the corporation.⁵² But if a corporation has been dissolved, creditors may sue a stockholder without a judgment against the corporation.⁵³

3. Necessity of return of execution.

Although the statutory provisions may not apply strictly to an equitable action by a judgment creditor to set aside a fraudulent conveyance, and the remedy may be available when circumstances render such course of action impossible,⁵⁴ it is the general rule, applicable except under unusual circumstances, that the return of an execution unsatisfied is a prerequisite to the action.⁵⁵ Equitable assets can only be

45. *Sturges v. Vanderbilt*, 73 N. Y. 384; *Geery v. Geery*, 63 N. Y. 252; *Lichtenberg v. Hertfelter*, 5 Civ. Pro. 426; *Adsit v. Butler*, 87 N. Y. 585; *Hurwitz v. Hurwitz*, 10 Misc. 353, 63 St. Rep. 415, 31 N. Y. Supp. 25; *National Bank v. Wetmore*, 42 Hun, 359; *Bank of Rochester v. Emerson*, 10 Paige, 115.

46. *Spelman v. Freedman*, 130 N. Y. 421; *Viall v. Dater*, 13 Wkly. Dig. 54; *Evans v. Hill*, 18 Hun, 464; *Bishop v. Halsey*, 3 Abb. 400; *Cropsey v. McKinney*, 30 Barb. 47; *Schnitzer v. Cohen*, 7 Hun, 665; *Reubens v. Joel*, 13 N. Y. 488; *N. Y. Ice Co. v. N. W. Ins. Co.*, 23 N. Y. 357; *Dunlevy v. Tallmadge*, 32 N. Y. 457; *Conner v. Webber*, 5 Wkly. Dig. 457.

47. *Barnett v. Gould*, 27 Hun, 366; *Allen v. Thurston*, 53 N. Y. 622; *Estes v. Wilcox*, 67 N. Y. 264.

48. *Lichtenburgh v. Herdfelder*, 103 N. Y. 302.

49. *Youngs v. Morrison*, 10 Paige, 325.

50. *National Bank of Rondout v. Dreyfus*, 14 Wkly. Dig. 160.

51. *Evans v. Hill*, 14 Hun, 464.

52. *Sturges v. Vanderbilt*, 73 N. Y. 384.

53. *Hetzel v. Tannehill Ins. Co.*, 4 Abb. N. C. 40.

54. See the following subdivision.

55. *Sturges v. Vanderbilt*, 73 N. Y. 384; *Adsit v. Butler*, 87 N. Y. 585; *National Tradesmen's Bank v. Wetmore*, 124 N. Y. 241; *Frothingham v.*

reached after the remedy at law has been exhausted, the evidence of which is a return of execution unsatisfied.⁵⁶

Creditors seeking the aid of a court of equity to reach equitable assets of their debtor in satisfaction of their claims must first exhaust their legal remedies, according to the laws of this State, by the recovery of a judgment in one of its courts and the return of execution thereon unsatisfied, unless there are facts constituting a sufficient excuse for the failure so to do, which facts must be set forth in the complaint.⁵⁷ The reasons on which the rule is based are said to be: (1) That a judgment and execution returned unsatisfied are the best evidences of the debt; (2) that legal tribunals should adjudicate legal claims. An execution which is void will not fulfill the obligation of the creditor, and the action may fail;⁵⁸ but, if the execution is not void, but is merely irregular, the action will not be dismissed.⁵⁹ An indorsement by a deputy sheriff, more than sixty days after issue of an execution of *nulla bona* and delivery by him to an officer in charge of the sheriff's office to have filed, is a sufficient return to sustain a creditor's suit begun on that day though the return be not filed with the county clerk till the next day.⁶⁰

4. When return of execution may be unnecessary.

While the recovery of a judgment and the return of an execution issued thereon unsatisfied are essential prerequisites to the maintenance of an action in the nature of a creditor's bill under the statute, and while, as a general thing, the same rule is applied to actions in equity, having in their purpose or the relief sought the nature of statutory creditor's bills, it does not extend so far as to deny to a creditor the interposition of the equity powers of the court, where the situation is such as to render it impossible for him to take those preliminary steps.⁶¹ When a party has done all that it is possible for him to do to prepare the way for his case to

Hodenpyl, 135 N. Y. 630; Baker v. Potts, 73 App. Div. 29, 76 N. Y. Supp. 406; Lisner v. Toplitz, 86 App. Div. 1, 83 N. Y. Supp. 423; Bell v. Merri-field, 28 Hun, 219; Whitney v. Davis, 88 Hun, 168, 35 N. Y. Supp. 531; aff'd, 148 N. Y. 256.

56. Harvey v. Brisbin, 143 N. Y. 151.

57. Trotter v. Lisman, 199 N. Y. 497.

58. Prentiss v. Bowden, 145 N. Y. 342; Lefever v. Phillips, 81 Hun, 232,

30 N. Y. Supp. 709, 62 St. Rep. 663.

59. Aultman & Taylor Co. v. Syme, 163 N. Y. 54.

60. Iselin v. Henlein, 16 Abb. N. C. 73.

61. National Tradesmen's Bank v. Wetmore, 124 N. Y. 241; Bateman v. Hunt, 46 Misc. 346, 94 N. Y. Supp. 861; Lefevre v. Phillips, 81 Hun, 232, 30 N. Y. Supp. 709; Whitney v. Davis, 88 Hun, 168, 35 N. Y. Supp. 531; aff'd, 148 N. Y. 256.

equitable cognizance, he is not to be denied access to the only tribunal capable of granting relief merely because he had proceeded no further than he was, without any fault or laches on his part, permitted to go.⁶² While a creditor's bill does not lie save in the absence of an adequate and effectual remedy at law, yet a creditor who has been prevented from obtaining a personal judgment against his debtor, because the latter, after executing an assignment for the benefit of creditors of property located in this State, removed to another State, may maintain an action in this State to set aside the assignment upon the ground of fraud.⁶³

5. Exhaustion of remedy at law.

It is the general rule in equitable actions that a party must exhaust his remedy at law before resorting to equitable relief.⁶⁴ But the return of an execution unsatisfied is the *prima facie* test for the exhaustion of legal remedies, and when that is done, as a general rule, the creditor can resort to the equitable action without further attempts to collect the judgment by legal proceedings.⁶⁵

A judgment can be collected by ordinary legal process during the ten years it continues to be a lien on real estate, and the aid of a court of equity cannot be invoked by a judgment creditor during that period, no matter how fraudulent the intent of the grantor in transferring the real property subject to the lien. A creditor may, however, after the expiration of the lien but before the statute has run against the judgment, seek the aid of equity to remove a fraudulent conveyance which is a barrier to the collection of the judgment, when he has failed to enforce it by execution while it remained a lien, because of ignorance of the facts or for other sufficient reasons.⁶⁶

A judgment creditor, on discovering that the only property owned by his debtor is real estate situated in another State, cannot maintain a suit in equity in this State for the appointment of a receiver and a decree directing the debtor to convey to the receiver so that he may apply the proceeds in satisfaction of the judgment, unless he shows facts calling for the interposition of equity. The creditor must pursue the legal remedy afforded by the laws of the other State. Even

62. National Tradesmen's Bank v. Wetmore, 124 N. Y. 241.

63. Patchen v. Rofkar, 52 App. Div. 367, 65 N. Y. Supp. 122.

64. Kerr v. Dildine, 60 Hun, 315, 38 St. Rep. 1005, 15 N. Y. Supp. 58,

20 Civ. Pro. 366; Kerr v. Dildine, 6 St. Rep. 163.

65. Baker v. Potts, 73 App. Div. 29, 76 N. Y. Supp. 406.

66. Holland v. Grote, 193 N. Y. 262.

if the lands of the debtor are situated in this State, the judgment creditor cannot sue in equity to subject the same to the lien of his judgment, but must proceed by execution.⁶⁷

Where the execution was against the real property, which defendant had, at a day later than the docketing of the judgment, the bill must be dismissed as the remedy at law has not been exhausted.⁶⁸ Where a judgment debtor by the death of his father became seized of individual shares in several pieces of real property his judgment creditor cannot maintain an action the purpose of which is to procure satisfaction of his judgment from the personal assets of the decedent's estate which is in course of administration, as plaintiff has an adequate remedy at law in an execution sale of the judgment debtor's real property.⁶⁹ But the existence of a remedy by execution is not a bar to a creditor's suit, when it is claimed that the property belongs to others.⁷⁰ The fact that the debtor is an insolvent corporation, and has conveyed its property contrary to the statute, does not authorize a resort to equity until the remedy at law is exhausted.⁷¹ A justice's execution does not exhaust the remedy at law.⁷²

A complaint in an action to set aside a fraudulent conveyance made by the judgment debtor will not be dismissed because it appears that the judgment creditor obtained two judgments against the debtor, and that at the time of the commencement of the action an execution had been returned unsatisfied on only one of the judgments.⁷³

6. Joint debtors.

If joint judgment debtors are all liable on the judgment in equal degree, the creditor must generally exhaust his legal remedy against all of them before commencing his suit in equity.⁷⁴ If they are not equally liable, as when one is a surety, the rule does not obtain.⁷⁵ Where the debt which was the foundation of the judgment was that of the judgment debtor whose property is sought to be reached, while the other judgment debtor was a surety only, execution need not

67. *Heyl v. Taylor*, 137 App. Div. 641, 122 N. Y. Supp. 279.

68. *Manning v. Merritt, Clarke Ch.* 98.

69. *Marsullo v. Rosendorf*, 89 Misc. 559, 152 N. Y. Supp. 51.

70. *Gilllett v. Staples*, 16 Hun, 587.

71. *Adee v. Bilger*, 81 N. Y. 349.

72. *Dix v. Briggs*, 9 Paige, 595; *Crippen v. Hudson*, 13 N. Y. 161;

Henderson v. Brooks, 3 T. & C. 445.

73. *St. John Woodworking Co. v. Smith*, 82 App. Div. 348, 82 N. Y. Supp. 1023; *aff'd* without opinion, 178 N. Y. 629.

74. *Field v. Chapman*, 15 Abb. Pr. 434; *Field v. Hunt*, 24 How. Pr. 463; *Child v. Brace*, 4 Paige, 309.

75. *Baker v. Potts*, 73 App. Div. 29, 76 N. Y. Supp. 406.

be issued as against both judgment debtors as a condition precedent to an action in equity to reach property fraudulently transferred.⁷⁶ And, where a creditor sues two joint debtors and recovers judgment against one, he is not obliged to prosecute the suit to judgment against the other before bringing a creditor's action; but he may do so at once upon the issue and return unsatisfied of an execution against the judgment debtor.⁷⁷ Execution against all of several joint debtors, parties to an action, is sufficient foundation for a creditor's suit, notwithstanding a formal irregularity in docketing the judgment only against those served.⁷⁸

In order to authorize a creditor of a firm to maintain an action against it, to recover money or choses in action transferred by it, a judgment must first have been obtained against the firm, and execution returned unsatisfied.⁷⁹ Judgments against a firm recovered upon service of the summons upon only one of the partners afford a sufficient basis for a creditor's action to set aside a general assignment made by the firm.⁸⁰ A firm creditor with a judgment against one partner, on a guaranty of the firm debt, cannot maintain a creditor's suit till he has a judgment against the other partner.⁸¹ A plaintiff who is a judgment creditor of a single partner, and also of the firm of which he is a member, may bring an action to set aside an assignment and collect both judgments.⁸²

C. Action in aid of execution.

Before the enactment of statutes relating to judgment creditors' actions, it was a recognized equitable remedy to permit a judgment creditor to maintain a suit to remove an obstruction to his execution.⁸³ This right of action has survived the enactment of the statutory provisions.⁸⁴ The general principle which requires the return unsatisfied of an

76. *Egan v. Hagan*, 119 App. Div. 189, 104 N. Y. Supp. 247.

77. *Hiler v. Hetterick*, 5 Daly, 33.

78. *Produce Bank v. Morfon*, 67 N. Y. 199.

79. *Lewishon v. Drew*, 15 Hun, 467; *Bell v. Merrifield*, 28 Hun, 219. *Comparte Tuthill v. Goss*, 35 N. Y. Supp. 136, 69 St. Rep. 454.

Limited partnership.—Any creditor of an insolvent limited partnership may, without judgment or execution, maintain an action to restrain the partners from disposing of the property contrary to law and for a re-

ceiver. *Whitcomb v. Fowler*, 7 Abb. N. C. 295.

80. *King v. Baer*, 31 Misc. 308, 64 N. Y. Supp. 228.

81. *Lewishon v. Drew*, 15 Hun, 467.

82. *Genesee Co. Bank v. Bank of Batavia*, 43 Hun, 295.

83. *Parshall v. Tillou*, 13 How. 7; *Bishop v. Halsey*, 3 Abb. 400.

84. *Mechanics & Traders' Bank of Jersey City v. Dakin*, 51 N. Y. 519; *Creteau v. Foote & Thorn Glass Co.*, 54 App. Div. 168, 66 N. Y. Supp. 370; *Bowe v. Arnold*, 31 Hun, 256; *aff'd*, 101 N. Y. 652.

execution before the commencement of a judgment creditor's action has no application in such a case;⁸⁵ in fact, the return of the execution would be fatal to the suit.⁸⁶ But the creditor must show the necessity of asking the aid of a court of equity.⁸⁷ A judgment creditor may invoke the aid of a court of equity after the issuance of execution and before it is returned unsatisfied; but in order to do this his complaint must show the existence of some obstruction to legal process either fraudulently or inequitably interposed.⁸⁸

A creditor cannot maintain the action without showing fraud, collusion or combination obstructing the ordinary process of law; mere questions as to the priority of liens as between himself and other claimants will not generally suffice.⁸⁹

The power of a court of equity to take jurisdiction of a judgment creditor's action is not limited to the particular creditor's action specified in the Civil Practice Act, nor to those in which a question of fraud is involved. Where the property of a corporation is illegally seized under attachment issued in actions brought against an individual, the court will entertain an action by a judgment creditor to set aside such levy in aid of the outstanding executions issued upon a judgment entered against the corporation, after the levy upon a warrant of attachment was made.⁹⁰

A creditor who by docketing a judgment has obtained a lien which gives him a right to enforce his judgment against the property on which the lien exists may pursue his remedy under such lien, if he have an outstanding execution, to remove obstacles and the enforcement of his execution.⁹¹ Where a plaintiff has issued execution upon his judgment and levy has been made on property of the judgment debtor, which is claimed to have been fraudulently assigned by him, the creditor may bring an action in aid of the execution to enforce its lien and remove the obstruction to the legal remedy occasioned by the fraudulent act of the debtor.⁹²

A judgment creditor, having no title or specific lien, may maintain an action to compel the cancellation of prior judg-

85. *Payne v. Sheldon*, 63 Barb. 169.

86. *Mechanics & Traders' Bank of Jersey City v. Dakin*, 51 N. Y. 519.

87. *Payne v. Sheldon*, 63 Barb. 169.

88. *Gavazzi v. Dryfoes*, 110 App. Div. 90, 97 N. Y. Supp. 59.

89. *Skinner v. Stewart*, 15 Abb. 391. See *Shaw v. Dwight*, 27 N. Y. 244.

90. *Stetson v. Hopper*, 60 App. Div.

277, 70 N. Y. Supp. 170.

91. *Adsit v. Butler*, 87 N. Y. 585; *Sullivan v. Miller*, 106 N. Y. 636.

92. *Chautauqua County Bank v. White*, 6 N. Y. 236; *Frost v. Mott*, 34 N. Y. 253; *Shaw v. Dwight*, 27 N. Y. 244; *Crippen v. Hudson*, 13 N. Y. 161; *McAuley v. Smith*, 132 N. Y. 524.

ments, which are apparent liens upon the lands of his debtor, but which he alleges to have been paid, and this without alleging any collusion on the part of the debtor to keep the judgments on foot to defraud his creditors.⁹³ A judgment creditor who has levied upon personal property of his debtor under a valid judgment may bring an action in equity in aid of his execution to procure an adjudication that chattel mortgages executed by the debtor covering such property are fraudulent and void as against his judgment.⁹⁴

Where a chattel mortgage clause, in a lease which is void because not filed, is used as an obstruction to an execution, the creditor may maintain an action against the parties to such lease to remove the obstruction in aid of his execution. To entitle a party to the aid of the court, in removing a fraudulent obstruction to an execution, the plaintiff must show a lien on the property by his judgment.⁹⁵ This remedy cannot be had by a simple contract creditor.⁹⁶ To entitle the plaintiff to maintain the action, it is essential he should show himself a judgment creditor, and that the conveyances challenged as fraudulent were so in fact and stood in the way of his judgment. The production of a judgment is conclusive evidence of the plaintiff's character as a creditor.⁹⁷

D. Action in aid of attachment.

An equitable action may be maintained by a creditor in aid of an attachment levied by him. Sections 922 and 943 of the Civil Practice Act contain matter referring to such an action.⁹⁸ The general rule is, that until after the recovery of a judgment and the issuing of an execution thereon, no equitable action can be maintained by an attaching creditor to set aside a fraudulent transfer. But there are some exceptions to this rule.⁹⁹

An equitable action analogous to a creditor's suit may properly be brought in aid of and to enforce the lien of an attachment before the recovery of judgment in the attachment suit, when the debtor's property has been fraudulently transferred and there is danger of its removal from the juris-

93. *Shaw v. Dwight*, 27 N. Y. 244.

94. *Robinson v. Hawley*, 45 App. Div. 287, 61 N. Y. Supp. 138.

95. *McElwain v. Willis*, 9 Wend. 548; *Parshall v. Tillou*, 13 How. 7; *Crippen v. Hudson*, 13 N. Y. 161; *Reubens v. Jeel*, 13 N. Y. 488.

96. *Bownes v. Weld*, 3 Daly, 253; *Bayard v. Fellows*, 28 Barb. 451;

Cropsey v. McKinley, 30 Barb. 47; *Dunlevy v. Tallmadge*, 32 N. Y. 457.

97. *Carpenter v. Osborn*, 102 N. Y. 552.

98. See *Castriotis v. Guaranty Trust Co.*, 229 N. Y. 74.

99. *Hart v. Clarke & Co.*, 194 N. Y. 403.

diction. The attaching creditor, after service of his warrant, is no longer to be deemed a creditor at large, but a creditor for a specific lien. For the purpose of upholding it, the decision of the judge granting the attachment is to be deemed an adjudication of the existence of the debt which is conclusive upon the fraudulent transferee. In order to authorize the action, however, it seems that there must be danger of removal of the attached property from the jurisdiction of the officer having it in custody.¹

A creditor, by attaching property in the debtor's possession, acquires such a specific lien that he is entitled, like a judgment creditor, to impeach the corporate title of a fraudulent mortgagee.²

An application for leave to bring an action in aid of an attachment made under the Civil Practice Act should not be denied because notice was not given to the non-resident defendant, if there are no special circumstances which rendered such notice proper.³

Where, upon the application of a creditor of a foreign corporation, the receiver who had been discharged was reinstated and directed to enforce the liability of stockholders on their subscriptions to stock, the assignee of said creditor was not estopped from attaching the liability of defendant's testator on his stock subscription and from maintaining an action in aid of the attachment.⁴ An attaching creditor of the insolvent corporation may maintain an action to set aside as fraudulent judgments recovered against the corporation and executions thereon levied previous to the attachment and to restrain the sheriff from applying the proceeds of sale upon the execution.⁵

A creditor who could not secure a judgment, because the debtor was not within the jurisdiction, and no personal service could be made upon him, nor attachment levied because he had made a general assignment before departing from the State, may maintain an action to set aside the assignment, without first proceeding by service of publication, attachment, and action in aid thereof under the Civil Practice Act.⁶

1. *Kauffman v. Van Buren*, 136 N. Y. 252.

2. *Frost v. Mott*, 34 N. Y. 253.

3. *Hall v. Tevis*, 139 App. Div. 636, 124 N. Y. Supp. 48.

4. *McNelus v. Stillman*, 172 App.

Div. 307, 158 N. Y. Supp. 428.

5. *Lopez v. Merchants & Farmers' National Bank*, 18 App. Div. 427, 46 N. Y. Supp. 91; rev'd, 163 N. Y. 340.

6. *Patchen v. Rofkar*, 52 App. Div. 367, 65 N. Y. Supp. 122.

E. Action by representative.**1. Real Property Law, § 268. Disaffirmance of fraudulent act by executor and others.**

An executor, administrator, receiver, assignee or other trustee, may, for the benefit of creditors, or of others interested in real property held in trust, disaffirm, treat as void and resist any act done or transfer or agreement made in fraud of the rights of any creditor, including himself, interested in such estate or property; and a person who fraudulently receives, takes, or in any manner interferes with the real property of a deceased person, or an insolvent corporation, association, partnership, or individual, is liable to such executor, administrator, receiver or other trustee for the same, or the value thereof, and for all damages caused by such act to the trust estate. A creditor of a deceased insolvent debtor, having a claim or demand exceeding one hundred dollars against such deceased, may, for the benefit of creditors or others interested in the real property of such deceased, disaffirm, treat as void, and resist any act done or conveyance, transfer or agreement made by such deceased in fraud of the rights of any creditor, including himself, and may maintain an action to set aside such act, conveyance, transfer or agreement, without having first obtained a judgment on such claim or demand; but the same, if disputed, may be established on the trial. The judgment in such action may provide for the sale of the premises or property involved, when a conveyance or transfer thereof is set aside, and that the proceeds thereof be brought into court or paid into the proper Surrogate's Court to be administered according to law.

(See B., C. & G. Consol. L., 2nd Ed., p. 7487.)

2. Personal Property Law, § 19. Disaffirmance of fraudulent acts by executors and others.

An executor, administrator, receiver, assignee or trustee, may, for the benefit of creditors or others interested in personal property, held in trust, disaffirm, treat as void and resist any act done, or transfer or agreement made in fraud of the rights of any creditor, including himself, interested in such estate, or property, and a person who fraudulently receives, takes or in any manner interferes with the personal property of a deceased person, or an insolvent corporation, association, partnership or individual is liable to such executor, administrator, receiver or trustee for the same or the value thereof, and for all damages caused by such act to the trust estate. A creditor of a deceased insolvent debtor, having a claim against the estate of such debtor, exceeding in amount the sum of one hundred dollars, may, without obtaining a judgment on such claim, in like manner, for the benefit of himself and other creditors interested in said estate, disaffirm, treat as void and resist any act done or conveyance, transfer or agreement made in fraud of creditors or maintain an action to set aside such act, conveyance, transfer or agreement. Such claim, if disputed, may be established in such action. The judgment in such action may provide for the sale of the property involved, when a conveyance or transfer thereof is set aside, and that the proceeds thereof be brought into court or paid into the proper Surrogate's Court to be administered according to law.

(See B., C. & G., Consol. L., 2nd Ed., p. 6156.)

3. Action by creditor.

The present statutory provisions are derived from chapter 314 of the Laws of 1858. When first enacted, the statute did not provide for an action directly by a creditor of the

deceased. In 1889 (chapter 487) the statute was amended to give the remedy to a creditor. The action by a creditor is an equity action in the nature of a creditor's bill, to set aside fraudulent conveyances made by a deceased, an insolvent debtor. The remedy given by the statute is not a new one, but is the extension of an old and familiar remedy by relieving the creditor of the necessity of recovering judgment and issuing execution, when that would be impossible owing to the death of the debtor. This does not change the character of the action, or its object, which is to remove an obstacle to the collection of a debt, to be established by common-law proof, instead of by the recovery of judgment and the return of execution unsatisfied.⁷ Prior to 1889, the creditor was generally required to procure a judgment before he was entitled to relief.⁸ Under the statutes a creditor of a decedent may resist, in any form or manner, and treat as void a fraudulent transfer of property made by the decedent during his lifetime, so far as he is able to do so without action. If, however, possession of the property has been taken by the fraudulent transferee, the creditor cannot reach the same except through the instrumentality of an action in a court of equity. He may maintain such action without having first obtained a judgment and can have his claim established in that action.⁹ He must prove his claim in the same manner as it would have to be proved in an action at law.¹⁰ If he is unable to establish his status as a creditor, the action will fail.¹¹ But the fact that the creditor has a judgment on his claim does not bar the action.¹² Under the present statute, the right of the creditor to sue is primary, and it is not necessary that the executor or administrator or other representative should have refused to bring the action.¹³ Under the original statute the creditor could maintain the action only on the refusal of the representative to do so.¹⁴

7. *Shoe & Leather Bank v. Baker*, 148 N. Y. 581.

8. *Nill v. Phelps*, 20 Misc. 488, 46 N. Y. Supp. 662.

9. *Matter of Bunting*, 98 App. Div. 122, 90 N. Y. Supp. 786; *Gould v. Fleitmann*, 188 App. Div. 759, 176 N. Y. Supp. 631.

10. *Mertens v. Mertens*, 48 Misc. 235, 96 N. Y. Supp. 785.

Reference.—An action by a general creditor of a deceased insolvent debtor, to set aside an alleged fraudulent conveyance, in which the plaintiff's alleged claim, consisting of many items

of credits and debits, is denied, is compulsorily referable. *National Shoe & Leather Bk. v. Baker*, 148 N. Y. 581, aff'g 90 Hun, 277, 35 N. Y. Supp. 933, 70 St. Rep. 600.

11. *Ga. Nun v. Palmer*, 159 App. Div. 86, 89, 144 N. Y. Supp. 457; mod'd, 216 N. Y. 603.

12. *Rosselle v. Klein*, 42 App. Div. 316, 59 N. Y. Supp. 94.

13. *Calkins v. Stedman*, 146 App. Div. 202, 130 N. Y. Supp. 932; *National Bank of Republic v. Thurber*, 39 Misc. 13, 78 N. Y. Supp. 768.

14. *Harvey v. McDonnell*, 113 N.

The action can only be maintained for the benefit of himself and other creditors, and it must appear from the face of the complaint that it is so prosecuted.¹⁵ But if he fails to bring it in this form, the defect is waived by the failure of the defendant to raise the question.¹⁶ The judgment should not direct payment to the plaintiff of the entire amount of his debt in the absence of proof that he is the only creditor of the deceased, but should provide for a *pro rata* distribution among all the creditors.¹⁷

The statutes contemplate that the property recovered in an action such as this shall either be administered by the court for the benefit of all creditors of the decedent or paid into the Surrogate's Court to be there administered according to law. It is doubtless discretionary with the court whether to administer the property itself or hand the administration over to the Surrogate's Court.¹⁸ The present statute does not authorize an action by a creditor to set aside an executor's deed as in fraud of creditors.¹⁹ Nor can he attack the validity of a judgment against his debtor in such an action.²⁰

4. Assignee for creditors.

An assignee for the benefit of creditors can maintain the action under the statutory provisions.²¹ The statutes give a new remedy in favor of creditors at large, which the assignee can enforce without acquiring a specific lien, and in spite of his situation as successor of the fraudulent assignor.²² The

Y. 526; *National Bank v. Leavy*, 127 N. Y. 549; *Prentiss v. Bowden*, 145 N. Y. 342.

15. *Louis v. Belgard*, 43 St. Rep. 766, 17 N. Y. Supp. 882.

Representative as party.—In an action under section 19 of the Personal Property Law to set aside an assignment made by a deceased testator as in fraud of creditors, the executor of the deceased debtor or the legal representatives of his estate need not be made parties defendant when the complaint shows that no executor was appointed and that the deceased died insolvent. Although the plaintiff will be required to prove himself a creditor of the decedent to an amount greater than \$100, such proof can be made without the presence of a representative of the estate. *Johnston v. Gundberg*, 113 App. Div. 228, 98 N. Y.

Supp. 1015.

16. *Brown v. Brown*, 83 Hun, 160, 31 N. Y. Supp. 650; *aff'd* on opinion below, 146 N. Y. 385.

17. *Campbell v. Heiland*, 55 App. Div. 95, 66 N. Y. Supp. 1116.

18. *Continental National Bank v. Moore*, 83 App. Div. 419, 82 N. Y. Supp. 392.

19. *Magoun v. Quigley*, 115 App. Div. 226, 100 N. Y. Supp. 1037.

20. *Frothingham v. Hodenpyl*, 41 St. Rep. 398, 16 N. Y. Supp. 341.

21. *Reynolds v. Ellis*, 103 N. Y. 116; *Southard v. Benner*, 72 N. Y. 424; *Spelman v. Freedman*, 130 N. Y. 427. See chapter on Debtor and Creditor Law, as to the powers of an assignee for creditors.

22. *Spring v. Short*, 90 N. Y. 538; *Leonard v. Clinton*, 26 Hun, 288.

assignee represents the creditors, and may treat as void all agreements made in fraud of their rights.²³ The statutes dispense with the necessity of any special or other lien in behalf of individual creditors, and an action by such trustee, to annul a fraudulent transfer, and to recover the property or its avails, may be brought for the benefit of simple contract creditors.²⁴ Or, if the assignee refuses to commence the action, it may be maintained by a creditor, making the debtor, the assignee and the transferee parties to the action.²⁵ The creditors collectively, or one in behalf of all who may come in, may compel the execution of the trust.²⁶ When an assignee for the benefit of creditors had refused to bring an action to set aside fraudulent transfers, a creditor at large may sue in aid of the assignment and to protect the trust fund.²⁷ But such an action cannot generally be maintained by creditors until the assignee has refused to bring it.²⁸ But a creditor may sue to set aside a fraudulent transfer where the assignee for creditors is in collusion with fraudulent grantee without his requesting the assignee to sue.²⁹

The assignee cannot maintain an action at law for the conversion of goods, taken by defendants under a chattel mortgage executed by the assignor in good faith to secure a legitimate debt, notwithstanding the fact that the mortgage was not filed until after the assignee took possession under the assignment. A chattel mortgage not filed as required by the Lien Law is only void as to the persons mentioned in the statute, which persons do not include the mortgagor's assignee for the benefit of creditors. In the absence of fraud the assignee has no greater rights than his assignor in respect to the mortgaged property.³⁰

5. Trustee or beneficiary.

The statutes have no application to an action by a *cestui que trust* against an executor or trustee of an express trust and his fraudulent grantee or vendee to annul a fraudulent conveyance of the trust property. Such a suit may be maintained without authority of any statute.³¹ A liquidating

23. Reynolds v. Ellis, 103 N. Y. 115.

24. Southard v. Benner, 72 N. Y. 424.

25. Dewey v. Moyer, 72 N. Y. 70.

26. Crounse v. Frothingham, 97 N. Y. 105.

27. Riessner v. Cohn, 22 Abb. N. C. 312, 1 N. Y. Supp. 161.

28. Strickland v. Laraway, 29 St.

Rep. 873, 9 N. Y. Supp. 761.

29. Kendall v. Mellen, 36 St. Rep. 805, 13 N. Y. Supp. 207.

30. Lain v. Sayer, 50 App. Div. 554, 64 N. Y. Supp. 248; Crisfield v. Bogardus, 18 Abb. N. C. 334.

31. Agne v. Schwab, 123 App. Div. 746, 108 N. Y. Supp. 487.

trustee to whom the assets of a bankrupt are transferred pursuant to a composition agreement duly approved by the Federal court is a trustee for creditors and may, under the authority of section 19 of the Personal Property Law, maintain an action to set aside a fraudulent transfer by the alleged bankrupt notwithstanding the provisions of section 14 of the Bankruptcy Act of 1898 providing that upon the execution of a composition agreement the bankrupt shall become discharged from all his provable debts.³²

6. Executors, administrators and receivers.

The statutes permit an executor or administrator to disaffirm the act of the deceased whom he represents.³³ The receiver of a corporation is also authorized to attack its conveyance under some circumstances.³⁴

ARTICLE III.

FRAUDULENT CONVEYANCES AND TRANSFERS.

A. Essential elements of fraudulent conveyances.

To constitute a fraudulent transfer there must be a debtor intending to defraud, a creditor to be defrauded, and a conveyance of property which would have been appropriated by law to the payment of the debt due and out of which the creditor could have realized all or a portion of his claim. To constitute a fraudulent disposition of property three things must occur: First, the thing disposed of must be of value out of which the creditor could have realized all or a portion of his claim; second, it must be transferred or disposed of by the debtor; and, third, this must be done with intent to defraud.³⁵ It must appear, in order to recover in a creditor's suit, that the conveyances challenged as fraudulent are so in fact, and stand in the way of the collection of the plaintiff's judgment.³⁶ A conveyance of exempt property cannot be assailed as a fraud upon creditors.³⁷ But a reconveyance by a wife to her husband of real property purchased by him with pension moneys and conveyed by him to her under her parol agreement to reconvey at any time, may be fraudulent as

32. *Kobre Assets Corporation v. Baker*, 178 App. Div. 62, 164 N. Y. Supp. 597.

33. See chapter on Decedents' Estates.

34. See chapter on Corporations.

35. *Hoyt v. Godfrey*, 88 N. Y. 669.

36. *Carpenter v. Osborn*, 102 N. Y. 552.

37. *Youman v. Bookhower*, 3 T. & C. 21.

against creditors of the wife who have extended credit in reliance upon her apparent ownership.³⁸

B. Fraudulent intent.

1. In general.

The fraudulent intent of one conveying property must be proved as matter of fact.³⁹ Moreover, the grantee must generally be shown to be a party to the fraud or to have knowledge of the fraudulent intent of the grantor.⁴⁰ To set aside a conveyance as fraudulent the plaintiff must prove facts from which a legitimate inference of fraudulent intent can be drawn. Evidence simply justifying a suspicion is not sufficient.⁴¹ The fraudulent intent of the grantor is a question of fact.⁴² In the absence of a finding of fact that the conveyance was made with intent to hinder, delay and defraud a creditor, a conclusion of law that its effect was to hinder and delay does not warrant the entry of the judgment setting aside the conveyance.⁴³ The finding of the trial court on the question of fact will not ordinarily be disturbed on appeal.⁴⁴ The fact that the court incorporates its finding that a bill of sale was executed for the purpose of hindering, delaying and defrauding creditors in its conclusions of law does not preclude the Appellate Division from giving to it the effect of a finding of fact.⁴⁵ Where there is no fraud there is no infirmity in the conveyance. Every case depends upon its circumstances and is to be carefully scrutinized, but the vital question is always of good faith of the transaction.⁴⁶ If a finding of fact is made that an instrument is not fraudulent,

33. Fritz v. Worden, 20 App. Div. 241, 46 N. Y. Supp. 1040.

39. Emmerich v. Hefferman, 53 Super. Ct. 98.

Undelivered deed.—An action to set aside a deed as fraudulent as to creditors cannot be maintained where such deed was not delivered during the grantor's lifetime but was surreptitiously and fraudulently obtained after his death, by the grantee or her husband, and the complaint, in an action by an executor to set aside a deed made by his testator as fraudulent as to his creditors, should show the existence of such debts as would render the conveyance fraudulent at the time it was made. Walker v. Pease, 17

Misc. 415, 41 N. Y. Supp. 198.

40. See *infra*, subdivision G, Status of grantee.

41. Jaeger v. Kelley, 52 N. Y. 274; Wilmerding v. Jarmulowski, 28 App. Div. 629, 53 N. Y. Supp. 583.

42. Fitzpatrick v. Fox, 80 App. Div. 345, 80 N. Y. Supp. 677; Bennett v. McGuire, 5 Lans. 183.

43. National State Bank of Camden v. Wheeler, 40 App. Div. 563, 58 N. Y. Supp. 99.

44. Muller v. Abramson, 25 Misc. 520, 54 N. Y. Supp. 1027.

45. Wright v. Loud, 39 App. Div. 270, 56 N. Y. Supp. 959.

46. Lloyd v. Fulton, 91 U. S. 479 (485).

when it is fraudulent as a matter of law, the finding of fact does not avail.⁴⁷

2. Proof of fraudulent intent.

The fraudulent intent of the grantor may be inferred from the circumstances.⁴⁸ Likewise the knowledge of the grantee of the fraud on the part of the grantor may be inferred from the circumstances. Direct proof of the intent or of the conspiracy between the parties is not required.⁴⁹ While fraud must be proved and is never presumed, it may be shown by circumstantial evidence.⁵⁰ The intent of either the grantor or grantee does not necessarily establish the fraudulent intent of the other.⁵¹ Fraud will not be presumed where an instrument admits of an innocent construction.⁵²

3. Testimony of parties as to intent.

On the issue whether the sale is fraudulent as against creditors, it is not error to allow the buyer and seller to testify directly as to their intent in making the sale.⁵³ And it has been thought that the grantor may testify that he did not make the conveyance with intent to hinder, delay and defraud creditors, but not as to his intention in executing the instrument.⁵⁴ Statements of the grantor showing his mental attitude toward the creditor may be admissible, not only as against himself, but as against the grantee.⁵⁵ Exclusion of evidence of a conversation tending to show the grantor's good faith is not ground for reversal of a judgment declaring a conveyance fraudulent where the substance of such conversation was given by other testimony.⁵⁶

47. *Coleman v. Burr*, 93 N. Y. 17.

48. *Lawrence Bros. v. Heylman*, 111 App. Div. 848, 98 N. Y. Supp. 121; *Stetson v. Brown*, 7 Cow. 732; *Cram v. Mitchell*, 1 Sandf. Ch. 251; *Currie v. Hart*, 2 Sandf. Ch. 353; *Bank of Orange Co. v. Fink*, 7 Paige, 87; *Vance v. Phillips*, 6 Hill, 433; *Hildreth v. Sands*, 14 Johns. 493; *Cook v. Smith*, 3 Sandf. Ch. 33; *Delaware v. Ensign*, 21 Barb. 85; *Wilson v. Ferguson*, 10 How. Pr. 175; *Newman v. Cordell*, 43 Barb. 448; *Pine v. Rickert*, 21 Barb. 469; *Briggs v. Mitchell*, 60 Barb. 288; *Waverly Bank v. Halsey*, 57 Barb. 249; *Solomon v. Moral*, 53 How. Pr. 342; *Blaut v. Gabler*, 77 N. Y. 461;

Van Wyck v. Seward, 18 Wend. 375.

49. *Saxton v. Sebring*, 96 App. Div. 570, 89 N. Y. Supp. 372.

50. *Hickok v. Cowperthwait*, 134 App. Div. 617, 119 N. Y. Supp. 390.

51. *Benedict v. Eldridge*, 14 App. Div. 625, 43 N. Y. Supp. 979.

52. *Bank of Silver Creek v. Talcott*, 22 Barb. 550.

53. *Hill v. Paige*, 108 App. Div. 71, 95 N. Y. Supp. 465.

54. *Vilas National Bank v. Newton*, 25 App. Div. 62, 48 N. Y. Supp. 1009.

55. *Meyer v. Mayo*, 196 App. Div. 78, 187 N. Y. Supp. 346.

56. *Benedict v. Eldridge*, 14 App. Div. 625, 43 N. Y. Supp. 979.

4. Surrounding circumstances as indicating fraudulent intent.

It is error for the court to exclude evidence offered by the plaintiff to show that after the conveyance the defendants gave two chattel mortgages to other parties on the property conveyed, because proof of contemporaneous conveyances, no matter to whom made, is always relevant to an issue of fraudulent conveyance. Evidence of the circumstances under which conveyances are made and the consideration paid therefor is also relevant on the issue of fraudulent intent.⁵⁷ Where a defense involves a charge of conspiracy between a debtor and others to defraud his creditors, evidence as to what the conspirators severally did in and about the debtor's property and affairs is competent on the question of his intent.⁵⁸

C. Presence or absence of consideration.

1. Absence of consideration not controlling.

The mere fact that a conveyance of property was made by a debtor without consideration, or for an inadequate consideration, does not justify a decree setting aside the conveyance.⁵⁹ A deed is not *per se* fraudulent, even as against existing creditors, because it is voluntary.⁶⁰ A person may transfer lands without consideration, providing he retains sufficient property to satisfy his creditors.⁶¹ But it is only where made in good faith and with no intent to defraud creditors that a voluntary conveyance will be upheld by proof that the grantor retained ample estate to pay all his debts.⁶² Fraudulent intent must be established as a matter of fact, either directly or by necessary inference.⁶³ The want of a valuable consideration, however, is a material circumstance bearing upon the intent of the conveyance.⁶⁴ A conveyance of the homestead by the brother to his sister eight years before he became insolvent will not be held fraudulent as to

57. *Wittemann Brothers v. Forman Bottling Co.*, 178 App. Div. 674, 165 N. Y. Supp. 811.

58. *Pohalshi v. Artheiler*, 18 Misc. 33, 41 N. Y. Supp. 10.

59. *Young v. Heermans*, 71 N. Y. 374; *Genesee, etc., Bank v. Mead*, 92 N. Y. 637; *Truesdell v. Davies*, 104 N. Y. 164; *Andreae v. Bourke*, 33 App. Div. 638, 53 N. Y. Supp. 885; *Hardt v. Deutsch*, 22 Misc. 66, 48 N. Y. Supp. 564; *Sachs v. Walsh*, 28 Misc. 751, 60 N. Y. Supp. 214; *Bank of South Dayton v. Kellogg*, 161 N. Y. Supp. 542; *Smart v. Harring*, 52 How. Pr. 505;

Emmerich v. Hefferan, 53 Super Ct. 98.

A gift *inter vivos*, without any intent to defraud creditors, cannot be questioned by a mere volunteer. *Duigan v. McCormack*, 53 How. Pr. 411.

60. *Young v. Heermans*, 71 N. Y. 374.

61. *Durland v. Crawford*, 172 App. Div. 283, 158 N. Y. Supp. 692.

62. *Fox v. Moyer*, 54 N. Y. 125.

63. *Emmerich v. Hefferan*, 53 Super. Ct. 98.

64. *Meyer v. Mayo*, 196 App. Div. 78, 187 N. Y. Supp. 346.

his creditors, although he paid the taxes, and once or twice included the land in a statement of his assets and there was a delay in recording the deed.⁶⁵

2. Conveyance by insolvent.

If, in addition to the want of consideration, it is shown that the grantor was insolvent at the time of making the conveyance, a *prima facie* case of a fraudulent conveyance is presented.⁶⁶ A voluntary conveyance by an insolvent debtor is presumptively fraudulent.⁶⁷ Or a transfer of all of the property of a debtor without consideration creates a presumption that it is in fraud of creditors.⁶⁸ Or, as the rule is sometimes stated, a voluntary conveyance by one indebted at the time is presumptively fraudulent as against existing creditors.⁶⁹ To render a voluntary conveyance fraudulent as to creditors, it is not necessary that the grantor be or believe himself insolvent; it is enough that his solvency is contingent upon the fluctuations of the market.⁷⁰

Where all the property of the corporation is transferred to an individual for a nominal consideration, and he makes no inquiries as to the liability of the corporation, but transfers the property to a new corporation in consideration of capital stock, the transfer is constructively fraudulent as to a creditor of the old corporation.⁷¹

Where a firm which is largely indebted transfers all its property to the mother-in-law of one of its members, who is a creditor, without any request therefor on her part, and con-

65. *Philadelphia & Reading Coal & Iron Co. v. Devoy*, 25 Misc. 640, 56 N. Y. Supp. 315.

66. *Gennerich v. Voight*, 46 App. Div. 622, 61 N. Y. Supp. 620; *Gould v. Fleitman*, 188 App. Div. 759, 176 N. Y. Supp. 631; *Tiffany v. Hosmer*, 54 Misc. 402, 105 N. Y. Supp. 1055.

Proof of insolvency.—In an action by a bank as a creditor of decedent to set aside as fraudulent an assignment of two policies of insurance on his life, the fact that no letters of administration were taken out on the decedent's estate, in connection with the other facts, tended to show that he was insolvent. *Continental Nat. Bank v. Moore*, 83 App. Div. 419, 82 N. Y. Supp. 302.

67. *Truesdell v. Bourke*, 29 App. Div. 95, 51 N. Y. Supp. 409; *Maxwell*

v. Conklin, 41 App. Div. 211, 58 N. Y. Supp. 474; *O'Brien v. Cavanagh*, 36 Misc. 362, 73 N. Y. Supp. 558.

68. *Baker v. Potts*, 73 App. Div. 29, 76 N. Y. Supp. 406; *Citizens' Nat. Bank v. Fonda*, 18 Misc. 114, 41 N. Y. Supp. 112.

69. *Kerker v. Levy*, 206 N. Y. 109; *Bushby v. Berkeley*, 85 Misc. 178, 148 N. Y. Supp. 121; *Lawrence Bros. v. Heylman*, 111 App. Div. 848, 98 N. Y. Supp. 121; *Hickok v. Cowperthwait*, 134 App. Div. 617, 119 N. Y. Supp. 390; *Champlin v. Seeber*, 56 How Pr. 46.

70. *Carpenter v. Roe*, 10 N. Y. 227; *Waterbury v. Sturtevant*, 18 Wend. 353.

71. *McNeal v. Hayes Machine Co.*, 118 App. Div. 130, 103 N. Y. Supp. 312.

tinues to carry on the business as her agents until the formation of a corporation to which she transfers the property in consideration of the entire capital stock, which she distributes among the household creditors of the firm, the transfer may be set aside.⁷²

A finding that a transfer was purely voluntary places the burden on the defendants of showing that it left the grantor solvent.⁷³

3. Effect of fair consideration.

The presence of a fair consideration for the property will usually save the transaction from the imputation of fraud.⁷⁴ The payment by the grantee of a fair consideration for property affords strong evidence of good faith in the transaction.⁷⁵ It may not be conclusive on the question of intent; but clear evidence of a fraudulent intent is necessary to overcome the presumption of honest motives arising from the consideration.⁷⁶

A deed will not be set aside as fraudulent where the sum paid by the grantee was substantial, though inadequate, unless he was chargeable with notice of the grantor's fraudulent intent.⁷⁷ The mere sale of goods by a person in failing circumstances upon credit, to one who has a knowledge of his condition, is not a fraud in law.⁷⁸ The sale by an insolvent firm of all its effects, at a fair valuation, to a responsible vendee, who has knowledge of the vendor's insolvency, is not fraudulent *per se*.⁷⁹ The mere fact that a man executes a mortgage for an usurious loan does not make the transaction fraudulent, nor does it necessarily give a creditor the right to intervene to set aside the security.⁸⁰

A valuable consideration, however, will not sustain a conveyance which is tainted with actual fraud.⁸¹ The fact of payment of a valuable consideration upon a transfer of property is not necessarily inconsistent with the existence of an intent to defraud.⁸² A sale for full value, made with intent to defraud creditors, passes no title to a purchaser who had knowledge of his vendor's fraudulent intent.⁸³ Where a

72. *Vilas National Bank v. Newton*, 25 App. Div. 62, 48 N. Y. Supp. 1009.

73. *Kineon v. Bonsall*, 194 App. Div. 110, 185 N. Y. Supp. 694.

74. *Tisdale v. Ryder*, 119 App. Div. 594, 104 N. Y. Supp. 77.

75. *Nugent v. Jacobs*, 103 N. Y. 125.

76. *Nugent v. Jacobs*, 103 N. Y. 125.

77. *Greenough v. Greenough*, 21 Misc. 727, 47 N. Y. Supp. 1096.

78. *Loeschigk v. Bridge*, 42 N. Y. 421.

79. *Ruhl v. Phillips*, 48 N. Y. 125.

80. *Marx v. Tailer*, 12 Civ. Pro. 226.

81. *Union Bank v. Warner*, 12 Hun, 306; *Goodhue v. Berrien*, 2 Sandf. Ch. 360.

82. *Billings v. Billings*, 101 N. Y. 226.

83. *Raeber v. Bowe*, 26 Hun, 554.

person takes a conveyance from a known insolvent, without agreeing to pay his debts, he can obtain no rights by subsequent voluntary payment.⁸⁴

D. Conveyance to creditor.

1. Right of debtor to give preference.

In the absence of statutory restrictions an insolvent debtor has the right to sell and transfer the whole or any portion of his property to one or more of his creditors in payment of or to secure his debts, when that is his honest purpose, although the effect of the sale or transfer is to place his property beyond the reach of his other creditors and render their debts uncollectible.⁸⁵ An absolute conveyance, intended merely as a security, is not fraudulent *per se*.⁸⁶ An insolvent debtor may lawfully prefer one creditor to another by a conveyance of property to secure him.⁸⁷ A conveyance in payment of a just debt is not *prima facie* fraudulent as to the grantor's creditors.⁸⁸ A debtor is at liberty to pay such of his creditors as he chooses to the extent of transferring all of his property to the favored ones, so long as there is no fraud on the part of the creditors.⁸⁹ And the creditor may, provided he does so in good faith, rightfully accept the debtor's property in part payment of a *bona fide* indebtedness, even though he knows that the debtor is insolvent and that by taking the property he will deprive other creditors of the means of collecting their debts.⁹⁰ If the vendee purchases solely for the purpose of obtaining payment of an honest debt, his knowledge of a fraudulent intent on the part of the vendor will not avoid the sale as to creditors.⁹¹

An insolvent debtor may make a valid sale or pledge of a part of his property to a third person to secure a part of his creditors.⁹² A deed from mother to daughter in considera-

84. Wood v. Hunt, 38 Barb. 302.

85. Dodge v. McKechnie, 156 N. Y. 514; Lehrenkrauss v. Bonnell, 199 N. Y. 240; Baker v. Georgi, 10 App. Div. 249, 41 N. Y. Supp. 1030; Jewell v. Knight, 123 U. S. 426.

86. Bigney v. Tallmadge, 17 How. Pr. 556.

87. Bishop v. Halsey, 13 How. 134; Powers v. Graydon, 10 Bosw. 630; McMenomy v. Roosevelt, 3 Johns. Ch. 446; Carpenter v. Muren, 42 Barb. 300; Bedell v. Chase, 34 N. Y. 386.

88. Goff v. Alexander, 20 Misc. 498, 45 N. Y. Supp. 737.

89. Commercial Bank v. Sherwood, 162 N. Y. 310, aff'g Commercial Bank v. Bolton, 20 App. Div. 70, 46 N. Y. Supp. 734.

90. Schidlovsky v. Gorman, 51 App. Div. 253, 64 N. Y. Supp. 993.

91. Norton v. Mallory, 63 N. Y. 434; Ocean Bank v. Hodges, 9 Hun, 161; Dudley v. Danforth, 61 N. Y. 626; Archer v. O'Brien, 7 Hun, 146; Shoemaker v. Hastings, 61 How. Pr. 79.

92. Delaney v. Valentine, 154 N. Y. 692.

tion of trust money of the daughter which the mother has applied to her own use will not be held fraudulent when attested by uncontradicted and unimpeached evidence.⁹³ The fact that a creditor to whom a debtor transfers real property in payment of a valid debt, about a year thereafter, as a condition of reconveying the property to another creditor, requires the latter to reimburse him for all expenses and advances incident to the transaction and moneys advanced by him to the debtor's wife, does not tend to indicate the existence of a fraudulent intent in the original conveyance.⁹⁴

2. Fraudulent intent of parties.

If the conveyance is made for the purpose of defrauding the creditors of the grantor, the fact that the guilty grantee is a *bona fide* creditor of the grantor will save the transaction.⁹⁵ A sale made with intent to hinder, delay and defraud the vendor's creditors is void notwithstanding the fact that it is in liquidation of a valid debt.⁹⁶ And the fraud of a debtor is properly imputed to creditors who take no affirmative action to collect their claims, but merely accept the advantage voluntarily given by the debtor for his own purposes and as part of his fraudulent scheme.⁹⁷

A transfer to a creditor may be held fraudulent, although the indebtedness to him exceeds the amount transferred, where he is at the same time holding other property of the debtor and protecting it from creditors.⁹⁸ A bill of sale by an insolvent firm of all its property, made immediately after inducing a creditor to defer the entry of judgment, may be set aside as fraudulent as to creditors.⁹⁹ The execution by the judgment debtor of a chattel mortgage at a time when he

93. *National Bank of Port Jervis v. Bonnell*, 26 Misc. 541, 57 N. Y. Supp. 486.

94. *O'Connor v. Docen*, 50 App. Div. 610, 64 N. Y. Supp. 206.

95. *Billings v. Russell*, 101 N. Y. 226; *New York County Nat. Bank v. American Surety Co.*, 69 App. Div. 153, 74 N. Y. Supp. 692; *Iselin v. Boldstein*, 35 Misc. 489, 71 N. Y. Supp. 1069; *Walsh v. Kelly*, 42 Barb. 98; *Palen v. Bushnell*, 1 Hun, 319; *aff'd*, 60 N. Y. 607; *Cohen v. Kelly*, 35 Super. Ct. 42.

Where the suffering of judgment by an insolvent corporation and the transfer of property by it to one who holds the same for the judgment creditor

are merely parts of a single scheme to prefer the creditor, an action may be maintained against all parties who participated in the transaction and received anything under it. *Wood v. Sidney Sash, Blind & Furniture Co.*, 92 Hun, 22, 37 N. Y. Supp. 885, 72 St. Rep. 830.

96. *N. Y. Ice Co. v. Cousins*, 23 App. Div. 560, 48 N. Y. Supp. 799.

97. *Metcalf v. Moses*, 161 N. Y. 587; *Barker v. Franklin*, 37 Misc. 292, 75 N. Y. Supp. 305.

98. *Blumenthal v. Michel*, 33 App. Div. 636, 54 N. Y. Supp. 81.

99. *Wright v. Loud*, 39 App. Div. 270, 56 N. Y. Supp. 959.

was assuring the judgment creditor that if he would delay entering the judgment a few hours longer he would pay his claim is a fraud upon the judgment creditor, and the lien of the judgment will not be postponed to the chattel mortgage, particularly where it does not appear that the mortgagees were *bona fide* creditors of the debtor.¹ A conveyance to the grantor's brother-in-law, for an alleged indebtedness to him, not satisfactorily proved, of property much in excess of the alleged indebtedness, the grantor continuing in control and collecting the rents, may be held to be in fraud of creditors.² Where the consideration for a transfer was an alleged loan from a mother to her son, the books of account of the son showing that whatever the mother had loaned him had been repaid prior to the transfer are admissible against both parties.³ In an action to set aside a confession of judgment as having been made without consideration, where the testimony of the defendant as to a consideration is contradicted only by the uncorroborated testimony of the debtor, who had testified differently in supplementary proceedings, a finding in favor of the plaintiff is against the weight of evidence.⁴

3. Debt not legally collectible.

A conveyance of land in payment of a *bona fide* debt is not fraudulent as to other creditors, although the debt is barred by the statute of limitations.⁵ The inclusion of interest not collectible at law, but which is equitably due, does not render a mortgage fraudulent as to creditors.⁶

4. Conveyance pursuant to trust.

A conveyance by one indebted, in pursuance of a parol trust, created upon a valuable consideration, is not fraudulent as against the creditors of the grantor.⁷ A conveyance of lands by a debtor for a nominal consideration, although presumptively fraudulent, will be sustained where it appears that he held the lands in trust, and that the lands were conveyed in pursuance of such trust.⁸

5. When debt is services of child.

Assignments of property, by a father to a son in settlement of services, may not be fraudulent against creditors, although

1. Robinson v. Hawley, 45 App. Div. 287, 61 N. Y. Supp. 138.

2. Hollis v. Drescher, 46 App. Div. 151, 63 N. Y. Supp. 378.

3. Saugerties Bank v. Mack, 34 App. Div. 494, 54 N. Y. Supp. 360.

4. Lummas v. Van Dyke, 17 App.

Div. 621, 45 N. Y. Supp. 489.

5. Hale v. Stewart, 7 Hun, 591.

6. Spencer v. Ayrault, 10 N. Y. 202.

7. Norton v. Mallory, 63 N. Y. 434.

8. Bachs v. Tomlinson, 1 St. Rep. 484.

the son was a minor when the services were rendered.⁹ But services rendered by a son to his father while living on the father's farm are an insufficient consideration for a transfer to the son by the father of most of his property as against the creditors of the father, in the absence of clear evidence of a contract to pay for such services.¹⁰

6. Effect of Bankruptcy Act.

The National Bankruptcy Act has the effect of annulling certain preferences given by a bankrupt within the four months preceding the filing of the petition in bankruptcy. In an action by a trustee in bankruptcy to recover money paid by an insolvent, proof that the insolvent made payment the effect of which was to give one creditor preference over others where there is evidence from which a jury might find that such creditors had reasonable ground to believe it was intended as a preference, the intent of the debtor in making the payment need not also be shown.¹¹ Where a conveyance of property belonging to a bankrupt was not made within four months prior to the filing of the petition, and the grantee had no cause to believe that it was intended as a preference, and he took the same for a valuable consideration, he was held entitled to retain the property as against the bankrupt's trustee.¹²

Transfers by a bankrupt, before voluntarily becoming such, to a creditor, where the bankrupt had at all times concealed from the creditor the fact that he was indebted to another, and where the creditor acted in good faith after personal examination of the books of the bankrupt, which showed him solvent, and where the bankrupt would have been solvent at such time but for the debt which he had concealed, will not be set aside as preferences in violation of the Bankruptcy Act.¹³ As to the effect of the Bankruptcy Act, see Collier on Bankruptcy, 12th Edition.

E. General assignment.

If a general assignment is made by an assignor with intent to hinder, delay or defraud creditors, it is invalid as against creditors no matter how free from knowledge or participation in the fraud the assignee may be.¹⁴ This

9. *Canavan v. McAndrews*, 14 Wkly. 282, 88 N. Y. Supp. 585. Dig. 282.

10. *Breen v. Henry*, 34 Misc. 232, 69 N. Y. Supp. 627.

11. *Benedict v. Deshel*, 177 N. Y. 1.

12. *Pratt v. Christie*, 95 App. Div.

13. *Brown v. Guichard*, 37 Misc. 78, 74 N. Y. Supp. 735.

14. *Loos v. Wilkinson*, 110 N. Y. 195.

doctrine is based upon the ground that an assignee under general assignment is not a purchaser for value.¹⁵ That an assignment is made with intent to prevent the assignor's creditors from gaining a preference by execution does not establish a fraudulent purpose.¹⁶ Intentional withholding of property by the assignor from the assignee is a fraud on the rights of creditors.¹⁷ So is an intentional omission of property from the schedule,¹⁸ unless the property has no value.¹⁹

Subsequent illegal acts of an assignor will not render invalid an assignment made with honest intent.²⁰ Thus an effort by an assignee to compromise with his creditors after an assignment is not evidence of fraudulent intent in making the assignment.²¹ An action is not maintainable to set aside a transfer or an assignment, because of the unlawful preferences, but it seems that the only remedy is an action in aid of the assignment, and for the benefit of all the creditors, to subject the excess to the claims of creditors under that instrument.²² Where the rights of creditors under general assignment of the debtor's property are not protected by the assignee, the remedy of creditors aggrieved is by an action in aid of the assignment for the benefit of the body of creditors; the party bringing the action obtains no preference.²³ A transfer by an insolvent debtor of all his property at its full value to a single creditor in payment of his debt, where no general assignment is made or contemplated, is not within the statute prohibiting preferences in general assignments in excess of one-third of the assigned estate.²⁴

F. Conveyance prior to debt.

Ordinarily a conveyance cannot be said to be in fraud of certain creditors, if it is made before the creation of the debts or obligations sought to be enforced.²⁵ A voluntary

15. *Putnam v. Hubbell*, 42 N. Y. 106; *Cuyler v. McCartney*, 40 N. Y. 221.

16. *Welles v. March*, 30 N. Y. 344; *Reed v. McIntyre*, 98 U. S. 507.

17. *White v. Benjamin*, 3 Misc. 490, 23 N. Y. Supp. 981; *Chambers v. Smith*, 60 Hun, 248, 14 N. Y. Supp. 706; *Schwab v. Kaughran*, 42 St. Rep. 407; *Smith v. Periae*, 121 N. Y. 376; *Coursey v. Morton*, 132 N. Y. 556.

18. *Pittsfield National Bank v. Tailer*, 60 Hun, 130, 14 N. Y. Supp. 557.

19. *Shultz v. Hoagland*, 85 N. Y. 464.

20. *Shultz v. Hoagland*, 85 N. Y. 464.

21. *Van Bergen v. Lehmaier*, 72 Hun, 304, 25 N. Y. Supp. 356.

22. *Abegg v. Bishop*, 142 N. Y. 286; *Maass v. Falk*, 146 N. Y. 34.

23. *Maass v. Falk*, 146 N. Y. 34.

24. *Tompkins v. Hunter*, 149 N. Y. 117.

25. *Phillips v. Wooster*, 36 N. Y. 412; *Alee v. Slane*, 26 App. Div. 455, 50 N. Y. Supp. 55; *Jacquelin v. Jac-*

conveyance is not fraudulent as to subsequent creditors, unless the grantor was then insolvent or the deed was made with intent to defraud subsequent creditors.²⁶ A voluntary conveyance by one who is not indebted can afterward be attacked by creditors only by showing that it was given with a view to continuing in business and creating future debts and saving the property from them for the purpose of defrauding future creditors.²⁷ No presumption of fraud will arise from a voluntary conveyance where there are no creditors, although a tort action is pending against the grantor.²⁸ But a conveyance with intent to defeat a recovery in a pending action may be void.²⁹ If a person who is about to engage in a new business convey his property without consideration, it may be void.³⁰ And a voluntary conveyance by one largely indebted may void as to subsequent creditors.³¹

An action may be maintained by a judgment creditor to set aside a conveyance of lands made by the debtor, as made with intent to defraud the creditor, although the debt was created after the conveyance, where it appears that the debtor obtained credit on the strength of his ownership of the lands, then transferred them with intent to defraud his creditors, and thereafter continued in possession and seeming ownership, and kept up his credit thereby; in such case a transfer may be made with intent to defraud a subsequent, as well as a prior creditor.³² If a voluntary conveyance is made immediately before engaging in some hazardous business or enterprise or obligations incurred so soon after the conveyance as to warrant a presumption that actual fraud is intended, or other circumstances lead to the same inference, a deed will be adjudged fraudulent and void as well against the subsequent as against existing creditors.³³

A conveyance made with actual intent to defraud may be avoided by a subsequent creditor, but subsequent creditors

quelin, 119 App. Div. 428, 104 N. Y. Supp. 701; *New Amsterdam Casualty Co. v. Gross*, 192 App. Div. 591, 183 N. Y. Supp. 74; *Sachs v. Walsh*, 28 Misc. 751, 60 N. Y. Supp. 214; *Lowther v. Rader*, 102 N. Y. Supp. 929; *Zimmerman v. Schoenfeldt*, 3 Hun, 692; *Ocean Bank v. Hodges*, 9 Hun, 161.

26. *Holmes v. Clark*, 48 Barb. 237; *Tappen v. Butler*, 7 Bosw. 480; *Loeschigk v. Hatfield*, 5 Robt. 26; *Cushman v. Addison*, 52 N. Y. 628.

27. *Teed v. Valentine*, 65 N. Y. 471.

28. *Termini v. Huth*, 191 App. Div. 218, 181 N. Y. Supp. 224.

29. *Ford v. Johnston*, 7 Hun, 563; *Van Buren v. Myers*, 18 Johns. 425; *Pendleton v. Hughes*, 65 Barb. 136.

30. *Case v. Phelps*, 39 N. Y. 164.

31. *Carpenter v. Muren*, 42 Barb. 300; *Mills v. Morris*, Hoff. Ch. 419.

32. *Shand v. Hanley*, 71 N. Y. 319.

33. *Young v. Heermans*, 71 N. Y. 374.

are not entitled to the benefit of improvements made by the fraudulent grantee, or of incumbrances paid by him.³⁴

Where the direct effect of a conveyance and of omitting to put it upon record is to defraud a creditor, who, relying upon the grantor's apparent ownership, intrusts him with the property which he misapplies, such conveyance is fraudulent as to creditors.³⁵ One who gives credit to the grantor, knowing he has parted with his title, cannot claim it as fraudulent as to him.³⁶ Where it appears that at the commencement of their dealings with a firm, the creditors made no search of the records as to the title, and that such search would have shown that the firm did not own the property, the conveyance will not be set aside.³⁷ But the fact that a firm requested a creditor not to record a security given, on the ground that such act would tend to affect its credit, is not, of itself, evidence from which an intent to defraud creditors can be inferred.³⁸

A deed of trust by a woman in contemplation of marriage, she having no debts and not contemplating the incurring of liability, the trustees to invest the property and pay the income to her for life and thereafter to her husband for life, if he survived her, with the principal over to her issue on his death, is not fraudulent conveyance or invalid as to subsequent creditors.³⁹

The fact that one fraudulently stated that he owned certain property at the time of the creation of the debt, when in fact he had previously conveyed it, does not constitute such fraud as to authorize the creditor to reach the property in a judgment creditor's action.⁴⁰

G. Status of grantee.

1. General rule.

As a general proposition, in order that a judgment creditor may set aside a conveyance as fraudulent he must show, not only that the grantor was guilty of fraudulent intent, but also that the grantee was a privy to the fraud or had knowledge of it when accepting the conveyance.⁴¹ One

34. *King v. Wilcox*, 11 Paige, 589.

35. *Pendleton v. Hughes*, 65 Barb. 136; s. c., 53 N. Y. 626.

36. *Lowther v. Rader*, 102 N. Y. Supp. 929; *Baker v. Gilman*, 52 Barb. 26.

37. *Trenton Bank Co. v. Duncan*, 86 N. Y. 221.

38. *Werner v. Franklin Nat. Bank*,

49 App. Div. 423, 63 N. Y. Supp. 383.

39. *Newton v. Jay*, 107 App. Div. 457, 95 N. Y. Supp. 413.

40. *New Amsterdam Casualty Co. v. Gross*, 192 App. Div. 591, 183 N. Y. Supp. 74.

41. *Jaeger v. Kelley*, 52 N. Y. 274; *Lary v. Pettit*, 55 App. Div. 631, 66 N. Y. Supp. 834; *Pritz v. Jones*, 117

who takes a chattel mortgage in good faith, upon sufficient consideration, is not affected by an undisclosed intent on the part of the mortgagor to defraud other creditors.⁴² To render a conveyance to a *bona fide* creditor void because of the fraudulent intent on the part of the debtor, such intent must have been shared by the creditor or those acting for him.⁴³ A purchaser for a valuable consideration is not chargeable with constructive notice that the conveyance to him, by his vendor, was made with intent to defraud creditors; his title can only be affected by actual notice of such fraudulent intent.⁴⁴

A transfer made by an insolvent debtor, even though made with intent on his part to defraud his creditors, is not void as against a transferee who has indorsed notes for his benefit which have been discounted and the proceeds used in the debtor's business.⁴⁵ But, if the grantee participates in the fraud or has actual knowledge thereof, the conveyance may be avoided.⁴⁶ Actual knowledge or notice to the vendee of the fraud need not be established by positive evidence but may be inferred from the circumstances.⁴⁷ The intent of the fraud need not be established by positive evidence which does not necessarily establish the fraudulent intent of the other.⁴⁸ That the grantee was ignorant of the grantor's intent will not protect him if his own acts were fraudulent.⁴⁹

2. No consideration by grantee.

A voluntary conveyance made without consideration may be set aside at the suit of a creditor, although the grantee was not a party to the grantor's fraud and had no knowledge

App. Div. 643, 102 N. Y. Supp. 549; *Ravin v. Subin*, 30 Misc. 193, 61 N. Y. Supp. 1104; *rev'd*, 31 Misc. 742, 64 N. Y. Supp. 138; *Boungierne v. Schiller*, 98 N. Y. Supp. 464.

42. *Smith v. Post*, 1 Hun, 516.

43. *Sommers v. Cottentin*, 26 App. Div. 241, 49 N. Y. Supp. 652; *Cothbery v. Connor*, 44 Super. Ct. 554; *Vanwyck v. Seward*, 6 Paige, 62; s. c., 18 Wend. 375; *Dunlap v. Hawkins*, 59 N. Y. 342. See *Babcock v. Eckler*, 24 N. Y. 628.

44. *King v. Holland Trust Co.*, 8 App. Div. 112, 40 N. Y. Supp. 480; *Farley v. Carpenter*, 37 Hun, 359; *Stearns v. Gage*, 79 N. Y. 102; *Parker v. Connor*, 93 N. Y. 118.

45. *Peetsch v. Sommers*, 31 App. Div. 255, 53 N. Y. Supp. 438, 28 Civ. Pro. 124.

46. *Canaday v. Arch Amusement Co.*, 179 App. Div. 842, 167 N. Y. Supp. 224; *Sjoberg v. Field*, 50 Misc. 412, 100 N. Y. Supp. 531.

47. *Ross v. Caywood*, 16 App. Div. 591, 44 N. Y. Supp. 985; *Lawrence Bros. v. Heylman*, 111 App. Div. 848, 98 N. Y. Supp. 121; *Bigelow v. Timmerman*, 7 Wend. 436; *Bennett v. Maguire*, 58 Barb. 625; *Babcock v. Eckler*, 24 N. Y. 623.

48. *Benedict v. Eldridge*, 14 App. Div. 625, 43 N. Y. Supp. 979.

49. *Hooker v. Mather*, 7 Cow. 301.

thereof.⁵⁰ The lack of consideration raises a presumption of fraud on the part of the grantee.⁵¹ A voluntary conveyance or transfer by an insolvent is fraudulent as against his creditors, even though the transferee was without knowledge or notice of such insolvency.⁵²

Moneys paid to an innocent transferee for the benefit of another may be recovered by the creditors of the transferor where the transferee has not paid them over according to the terms of the transfer, or where he has so paid them over with knowledge or notice of his transferor's insolvency.⁵³ Proof that a father, about a month before a note became due, and while he was insolvent, conveyed to his daughter all his property consisting of real and personal estate; that the daughter knew that this was all he had and that there was no change of possession of the personal property, is sufficient to sustain finding of fraudulent intent.⁵⁴ Where a debtor received money as the proceeds of a leasehold, and thereafter delivered the same to his mother, who received it without consideration and for the purpose of preventing plaintiff in an action against the debtor from recovering it, she was charged with the amount thereof in a suit by plaintiff to set aside the transfer.⁵⁵

3. Burden of proof as to guilt of grantee.

The intent on the part of the grantor to defraud creditors being shown, the presumption is that such also was the intent of the grantee, and the burden devolves upon the

50. *Whyte v. Denike*, 53 App. Div. 320, 65 N. Y. Supp. 577; *Gould v. Fleitman*, 188 App. Div. 759, 176 N. Y. Supp. 631; *Mohawk Bank v. Atwater*, 2 Paige, 54; *N. Y. & H. R. R. Co. v. Kyle*, 5 Bosw. 587; *Hildreth v. Sandt*, 2 Johns. Ch. 35.

51. *Newman v. Cordell*, 43 Barb. 448; *Holmes v. Clark*, 48 Barb. 237; *Wood v. Hun*, 38 Barb. 302, 4 Johns. Ch. 481.

52. *Truesdell v. Bourke*, 29 App. Div. 95, 51 N. Y. Supp. 409.

Proof of insolvency.—In an action by a debtor's trustee in bankruptcy to set aside an alleged fraudulent conveyance, the debtor's bankruptcy schedules showing his insolvency shortly after the transfer are sufficient to authorize a finding of insolvency at the date of the execution of

the conveyance as against grantees who were not *bona fide* purchasers for value; the grantor not having been engaged in any business between the date of the conveyance and the execution of the schedules. *Saxton v. Seabring*, 96 App. Div. 570, 89 N. Y. Supp. 372. The return of an execution partly unsatisfied a year after a conveyance by a judgment debtor does not tend to establish insolvency at the time of the conveyance, in the absence of other facts. *Wadleigh v. Wadleigh*, 111 App. Div. 367, 97 N. Y. Supp. 1063.

53. *Truesdell v. Bourke*, 29 App. Div. 95, 51 N. Y. Supp. 409.

54. *First National Bank of Amsterdam v. Miller*, 163 N. Y. 164.

55. *Fox v. Erbe*, 100 App. Div. 343, 91 N. Y. Supp. 832.

grantee to show that she was not only a purchaser for value in good faith, but had no knowledge or notice of facts which put him on inquiry as to the intent of the grantor.⁵⁶ Where the grantor's insolvency is shown, the grantee has the burden of showing that the conveyance was upon a good consideration and that he had no knowledge of grantor's fraudulent intent.⁵⁷ But a person may transfer lands without consideration providing he retains enough property to satisfy his creditors, and, until the evidence shows the contrary, the grantee is not bound to prove a consideration for the grant.⁵⁸ Mere proof of a conveyance by a debtor is not sufficient to show the insolvency of the debtor at the time of the conveyance. The creditor in such an action has the burden of proving that the debtor was insolvent at the time of the conveyance.⁵⁹

4. Permitting deed to stand as security for grantee.

A person who, with fraudulent intent, takes a conveyance from a debtor to hinder the creditors of the latter, does it at the peril of having that which he receives taken from him by the creditor whom he is attempting to defraud, without any remedy to recover that which he parts with in carrying out his bargain.⁶⁰ When a conveyance is made which is fraudulent as to creditors and the grantee is a party to the fraud, such grantee is not entitled to protection for any sum paid or liability incurred by him. The conveyance is absolutely void and is not permitted to stand as security for any purpose of indemnity or reimbursements.⁶¹ A fraudulent transferee is not entitled to an allowance for expenses incurred in preparing the property for the market.⁶² He cannot recover for advances which were the consideration for the fraudulent transfer.⁶³ A conveyance procured to

56. *Gilmour v. Colcord*, 96 App. Div. 358, 89 N. Y. Supp. 689; *Bailey v. Fransioli*, 101 App. Div. 140, 91 N. Y. Supp. 852; *Lawrence Bros. v. Heylman*, 111 App. Div. 848, 98 N. Y. Supp. 121; *Canaday v. Arch Amusement Co., Inc.*, 179 App. Div. 842, 167 N. Y. Supp. 224. Compare *Wilmerding v. Jarmulowski*, 28 App. Div. 629, 53 N. Y. Supp. 583.

57. *Hyde v. Wolfe*, 31 App. Div. 125, 52 N. Y. Supp. 764; *Wadleigh v. Wadleigh*, 111 App. Div. 367, 97 N. Y. Supp. 1063.

58. *Durland v. Crawford*, 172 App.

Div. 283, 158 N. Y. Supp. 692.

59. *Lewis v. Boardman*, 78 App. Div. 394, 79 N. Y. Supp. 1014; *Fitzpatrick v. Fox*, 80 App. Div. 345, 80 N. Y. Supp. 677.

60. *Union National Bank of Albany v. Warner*, 12 Hun, 306.

61. *Davis v. Leopold*, 87 N. Y. 620; *Van Wyck v. Baker*, 16 Hun, 168; *Sands v. Codwise*, 4 Johns. 536.

62. *Saugerties Bank v. Mack*, 35 App. Div. 398, 54 N. Y. Supp. 950.

63. *Wesier v. Wesier*, 53 N. Y. Supp. 578.

be made to a wife through a third person, in fraud of the husband's creditors, to which the wife is a party, is absolutely void; it will not be permitted to stand as security for any purpose of indemnity or reimbursement.⁶⁴ But, if the guilt of a transferee in fraud of the transferor's creditors is constructive only, arising from the legal presumption that he intended the consequence of his acts, money paid by him in redemption of pre-existing incumbrances may be allowed to him.⁶⁵ And one who, in good faith for an honest purpose, receives a conveyance which proves to have been made with intent to defraud, is only bound to restore to the grantor's creditors what he has received.⁶⁶ Where the grantee was not aware of the fraud, if the consideration was inadequate, a court of equity would treat it merely as security for the consideration actually paid.⁶⁷ A sale of goods which is not found to be fraudulent as to creditors is not to be treated as a security, with a view to an accounting by the buyer.⁶⁸

Where in a creditor's suit it appeared that the conveyance was for a good consideration, there was no frauds or facts from which a fraudulent intent could be inferred, and the court refused to grant a nonsuit, but, finding the consideration paid inadequate, permitted the conveyance to stand as security for the amount actually paid, it was held that this was error; that even if the consideration paid was inadequate, it was sufficient to sustain defendant's title; and, there being no fraud shown, defendant was entitled to a nonsuit, and the relief granted by the court could only be given in a proper action, where the evidence was consistent with the complaint.⁶⁹

Where a sister in good faith took a transfer of a farm to secure advances made to help her brother, on a retransfer of the same she would be entitled to repayment of the advances made and any obligations assumed by her.⁷⁰

H. Conveyance to subsequent bona fide purchaser.

A conveyance by a fraudulent grantee to a *bona fide* purchaser, for a valuable consideration, without notice, will prevail against the creditors of the original fraudulent

64. *Davis v. Leopold*, 87 N. Y. 620.

65. *Lore v. Dierkes*, 16 Abb. N. C. 47.

66. *Pond v. Comstock*, 20 Hun, 492; *aff'd*, 87 N. Y. 627; *Murphy v. Moore*, 23 Hun, 95; *aff'd*, 89 N. Y. 446.

67. *Van Wyck v. Baker*, 16 Hun, 168.

68. *Van Wyck v. Baker*, 16 Hun, 169; *Leet v. McMaster*, 51 Barb. 236; *Manning v. Ennis*, 21 Wkly. Dig. 27.

69. *Truesdell v. Searles*, 104 N. Y. 164.

70. *Nichols v. Nichols*, 40 Misc. 9, 81 N. Y. Supp. 156.

grantor.⁷¹ Where a fraudulent grantee has, at the instance of the grantor, executed a mortgage to pay debts of the latter, the equity of the mortgagee will prevail over the rights of a receiver in supplementary proceedings, if the creditors were ignorant of the debtor's financial condition.⁷² The title of a purchaser in good faith acquired through the purchase at a foreclosure of a chattel mortgage is not affected by the fact that the mortgage was executed to hinder, delay and defraud creditors.⁷³ A complaint that a judgment was obtained by collusion between the parties with intent to defraud defendant's creditors does not affect the title acquired by another buying property at the execution sale under the highest bid and for an adequate price.⁷⁴

A transfer of property by a debtor fraudulent as to creditors is not void *ab initio*; the title passes, and if the property, though obtained by the debtor by fraud, is levied upon and sold by a creditor of the transferee, under a judgment, and the proceeds paid over to him before action taken to set aside the transfer, they cannot be reached by creditors of the debtor who made the transfer.⁷⁵

I. Conveyance reserving privileges to grantor.

1. Deed providing trust for grantor.

A transfer of all of his property by a debtor, without consideration, in trust for his own use during life, and after his death for the payment of his debts, is on its face fraudulent as to existing creditors, without reference to fraudulent intent.⁷⁶ And a sale by one indebted, in consideration of supporting himself or his family, is fraudulent and void as to creditors.⁷⁷ A bill of sale made by an insolvent debtor which provides that the purchaser, as part of the consideration, shall board the seller and his family for one year, may be void as against creditors.⁷⁸

A covenant in a deed for the support of the grantor as part of the consideration creates a trust in his favor and renders the deed fraudulent and void as to his creditors even though a portion of the consideration is valid. Where

71. *Anderson v. Roberts*, 18 Johns. 515; *Hawley v. Cramer*, 4 Cow. 132; *Reynolds v. Park*, 5 Lans. 149.

72. *Murphy v. Moore*, 23 Hun, 95; aff'd, 89 N. Y. 446.

73. *Zoeller v. Riley*, 100 N. Y. 102.

74. *Lipshitz v. Halperin*, 53 Misc, 280, 103 N. Y. Supp. 202.

75. *Standard Nat. Bank v. Garfield*

Nat. Bk., 70 App. Div. 46, 75 N. Y. Supp. 28.

76. *Young v. Heermans*, 66 N. Y. 374.

77. *McLean v. Button*, 19 Barb. 450; *Jackson v. Porter*, 9 Cow. 73; *Todd v. Monell*, 19 Hun, 362.

78. *Brown v. Sherman*, 16 App. Div. 579, 44 N. Y. Supp. 1112.

such a covenant was inserted in the deed without the grantee's knowledge, but upon discovery thereof she makes no effort to have the deed reformed, but provides such support, she must be regarded as having adopted such provision and occupies the same position as if she had full knowledge of its contents.⁷⁹ If, however, the grantee pays a valuable consideration for the property, besides the support of the grantor, and there is no fraudulent intent, the conveyance may be sustained.⁸⁰

A creditor's suit will not lie to have a trust created by a debtor for the benefit of his wife during life, then for the benefit of himself during life, remainder to his children, declared void as to the part for his own benefit, inasmuch as his wife may survive him, and the action is based upon a mere possibility and presumption.⁸¹ Where a party while solvent creates a trust, reserving a beneficial interest for life, such interest is subject to the claims of his subsequent creditors.⁸²

2. Chattel mortgage.

Where a mortgagor of personal property has a right to dispose of some of the property, the mortgage is generally fraudulent as to creditors of the mortgagor. Thus, a chattel mortgage on a stock of goods which may be disposed of by the mortgagor in the ordinary course of business is generally avoided by creditors.⁸³ Where property embraced in a chattel mortgage is left in possession of a mortgagee, under an agreement that he may use it as before for the support of his family, it is fraudulent.⁸⁴ A mortgage by a corporation reserving the power to sell the personal property and use the income in the business and not requiring the application of the proceeds to any particular purpose, but for the use of the mortgagor, is void as to creditors.⁸⁵

3. Right to continue in possession of property.

The continuance of possession of personal property by the seller after the sale is made, is an indication of fraud and the sale may be set aside on behalf of the creditors of

79. *Townsend v. Bumpus*, 29 App. Div. 122, 51 N. Y. Supp. 513.

80. *Vial v. Mathewson*, 34 Hun, 70.

81. *Myer v. Thompson*, 35 Hun, 561.

82. *Scheneck v. Barnes*, 156 N. Y. 316, 27 Civ. Pro. 354.

83. *Griffin & Curtis on Chattel Mort-*

gages and Conditional Sales (3rd Ed.), p. 108.

84. *Marston v. Vultee*, 8 Bosw. 129.

85. *Zartman v. First National Bank of Waterloo*, 109 App. Div. 406, 96 N. Y. Supp. 633; *aff'd*, 189 N. Y. 267.

the seller.⁸⁶ The execution of a bill of sale of personal property, on the express understanding that as a condition precedent to its having effect the purchaser shall execute a written agreement to allow the seller to remain in possession, passes no title as against one having a valid judgment and execution against the seller.⁸⁷

Proof that after the transfer of a business from a son to his mother it was conducted the same as before, the son being put in charge on a salary payable out of the business under an agreement made at the time of the transfer; that the property largely exceeded the alleged consideration, and that the son failed to enter on the books receipts for large sums of money received immediately prior to the transfer is sufficient to establish fraud.⁸⁸ But the fact that fixtures which remained in the debtor's possession were included in a bill of sale is not evidence of fraud where they were so included by mistake, and the debtor's possession is open.⁸⁹ The continuance in possession by a grantor of real estate after conveyance to another, while a circumstance to be considered with the other evidence, does not of itself warrant the legal conclusion that the deed was fraudulent as to creditors.⁹⁰ Where a debtor, for a nominal consideration, conveys his real estate to his wife and children, but remains in possession of the same without any apparent change of ownership, and continues in business, paying his past indebtedness by obtaining new credits and contracting new debts, until he fails in business, such conveyance is fraudulent as to subsequent creditors.⁹¹

4. Provision for reconveyance.

A transfer by an insolvent debtor of his business and assets in trust to have the business conducted for an indefinite time by his trustees, who are to pay in full from the profits such creditors as consent to the arrangement and then retransfer the business to the debtor, or at any time to sell the business to any purchaser provided by the debtor who will pay a sum sufficient to pay off the consenting creditors, hinders and delays the non-assenting creditors and is void as to them.⁹² A conveyance of land in payment of a

86. *New York Ice Co. v. Cousins*, 23 App. Div. 560, 48 N. Y. Supp. 799.

87. *Fowler v. Haynes*, 91 N. Y. 346.

88. *Saugerties Bank v. Mack*, 34 App. Div. 494, 54 N. Y. Supp. 360.

89. *King v. Simmons*, 36 App. Div.

623, 55 N. Y. Supp. 173.

90. *Willis v. Willis*, 79 App. Div. 9, 79 N. Y. Supp. 1028.

91. *Savage v. Murphy*, 34 N. Y. 508.

92. *Wright v. Thorpe*, 22 Misc. 284, 49 N. Y. Supp. 111.

debt owing by the grantors upon an understanding embodied in the contract executed immediately after the delivery of the deed that the land should be reconveyed to the wives of the grantors upon the payment of the debt is fraudulent as against the creditors of the grantors.⁹³ Where a failing debtor conveys all of his property to trustees under their separate agreement to reconvey on request, and to use the income and the proceeds of any sale to support him and his family and pay his debts, the conveyance is void.⁹⁴ A conveyance by a solvent debtor, of a portion of his property to trustees to pay a portion of his creditors, is not, as a matter of law, fraudulent and void as to those not provided for, merely because it contains a provision that the surplus is to be repaid to the grantor, although such a conveyance by an insolvent debtor would be.⁹⁵

J. Husband and wife.

1. In general.

A voluntary conveyance by a husband to his wife without consideration, or for an inadequate consideration, leaving insufficient assets for his creditors is void as to such creditors.⁹⁶ But a voluntary settlement of a moderate sum by a husband on his wife, he retaining abundant means to pay his liabilities, cannot be invalidated by reason of his subsequent inability to pay a prior debt.⁹⁷ A man may make

93. *Harris v. Ornowitz*, 35 App. Div. 594, 55 N. Y. Supp. 172. .

94. *New York Public Library v. Tilden*, 39 Misc. 169, 79 N. Y. Supp. 161.

95. *Knapp v. McGowan*, 96 N. Y. 75.

96. *Cole v. Tyler*, 65 N. Y. 73; *Bolin v. Thompson*, 51 App. Div. 601, 64 N. Y. Supp. 203; *Marcy v. French*, 108 Misc. 302, 177 N. Y. Supp. 602; *Briggs v. Mitchel*, 60 Barb. 288; *Smart v. Harring*, 52 How. Pr. 505; *Sandman v. Seaman*, 84 Hun, 337, 65 St. Rep. 602, 32 N. Y. Supp. 338; *aff'd*, 156 N. Y. 668; *Milwaukee Harvester Co. v. Culver*, 89 Hun, 598, 35 N. Y. Supp. 289.

Money.—If a husband makes a gift of money to his wife it is void as to existing debts, and also as to future creditors. *Partridge v. Stokes*, 44 How. Pr. 381. A gift of money from a husband to a wife, which she immediately returns to him with instruc-

tions to use it as her agent, cannot be upheld. *Little v. Willetts*, 55 Barb. 125.

Wife to husband.—A voluntary conveyance made by a wife to her husband, leaving her insolvent, is fraudulent and void as against one who, relying on the wife's ownership of the property, had performed labor thereon. Where a husband was actually the owner of the property and paid the consideration, and had the title invested in the wife for his own purposes, he could not, by any advances made or dealings had on account of the property, create an indebtedness in his favor against his wife. *Multz v. Price*, 91 App. Div. 116, 86 N. Y. Supp. 480.

97. *Babcock v. Eckler*, 24 N. Y. 623; *Alee v. Slane*, 26 App. Div. 455, 50 N. Y. Supp. 55; *Wilbur v. Fradenburgh*, 52 Barb. 474.

a reasonable provision for his wife but he cannot do so with dishonest motives, at the expense of his creditors. He must deal honestly and openly and if he involves, mingles and merges his business transactions with those of others, the courts will assume that it was done to accomplish some ulterior purpose.⁹⁸ A naked gift from the husband to the wife will be sustained to the wife where creditors' rights are not affected.⁹⁹

The fact that the grantor is insolvent and is indebted at the time of the conveyance to his wife does not make the conveyance fraudulent as against creditors, so long as he retains sufficient to satisfy his creditors.¹ A conveyance executed for a nominal consideration by a husband to his wife as a settlement upon her and his children, of property the value of which was not greater than was reasonably sufficient for that purpose, made at a time when solvent, he retaining a surplus greatly in excess of all existing and contingent liabilities, which surplus he continued to hold for some time after the execution of the conveyance, is valid as against a creditor of the husband whose claim accrued prior to its execution.² A conveyance of land by a husband to his wife through a third person, as a gift, will not, after a lapse of forty years, be held fraudulent as to creditors, where the conveyance was made at a time of financial panic, the husband's debts were small and were paid within a month thereafter and he reserved valuable property.³

A conveyance by a husband to his wife alleged to have been made as a special provision for her could not be set aside merely because it had no consideration, and a judgment creditor who attacks it must show that there was a fraudulent intent on the part of the grantor.⁴ The fact that a wife is the grantee in a deed made by her husband with intent to defraud his creditors does not so connect her with her husband's fraudulent intent that proof of such intent on his part only will invalidate the deed.⁵ The mere proof of a voluntary conveyance by a husband to his wife is not

98. *Marcy v. French*, 108 Misc. 302, 177 N. Y. Supp. 602.

99. *Dewey v. Dunham*, 19 Wkly. Dig. 47. As to what constitutes such a valid gift, see *Armistage v. Mace*, 96 N. Y. 538.

1. *Wadleigh v. Wadleigh*, 111 App. Div. 367, 97 N. Y. Supp. 1063; *Pearshall v. Stewart*, 112 App. Div. 368, 98

N. Y. Supp. 467.

2. *Guy v. Craigher*, 46 App. Div. 614, 61 N. Y. Supp. 988.

3. *Hulse v. Bacon*, 26 Misc. 455, 57 N. Y. Supp. 537.

4. *Guy v. Craighead*, 21 App. Div. 460, 47 N. Y. Supp. 576.

5. *Bogert v. Hess*, 50 App. Div. 253, 63 N. Y. Supp. 977.

sufficient to impose the burden on the defendant of showing that there was no fraudulent intent.⁶

A wife who has constituted her husband her agent and was content to let him do as he pleased is chargeable with notice of his fraudulent intent and purpose in making a transfer of his property to her.⁷

2. Obligation due wife as sufficient consideration.

If there is an adequate consideration for a transfer of property from a husband to his wife, and the transaction is made without fraudulent intent, it may be sustained. Hence, if a husband conveys to his wife property which is the result of her earnings, the deed will be sustained.⁸ The wife's release of her inchoate right of dower in her husband's lands may be a good consideration for a note in her favor, if there is no intent to defraud his creditors,⁹ though, as against the creditors of an insolvent husband, it is good only to the extent of the actual value of such inchoate right of dower as shown by the annuity tables.¹⁰ A mortgage by a husband to his wife, made in consideration of a previous existing loan on which he had promised to give her security, is not fraudulent merely because it was intended by both to prevent some other creditor from collecting his debt out of the mortgaged property.¹¹

A husband may pay his wife any indebtedness he owes her, providing it is done without any design to cheat or defraud his other creditors; but a conveyance by a landowner to his wife, in order to prevent him from dissipating the property and making bad sales, is subject to any judgments which might be recovered against him on existing demands.¹² A conveyance of lands by a husband to a wife may be valid where they were purchased by the husband with the proceeds of other lands of which the wife was the equitable owner.¹³ A deed from a wife to her husband of property theretofore conveyed by the husband to the wife and purchased with the husband's means is valid.¹⁴ Where a husband owes his wife for money earned before her marriage, he has a right

6. *Kalish v. Higgins*, 70 App. Div. 192, 75 N. Y. Supp. 397.

7. *Sommers v. Cottentin*, 26 App. Div. 241, 49 N. Y. Supp. 652.

8. *Mason v. Libbey*, 19 Hun, 119; *aff'd*, 90 N. Y. 683.

9. *Foster v. Foster*, 5 Hun, 557; *Swart v. Harring*, 14 Hun, 576.

10. *Doty v. Baker*, 11 Hun, 222;

Swart v. Harring, 14 Hun, 576.

11. *Jewett v. Noteware*, 30 Hun, 192.

12. *Tanner v. Eckhardt*, 107 App. Div. 79, 94 N. Y. Supp. 1013.

13. *Smith v. Smith*, 17 Wkly. Dig. 81.

14. *Hulse v. Bacon*, 40 App. Div. 89, 57 N. Y. Supp. 537.

to secure it to her.¹⁵ A loan of money by a married woman to her husband, on his promise to repay it, constitutes a moral obligation which will uphold a payment to her while the husband is insolvent.¹⁶ Where a married woman purchases property, but the deed is made to her husband on his promise to pay on request, a subsequent conveyance of the legal title by him is not void as to his creditors.¹⁷

A conveyance by a husband of all his property to his wife and daughter on condition that the wife will discontinue a pending suit for a limited divorce is fraudulent and void as to existing creditors.¹⁸ But a transfer by husband to a wife where separation proceedings had been taken may be sustained upon the ground that there was a good consideration for the transfer, it being less than alimony as calculated by the tables of mortality, and the wife not being aware of the existence of judgments against her husband.¹⁹ A transfer of property made by a husband to his wife with intent to hinder, delay or defraud creditors cannot be upheld by proof that the transfer was made in consideration of a *bona fide* debt due to the wife from her husband.²⁰

A chattel mortgage given by an insolvent debtor to secure a debt of his wife is presumptively fraudulent as to his creditors.²¹ An action cannot be maintained on behalf of the creditors of the husband against the wife of such debtor to recover the value of services rendered by him in carrying on the separate business of the wife, where such services were rendered without any express agreement on the part of the wife to pay therefor.²²

3. Conveyance pursuant to ante-nuptial contract.

In the absence of fraud, the fact that the intended husband, at the time of making an ante-nuptial contract, was largely in debt does not invalidate it.²³ If a conveyance is made on

15. *Harbottle v. Farrell*, 21 Wkly. Dig. 534.

16. *Woodworth v. Sweet*, 51 N. Y. 8; *McCartney v. Welch*, 44 Barb. 271; s. c., 51 N. Y. 626; *Jaycox v. Caldwell*, 51 N. Y. 395; *Lowry v. Smith*, 9 Hun, 514.

17. *Holden v. Burnham*, 2 Hun, 678. See, also, *Fitzpatrick v. Fox*, 80 App. Div. 345, 80 N. Y. Supp. 677.

18. *Morgan v. Potter*, 17 Hun, 403.

19. *Tisdale v. Ryder*, 119 App. Div. 594, 104 N. Y. Supp. 77.

20. *Vogedes v. Beakes*, 38 App. Div. 380, 56 N. Y. Supp. 662.

21. *Lippitt v. Gilmartin*, 37 App. Div. 411, 55 N. Y. Supp. 1042.

22. *Lynn v. Smith*, 35 Hun, 275; *Abbey v. Deyo*, 44 N. Y. 343; *Foster v. Persch*, 68 N. Y. 400; *Sherman v. Elder*, 24 N. Y. 381; *Buckley v. Wells*, 33 N. Y. 518; *Gage v. Dauchy*, 34 N. Y. 293; *Draper v. Stouvenel*, 35 N. Y. 507; *Bertles v. Nunan*, 92 N. Y. 152. See *Kingman v. Frank*, 33 Hun, 471.

23. *Starkey v. Kelly*, 50 N. Y. 676.

consideration of a promise of marriage, it will not be set aside if the wife is innocent of the fraud.²⁴ An ante-nuptial contract, that if the intended husband should occupy a portion of his wife's real estate after marriage, he would pay interest on a mortgage in lieu of rent, is not fraudulent as to his creditors.²⁵ An oral ante-nuptial agreement, as against the husband's creditors, has been held an insufficient consideration for a deed by the husband to the wife.²⁶ But an oral agreement by a woman, made to an infant, to marry him if he would transfer to her a fund in which he had an interest, has been held a good consideration for the assignment of such fund to her after he attained majority, and sustained in a suit of his creditors whose claims accrued during his infancy, where the assignee had no knowledge of such claims when she took the assignment.²⁷ A conveyance of real estate by a man to a woman, in consideration of her marrying him, with knowledge on her part that his remaining property is insufficient to pay his debts, is void as to his creditors.²⁸ When an ante-nuptial contract is relied on as the consideration for a transfer, evidence should be received to show the incapacity of the wife to marry by reason of a former husband, for, if such is the case, the contract is not based on a good consideration.²⁹

K. Conveyance to one when consideration paid by another.

A grant of real property for a valuable consideration to one person, the consideration being paid by another, is presumed fraudulent as against the creditors of the person paying the consideration.³⁰ If a debtor purchase land and

24. *Foley v. Reynolds*, 107 Misc. 125, 177 N. Y. Supp. 55. In the case of *Magniac v. Thompson*, 7 Pet. 348-393, the court said "Nothing can be clearer, both upon principle and authority, than the doctrine, that to make an antenuptial settlement void, as a fraud upon creditors, it is necessary that both parties should concur in, or have cognizance of the intended fraud. If the settler alone intends a fraud, and the other party have no notice of it, but is innocent of it, she is not, and cannot be affected by it. Marriage, in contemplation of the law, is not only a valuable consideration to support such a settlement, but is a consideration of the highest value; and

from motives of the soundest policy is upheld with a steady resolution."

25. *Odell v. Mylins*, 53 How. Pr. 250.

26. *Whyte v. Denike*, 53 App. Div. 320, 65 N. Y. Supp. 577.

27. *De Hierapolis v. Reilly*, 44 App. Div. 22, 60 N. Y. Supp. 417; *aff'd*, 168 N. Y. 585.

28. *Kepp v. Kepp*, 7 Abb. N. C. 240.

29. *Hosmer v. Tiffany*, 115 App. Div. 303, 100 N. Y. Supp. 797.

30. Real Property Law, § 94.

The presumption of fraudulent intent which the statute creates may be overcome. *Flower City Brewing Co. v. Edwards*, 190 App. Div. 203, 179 N. Y. Supp. 887.

procure the deed therefor to be executed to his wife, it is void as to existing creditors.³¹

A creditor may reach property which his debtor paid for, but caused to be conveyed to another person, although his judgment never was a lien on the property, or by reason of the lapse of time had ceased to be a lien on the property.³²

A trust created in favor of the creditors of a person who pays the consideration for a conveyance to another can only be established in an action by a judgment creditor whose execution has been returned unsatisfied. The judgment creditor who first succeeds in obtaining a judgment establishing the trust is entitled to payment from the proceeds of the trust property in preference to other judgment creditors.³³

Moneys expended by a husband with fraudulent intent upon a house on his wife's land can be followed by his creditors; otherwise as to his personal services.³⁴ But if a husband, without fraudulent intent and in good faith, who is not indebted, pay the purchase price of land and cause the same to be conveyed to his wife, her title is good as against subsequent creditors.³⁵ This rule holds good as to persons who had dealt with the husband previously, and gave him credit without knowledge of the transfer, where it was clear there was no fraudulent intent.³⁶

Where the daughter of a judgment debtor takes title to a piece of property upon which the debtor, as her agent, erects a building, the creditors have no interest therein.³⁷ Where a solvent husband takes a conveyance in the name of his wife, the conveyance is not fraudulent as to future creditors.³⁸ A conveyance to a wife of property paid for by her husband is valid as against all but existing creditors.³⁹ Where the purchase money of land is paid by one and the conveyance made to another, the conveyance made is not fraudulent as to creditors if the consideration were paid in discharge of a prior moral obligation.⁴⁰ Where a wife has permitted her husband to take title to her real estate, her equitable title cannot prevail as against creditors of the husband.⁴¹ Where

31. *Wait v. Day*, 4 Den. 439.

32. *Scoville v. Shed*, 36 Hun, 165.

33. *Mandeville v. Campbell*, 45 App. Div. 512, 61 N. Y. Supp. 443.

34. *Isham v. Shafer*, 60 Barb. 317.

35. *Tappan v. Butler*, 7 Bosw. 480; *Curtis v. Fox*, 47 N. Y. 299.

36. *Carr v. Breese*, 81 N. Y. 584.

37. *Parks v. Murray*, 2 St. Rep. 628.

38. *Spicer v. Ayres*, 2 T. & C. 625;

Phoenix Bank v. Stafford, 89 N. Y. 405; *Seaman v. Wall*, 54 How. 47.

39. *Zimmerman v. Schoenfeldt*, 3 Hun, 692; *Ocean Bank v. Hodges*, 9 Hun, 161.

40. *Watson v. LeRoy*, 6 Barb. 481; *Mead v. Gregg*, 12 Barb. 653.

41. *Sloan v. Huntington*, 8 App. Div. 93, 40 N. Y. Supp. 393.

a husband while solvent paid the consideration for a house conveyed to his wife, which was used by them as a residence, payments made by him for mortgage interest, insurance, taxes and repairs in lieu of rent, but without arrangement with his wife, are not in fraud of creditors and do not entitle a judgment creditor of the husband to a lien on the premises.⁴²

L. Admissibility of declarations of grantor.

Admissions by an alleged fraudulent vendor made after his conveyance and in the absence of the vendee are not admissible against the latter.⁴³ But declarations of the debtors made after the transfer of their property to a member of the family or one of them, and before a re-transfer to a corporation organized by them, in order to reconcile a creditor to the scheme, may be admissible against them and their grantee as part of the *res gestæ*.⁴⁴ The testimony of the grantor in supplementary proceedings taken after the conveyance was made is inadmissible against the grantee on the question of intent, although she was the wife of the grantor and was also a witness in such proceeding, where there is no other evidence of joint interest or privity of design between them.⁴⁵

Where, in a suit to set aside an alleged fraudulent transfer of the proceeds of a certain leasehold against the debtor and his transferee, the debtor claimed that he held such proceeds only as trustee for the transferee, and the debtor was offered by the transferee as a witness to sustain such contention, a judgment against the debtor in a suit with reference to such leasehold, in which he answered alleging ownership thereof, together with the debtor's examination in supplementary proceedings containing declarations inconsistent with his evidence at the trial, were admissible for the purpose of contradicting him.⁴⁶

Letters written by a judgment debtor after a transfer of his property are not competent evidence as against plaintiff in a creditor's suit, nor can they be used to impeach the testimony given by the debtor in a deposition when not called to his attention upon an examination under the commission.⁴⁷

42. *Brundage v. Munger*, 54 App. Div. 549, 66 N. Y. Supp. 1014.

43. *Wadleigh v. Wadleigh*, 111 App. Div. 367, 97 N. Y. Supp. 1063; *Meyer v. Mayo*, 196 App. Div. 78, 187 N. Y. Supp. 346; *Strauss v. Murray*, 31 Misc. 69, 63 N. Y. Supp. 201.

44. *Vilas National Bank v. Newton*, 25 App. Div. 62, 48 N. Y. Supp. 1009.

45. *Lent v. Shear*, 160 N. Y. 462.

46. *Fox v. Erbe*, 100 App. Div. 343, 91 N. Y. Supp. 832.

47. *Cooper v. Hills Bros. Co.*, 50 App. Div. 304, 63 N. Y. Supp. 1046.

M. Effect of fraudulent conveyance.

A fraudulent conveyance is void as against the creditors intended to be defrauded.⁴⁸ But it is generally valid except as to creditors.⁴⁹ One who claims a beneficial interest under an assignment cannot have relief on the ground that it is fraudulent.⁵⁰ The grantor of land to a married woman, who received the price from her husband, cannot complain it was a fraud on himself as a creditor.⁵¹

Where a debtor transferred all his stock, fixtures and accounts by bill of sale to one who agreed to pay debts due certain creditors mentioned, and to take possession of the property and apply the proceeds, a valid trust being thereby created as between the parties, it could not be repudiated by the trustee as made with intent to defraud creditors.⁵²

A fraudulent conveyance is binding on the grantor and his heirs, and the heir cannot impeach the ancestor's deed on the ground that it is fraudulent as to creditors.⁵³ No action can be maintained by the fraudulent grantor to recover the property conveyed, although the conveyance was made by the advice of the grantee in whom the grantor had great confidence.⁵⁴ But where a woman having great confidence in the judgment, skill and ability of defendant, at his suggestion transferred property to him to place an obstacle to those who were threatening her with a law suit, her act in making the transfer is not a defense in a suit to set it aside, as, owing to the relation of the parties, they were not *in pari delicto*.⁵⁵

N. Conveyance partially fraudulent.

A bill of sale to two or more creditors which is fraudulent and void as to the claim of one of them is generally void as to all.⁵⁶ A chattel mortgage, void in part as being given to hinder, delay or defraud creditors, is void *in toto*.⁵⁷ A mortgage which is void as in fraud of creditors, because founded in part upon a pretended debt, will not be sustained to any extent as against creditors, though their claims may have

48. *Stephens v. Sinclair*, 1 Hill, 143.

49. *Bicknell v. Lancaster City Fire Ins. Co.*, 1 T. & C. 215; *aff'd*, 58 N. Y. 677.

50. *Ontario Bank v. Root*, 3 Paige, 478.

51. *Phillips v. Wooster*, 36 N. Y. 412.

52. *Neresheimer v. Smythe*, 167 N. Y. 202.

53. *Sander v. Cadwell*, 1 Cow. 622; *Cadwell v. King*, 4 Cow. 207; *Malin*

v. Garnsey, 16 Johns. 189; *Wood v. Hunt*, 38 Barb. 302; *Waterbury v. Westervelt*, 9 N. Y. 598; *Moseley v. Moseley*, 15 N. Y. 334.

54. *Renfrew v. McDonald*, 11 Hun, 254.

55. *Ingersoll v. Weld*, 103 App. Div. 554, 93 N. Y. Supp. 291.

56. *Shaffer v. Martin*, 25 App. Div. 501, 49 N. Y. Supp. 853.

57. *Russell v. Winne*, 37 N. Y. 591; *Dodds v. Johnson*, 3 T. & C. 215.

been created since the filing of the mortgage and with knowledge of its existence.⁵⁸ But where a debtor transferred property to his creditor, not only to pay the debt due, but for the purpose of preventing his other creditors from reaching it, it was held that the creditor should be required to pay over all the property brought in excess of his claim.⁵⁹

A transfer by a debtor of one-half of his business to a creditor and the other half to his wife to whom he claimed to be indebted may be sustained as to the former and set aside as to the latter, it appearing that he was not indebted to the wife, and that the transfer to her was made with fraudulent intent.⁶⁰

ARTICLE IV.

PARTIES.

A. Plaintiff.

1. In general.

Though some of the earlier cases permit the action to be brought by an individual creditor,⁶¹ or by two or more creditors jointly,⁶² the action is generally brought by a creditor in behalf of himself and all others similarly situated.⁶³ If he sues for others, he should aver the existence of others, or

58. *Levy v. Hamilton*, 68 App. Div. 277, 74 N. Y. Supp. 159.

59. *Palen v. Bushnell*, 1 Hun, 319; *aff'd*, 60 N. Y. 607.

60. *Commercial Bank v. Bolton*, 20 App. Div. 70, 46 N. Y. Supp. 734.

61. *Reubens v. Joel*, 13 N. Y. 488; *Greene v. Breck*, 32 Barb. 73.

Highway commissioners.—A creditor's action is not an action on contract in such sense that it can be maintained by highway commissioners to avoid a fraudulent conveyance. *Albro v. Rood*, 24 Hun, 72.

62. *Tabor v. Bunnell*, 10 Wkly. Dig. 551; *Lentilhon v. Moffat*, 1 Edw. 451; *Dix v. Briggs*, 9 Paige, 595; *Murray v. Hay*, 1 Barb. Ch. 59.

Accounting.—An action may be maintained by separate creditors of an estate to compel an accounting and set aside a fraudulent transaction. *Paff v. Kinney*, 5 Sandf. 380; *Petree v. Lansing*, 66 Barb. 357.

63. *Hammond v. Hudson R., etc.*, Co., 20 Barb. 378; *Edmeston v. Lynde*,

1 Paige, 637; *Wakeman v. Grover*, 4 Paige, 23; *Habicht v. Pemberton*, 4 Sandf. 657; *Brownson v. Gifford*, 8 How. 389.

Assignment.—An action to set aside certain provisions of an assignment, and to carry it out as modified, should be brought for the benefit of all who come in and contribute to the expense. *Cox v. Platt*, 32 Barb. 126.

Intervention.—While judgment creditors holding distinct and several judgments may unite in an action to set aside a conveyance of land by the common debtor, made in fraud of their rights as creditors, they are not all necessary parties to such an action; and where one of them has commenced such an action, the court does not require the plaintiff to bring in other creditors, and an order denying the application of such other creditors to intervene is discretionary and not reviewable in Court of Appeals. *White's Bank of Buffalo v. Faithing*, 101 N. Y. 344.

state facts upon which judgment can be given in their favor.⁶⁴ Where creditors are so numerous that it is impracticable to join them all, preferred creditors may sue for themselves and the others.⁶⁵ Where by statute no preference can be given, but the fund is applicable to all the creditors *pro rata*, the action should be brought for the benefit of all.⁶⁶ One of several co-sureties, having paid the whole of a judgment against them, may maintain a creditor's bill.⁶⁷ In case of general assignment where it is sought to set it aside upon the ground of fraud, not all creditors may assail it, since the assignment may be void as to creditors who choose to disaffirm, but valid as to those creditors who are provided for in it and have accepted benefits under it.⁶⁸ The mere presentation of claim by a creditor to the assignee is not sufficient to indicate an acceptance of benefit under the assignment on his part so as to estop him from assailing the assignment.⁶⁹ But the acceptance of a dividend under the assignment is regarded as an estoppel upon the creditor.⁷⁰

2. Assignee.

The assignee of a judgment may maintain the action, if an execution has been issued by the assignee and returned unsatisfied.⁷¹ But the assignee of merely the obligation on which the judgment was recovered cannot maintain the suit.⁷²

3. Mortgagee.

A mortgagee who has sued his bond to judgment may maintain the action, unless the land has become the primary fund for the payment of the debt.⁷³

4. Partnership debtors.

An individual creditor of a surviving partner cannot maintain a creditor's action to set aside a general assignment of

64. *Elwell v. Johnson*, 3 Hun, 558; appeal dism'd, 74 N. Y. 80.

65. *Brooks v. Peck*, 38 Barb. 519.

66. *Innes v. Lansing*, 7 Paige, 583; *Greene v. Breck*, 32 Barb. 73; *Hammond v. Hudson, etc., Co.*, 20 Barb. 378.

67. *Cuyler v. Ensworth*, 6 Paige, 32.

68. *Mills v. Argal*, 6 Paige, 577; *Pratt v. Adams*, 7 Paige, 615; *Hone v. Henriquez*, 13 Wend. 240; *Moller v. Tuska*, 87 N. Y. 166; *Conrow v. Little*, 115 N. Y. 387; *Terry v. Munger*, 121 N. Y. 161. See, however,

opinion Judge Gray in *Mills v. Parkhurst*, 126 N. Y. 89.

69. *Turney v. Van Gelder*, 68 Hun, 481, 52 St. Rep. 664, 23 N. Y. Supp. 27; aff'd, 143 N. Y. 632; *Thompson v. Fry*, 51 Hun, 296; *Schofield v. Scott*, 20 St. Rep. 815; *Talcott v. Hess*, 4 St. Rep. 62.

70. *Babcock v. Dill*, 43 Barb. 577.

71. *Gleason v. Gage*, 7 Paige, 121.

72. *Strange v. Longley*, 3 Barb. Ch. 650.

73. *Palmer v. Foote*, 7 Paige, 457.

the assets of the firm made by the surviving partner, for the right to do so is in the representatives of the deceased partner, and perhaps in the partnership creditors.⁷⁴ A judgment creditor of a limited partnership, after execution returned unsatisfied, may maintain an action to set aside as void an assignment by the firm.⁷⁵ A judgment creditor of the firm, who has had execution returned against the survivor, may maintain an action against the legal representatives of the deceased.⁷⁶ Where a trustee in bankruptcy was appointed for two bankrupts individually, and for them also as co-partners in a single proceeding; it was held that it was but one office, and that in an action by him to set aside an alleged fraudulent conveyance by the bankrupts there was no misjoinder of parties plaintiff.⁷⁷

B. Defendant.

1. Judgment debtor.

The judgment debtor is always a proper, and generally a necessary, party defendant in a judgment creditor's action.⁷⁸ But if the transfer is absolute, it may be that the judgment debtor is not a necessary party to the action.⁷⁹ An assignor making a general assignment is a necessary party to an action to set aside the assignment.⁸⁰ And in such a case, although all creditors are presumed to be represented by the general assignee, they may be allowed to intervene as parties.⁸¹

2. Joint debtors.

All parties against whom the judgment was recovered should generally be defendants,⁸² except in cases of insolvency or absence from the jurisdiction, when the facts should be

74. *Haynes v. Brooks*, 17 Abb. N. C. 152.

75. *Fanshawe v. Lane*, 16 Abb. 71; *Greene v. Breck*, 32 Barb. 73.

76. *Yates v. Hoffman*, 5 Hun, 113.

77. *Wright v. Simon*, 52 Misc. 360, 102 N. Y. Supp. 1108.

78. *Vanderpoel v. Van Valkenburg*, 6 N. Y. 190; *Miller v. Hall*, 70 N. Y. 250; *Allison v. Weller*, 6 T. & C. 291; *aff'd*, 66 N. Y. 614; *Shaver v. Brainard*, 29 Barb. 25; *Wallace v. Eaton*, 5 How. 99; *Bennett v. McGuire*, 58 How. 625; *Lawrence v. Bank of the Republic*, 35 N. Y. 320; *Palen v. Bushnell*, 18 Abb. 301; *Monroe v. Galveston*, etc.,

Co., 19 Abb. 90.

79. *Kineon v. Bonsall*, 194 App. Div. 110, 185 N. Y. Supp. 694.

80. *Hubbell v. Merchants' National Bank*, 42 Hun, 200; *Miller v. Hall*, 40 Super. Ct. 262; *aff'd*, 70 N. Y. 250; *Lawrence v. Bank of Republic*, 35 N. Y. 320; *Edwards v. Woodruff*, 90 N. Y. 396.

81. *Davies v. Fish*, 47 Hun, 314; *Chandler v. Powers*, 25 Hun, 445.

82. *Bennett v. McGuire*, 58 Barb. 625; *Child v. Brace*, 4 Paige, 309; *Commercial Bank v. Meach*, 7 Paige, 449.

alleged in the complaint.⁸³ But when only one of the debtors has made a fraudulent conveyance, the other debtor may be neither a proper nor a necessary party.⁸⁴ A creditor's action cannot be maintained against the separate property of a joint debtor not served.⁸⁵

3. Representatives of debtor.

A creditor's action to set aside a general assignment and transfers cannot proceed to judgment after the death of the assignor, unless his personal representatives are made parties.⁸⁶ Where a judgment debtor dies pending an action to set aside a conveyance and his grantee is appointed as his administratrix, such grantee must be made a party defendant in her representative capacity, although she has been made a party individually.⁸⁷ Although the heirs of the deceased grantor are proper parties to an action by a judgment creditor to set aside a deed as fraudulent, for the purpose of determining whether a legal estate vested in the grantee as against them, yet if omitted, a judgment may be entered declaring the deed void as to plaintiff and his judgment a lien on the lands.⁸⁸

As a rule an action will not lie against a foreign executor, but the courts of this State are not wholly without power to protect a resident creditor under special circumstances. In an action in equity where it is necessary to prevent the failure of justice, jurisdiction will be assumed at least so far as the relief to be secured relates to property within the jurisdiction of the court. The form and detail of the judgment in such case is in the discretion of the court at Special Term.⁸⁹

4. Corporations.

In an action by a judgment creditor of a corporation to subject to the payment of its claim property fraudulently conveyed by the corporation to its stockholders, the corporation is a necessary party.⁹⁰ A stock exchange is not a necessary party to set aside the transfer of a member's seat.⁹¹ Where, prior to the appointment of a trustee in bankruptcy

83. *Van Cleef v. Sickles*, 5 Paige, 505.

84. *Fox v. Moyer*, 54 N. Y. 125.

85. *Field v. Champion*, 13 Abb. Pr. 434.

86. *First Nat. Bank of Amsterdam v. Shuler*, 153 N. Y. 163.

87. *Vietor v. Goodman*, 26 Misc. 545, 57 N. Y. Supp. 599, 29 Civ. Pro. 263.

88. *Young v. Heermans*, 66 N. Y. 374.

89. *Bergmann v. Lord*, 194 N. Y. 70.

90. *Lathrop, Shea & Henwood Co. v. Byrne*, 115 App. Div. 846, 100 N. Y. Supp. 1041.

91. *Sprogg v. Dichman*, 28 Misc. 64, 59 N. Y. Supp. 806.

proceedings, property covered by a chattel mortgage given less than four months prior to the filing of the petition was sold and the proceeds deposited with a trust company, neither the trust company nor the temporary receiver were necessary parties to an action in a State court by the trustee to vacate the mortgage.⁹²

5. Wife of debtor.

In an action by a judgment creditor to set aside a conveyance, in which the debtor's wife joined, the latter is not a necessary party defendant.⁹³

6. Subsequent lienors.

If a creditor, under a prior judgment, is not made a party to a judgment creditor's action, the purchaser takes subject to such judgment.⁹⁴ Where an action is commenced in aid of an execution against a judgment debtor, all persons claiming any interest in the subject-matter are necessary parties, in order that their respective liens may be determined.⁹⁵ In an action by a trustee in bankruptcy to set aside a chattel mortgage, the fact that the bankrupt had given other chattel mortgages on the same property subject to the one in controversy does not make the mortgagees therein necessary parties, where the subsequent mortgages were not filed in compliance with the Lien Law, declaring such mortgages void as against creditors if not filed as directed therein.⁹⁶

7. General assignee.

In an action to set aside a general assignment, the assignee is generally a necessary party. But in a suit to set aside as void an assignment for the benefit of creditors where the assignee is not in possession of the premises, and plaintiff neither seeks relief against the assignee or to reach the proceeds, the assignee is not a necessary party.⁹⁷ And in a suit to set aside a general assignment, where it is alleged and conceded that the property alleged to have been fraudulently conveyed did not pass by the assignment, the general assignee is not a necessary party, and in any event the objection must be taken by answer or demurrer, or it will be waived.⁹⁸

92. *Vollkommer v. Frank*, 107 App. Div. 594, 95 N. Y. Supp. 324.

93. *McMahon v. Specht*, 64 App. Div. 128, 71 N. Y. Supp. 806.

94. *Scouten v. Bender*, 3 How. 185.

95. *Gavazzi v. Dryfoos*, 47 Misc. 15, 95 N. Y. Supp. 199.

96. *Shanks v. National Casket Co.*, 95 App. Div. 187, 88 N. Y. Supp. 839.

97. *Jessup v. Hulse*, 29 Barb. 539; rev'd on other grounds, 21 N. Y. 168.

98. *McCreery v. Gordon*, 38 Hun, 467.

Although, in a creditor's suit, to set aside a general assignment for the benefit of creditors, a preferred creditor is not a necessary party defendant; yet, where it is alleged that such creditor has received a sum of money under his preferences which he withholds, and an accounting is asked, he is a proper party.⁹⁹ The assignee represents the creditors in an assignment.¹

8. Grantee.

In an action to set aside an alleged fraudulent transfer of property, the transferee is generally a necessary party to the action.² Where assignments by a debtor to a third party and by such party to defendant's wife are sought to be set aside, such third party is a necessary party.³ The plaintiff may join as defendants all persons who are fraudulent grantees in the common design to hinder, delay or defraud him.⁴ All the grantees and incumbrancers should be defendants, though they took separate parcels at different times.⁵ But it is said that one who innocently took as trustee and conveyed to a third person is not a necessary party.⁶ And, if the transferee has made a disposition of the property before the commencement of the action, he may not be a necessary defendant.⁷ If one who receives property under a fraudulent transfer re-transfers it, he is not liable to one who obtained no specific lien before the transfer.⁸ But, where a debtor has, with fraudulent intent, conveyed his property to a fraudulent transferee, thus preventing a creditor from collecting his debt by ordinary legal methods and the fraudulent grantee has further transferred the property, he may be compelled in equity to account to a creditor for the proceeds of such property.⁹

99. *Genesee Bank v. Bank of Batavia*, 43 Hun. 295.

1. *Bank of British N. A. v. Suydam*, 6 How. 379. See *Wheeler v. Wheeldon*, 9 How. 293.

2. *Hammond v. Hudson, etc., Co.*, 20 Barb. 378; *Gray v. Schenck*, 4 N. Y. 460; *Sprogg v. Dichman*, 28 Misc. 64, 59 N. Y. Supp. 806.

3. *Bennett v. McGuire*, 5 Lans. 183.

4. *Merchants' Bank of Rochester v. Thalheimer*, 23 Wkly. Dig. 116.

5. *Wade v. Rusher*, 4 Bosw. 531; *Jacob v. Boyle*, 18 How. 106; *Sage v.*

Mosher, 28 Barb. 287; *Newbould v. Warrin*, 14 Abb. 80; *Boyd v. Hoyt*, 5 Paige, 65; *Reed v. Stryker*, 12 Abb. 47; *Morton v. Weil*, 11 Abb. 421; *Durand v. Hangerson*, 39 N. Y. 287; *Fellows v. Fellows*, 4 Cow. 682.

6. *Spicer v. Hunter*, 14 Abb. 4.

7. *Skillen v. Endelman*, 39 Misc. 261, 79 N. Y. Supp. 413.

8. *Cramer v. Blood*, 57 Barb. 671; *aff'd*, 49 N. Y. 684.

9. *Holland v. Grote*, 193 N. Y. 262; *mod'g* 125 App. Div. 413, 109 N. Y. Supp. 787.

9. Grantee of grantee.

If the grantee of the property has made a transfer thereof before the commencement of the action, the second transferee is generally a necessary party to an action to set aside the transfers. A grantee of one who takes a deed in fraud of the creditors of his grantor is a necessary party to a creditor's suit, and the Appellate Division may, upon an appeal from the judgment in favor of plaintiff, direct that the grantee of one who took the deed alleged to be in fraud of the creditor of the grantor be made a party, although the question was not raised by answer or demurrer.¹⁰ But where the complaint seeks only an accounting from the debtor's grantees of the proceeds received by them, but does not seek to set aside the deeds and mortgages made by them, their grantees and mortgagees are not necessary parties.¹¹

ARTICLE V.

PLEADINGS.

A. Complaint.

1. In general.

To entitle a plaintiff to maintain an action to set aside a conveyance of his debtor, he must show that he is a judgment creditor and that the conveyance was fraudulent in fact, and stands in the way of the collection of his judgment.¹² A complaint which states that the plaintiff is a judgment creditor of one of the defendants having an execution returned unsatisfied; that a chattel mortgage was executed by the debtor and taken by his co-defendant with intent to hinder, delay and defraud the creditors of the former; that the mortgagee has sold the property and converted the proceeds, is sufficient as a creditor's bill.¹³ A complaint in a creditor's action to remove a fraudulent obstruction by the judgment creditor must show that such removal will enable the judgment to attach to the debtor's property.¹⁴

A complaint seeking to reach funds of a judgment debtor in the hands of a testamentary trustee, which alleges the terms of the trust, that the trustees have assumed the same, and have in their hands a surplus over and above the sum

10. *Cook v. Lake*, 50 App. Div. 92, 63 N. Y. Supp. 818.

11. *Arnot v. Birch*, 29 App. Div. 356, 51 N. Y. Supp. 491.

12. *Carpenter v. Osborn*, 102 N. Y. 552.

Bill of particulars refused in a creditor's action. *Allter v. Jerome*, 110 App. Div. 813, 97 N. Y. Supp. 243.

13. *Murtha v. Curley*, 90 N. Y. 372.

14. *Lourey v. Clinton*, 32 Hun, 267.

necessary for the support and maintenance of the *cestui que trust* and those dependent upon him, and asking that the court fix the allowance to the *cestui que trust*, and that the surplus be applied in payment of the debt, states a sufficient cause of action.¹⁵

An allegation that, by the acts of the defendants, "it became impossible for the creditors of the railway company to enforce at law the collection of their claim and debts" is not a sufficient ground for the assumption of jurisdiction by a court of equity, for such allegation is not one of fact, but is the statement of the pleader's conclusion.¹⁶

Where complaint alleged that the principal defendant was insolvent and indebted to plaintiff on an unmatured note when she transferred all her property and business to her children, who were also made defendants, either without consideration, or because of money alleged to have been loaned her by them; that she thereafter continued her business in the same manner, inducing plaintiff, who did not know of the transfer, to take other notes, which were unpaid, and the basis, in part, of a judgment obtained by complainant; that such transfers were fraudulent and intended to delay creditors; and that defendants fraudulently conspired for that purpose, and held the property in trust for the creditors of the principal defendant, it was held that it stated a cause of action.¹⁷

A complaint by a trustee in bankruptcy asking that a transfer of property be declared void need not specifically allege that such transfer was voidable by the transferee. In such a complaint allegations of the bankruptcy sufficiently shows the plaintiff's interest.¹⁸

2. Judgment.

The complaint should allege the existence of the judgment and the facts constituting it a lien.¹⁹ If the judgment was recovered in a court of inferior jurisdiction, the court should allege the facts showing the jurisdiction of the court to render the judgment.²⁰ If the plaintiff is suing as the assignee of a judgment, the assignment should be alleged, but it is not

15. *McEvoy v. Appleby*, 27 Hun, 44.

16. *Trotter v. Lisman*, 199 N. Y. 497.

17. *Carpenter v. Adickes*, 34 Misc. 645, 70 N. Y. Supp. 607.

18. *Lesser v. Bradford Realty Co.*, 116 App. Div. 212, 101 N. Y. Supp. 571.

19. *Adsit v. Butler*, 87 N. Y. 585; *Parshall v. Tillou*, 13 How. Pr. 7; *Reubens v. Joel*, 13 N. Y. 488.

20. *Werbelovsky v. Michael*, 106 App. Div. 138, 94 N. Y. Supp. 156; *Pendleton v. Friedman*, 135 App. Div. 420, 119 N. Y. Supp. 994.

necessary to allege a general transfer of the cause of action set forth in the complaint.²¹

3. Issuance and return of execution.

The complaint in a creditor's suit to reach property disposed of by means of a fraudulent conveyance must allege the issuance and return of an execution.²² And it must allege that the execution was issued to the county where the debtor resides, if he is a resident of the State;²³ or if he is a non-resident, to the county where he has his office or where the judgment-roll is filed.²⁴ It is not sufficient to allege insolvency,²⁵ or to show that an execution would be useless.²⁶ An allegation that the debtor possessed no property except the equitable assets sought to be reached in the action is not sufficient to show that the legal remedy has been exhausted. The statute (Civil Practice Act, § 1189,) providing for a creditor's action to discover any property or chose in action belonging to the debtor does not make insolvency the basis of the action.²⁷

Where the complaint in a judgment creditor's action to set aside a conveyance does not in words allege that the plaintiff has no adequate remedy at law but does allege and the proof shows that an execution against the property of the judgment debtor had been returned wholly unsatisfied it brings the case within section 1189 of the Civil Practice Act, and the plaintiff is entitled to maintain the action.²⁸

4. Fraudulent intent.

In an action to set aside a fraudulent transfer, a fraudulent intent must be alleged as well as proved.²⁹ A complaint in an action to set aside a conveyance as fraudulent against

21. *Holland v. Grote*, 193 N. Y. 262.

22. *Crippen v. Hudson*, 13 N. Y. 101; *Dunlevy v. Tallmadge*, 32 N. Y. 457; *Beardsley Seythe Co. v. Foster*, 36 N. Y. 561; *Adsit v. Butler*, 87 N. Y. 585; *Allyn v. Thurston*, 53 N. Y. 622; explained and applied in *Barton v. Hosner*, 24 Hun, 467, and *Estes v. Wilcox*, 67 N. Y. 264.

23. *Payne v. Sheldon*, 63 Barb. 169; *Baldwin v. Ryan*, 3 T. & C. 251; *Hope v. Brinckerhoff*, 3 Edw. Ch. 446; *Campbell v. Foster*, 16 How. 275; *Simmons v. Eldridge*, 29 How. 309; *Beardsley Seythe Co. v. Foster*, 36 N. Y. 561.

24. *Pendleton v. Friedman*, 135 App. Div. 420, 119 N. Y. Supp. 994; *Voorhees v. Howard*, 4 Keyes, 371; *Reed v. Wheaton*, 7 Paige, 363.

25. *Adsit v. Sanborn*, 23 Hun, 45; *Tabor v. Bunnell*, 10 Wkly. Dig. 551.

26. *Elwain v. Willis*, 9 Wend. 548.

27. *Trotter v. Lisman*, 199 N. Y. 497.

28. *Shenk v. Oliva*, 94 Misc. 702, 158 N. Y. Supp. 437.

29. *Bailey v. Rider*, 10 N. Y. 363; *Genesee National Bank v. Mead*, 18 Hun, 303; *Rome Exchange Bank v. Kirkland*, 1 Keyes, 588.

creditors must show fraud in the conveyance and must either allege a fraudulent intent or set forth the facts logically indicating the existence of such intent.³⁰ The burden of charging as well as proving fraud is on the party setting it up, and while it is not necessary or proper that he should spread out in a pleading the evidence on which he relies, he must aver, fully and explicitly, the facts constituting the alleged fraud.³¹ If a party avers fraud, he is bound to so aver it that his opponent shall have notice of it and an opportunity to meet it.³² It is sufficient to charge that the alleged fraudulent conveyance was made with intent to hinder, delay and defraud creditors of the assignor, and is, therefore, fraudulent and void; it need not go into detail as to the fraud claimed.³³ While it is not necessary to set forth the specific fraudulent acts relied upon by plaintiff to establish a fraudulent intent,³⁴ yet the complaint should allege the recovery of the judgment and return of the execution, and fully set forth that the assignment was made with intent to hinder, delay and defraud creditors.³⁵ It is not sufficient to authorize suit in equity to allege fraudulent intent on the part of a judgment debtor in making a conveyance, if it appears from other allegations of the complaint that such intent has not been consummated by acts which prevent the enforcement by ordinary remedies.³⁶

5. Variance.

Where the complaint contains allegations which will authorize the court to treat the case as within the statute providing for actions not resting in the fraudulent disposition of property, relief may be granted upon that theory, notwithstanding allegations of fraudulent intent which the plaintiff does not succeed in establishing.³⁷ If an answering defendant makes default in appearing at the trial, any judgment consistent with the case made by the complaint and embraced within the issues may be taken irrespective of the prayer for relief.³⁸ A complaint in a creditor's suit which alleges that the conveyance sought to be set aside was made with intent to

30. *Fritz v. Jones*, 117 App. Div. 643, 102 N. Y. Supp. 549.

31. *Butler v. Viele*, 44 Barb. 166.

32. *Hilsen v. Libby*, 44 Super. Ct. 12.

33. *Mott v. Dunn*, 10 How. 225; *Wilson v. Forsyth*, 24 Barb. 105; *Hastings v. Thurston*, 18 How. 530; *Jessup v. Hulse*, 21 N. Y. 168; *Dudley v. Danforth*, 61 N. Y. 626.

34. *Dirant v. Pierson*, 29 St. Rep. 510; *Pittsfield Nat. Bank v. Tailer*, 60 Hun, 130.

35. *Adsit v. Butler*, 87 N. Y. 585.

36. *Holland v. Grote*, 193 N. Y. 262.

37. *Chadwick v. Burrows*, 42 Hun, 39; appeal dism'd, 115 N. Y. 671.

38. *Doti v. Henderson*, 107 Misc. 533, 177 N. Y. Supp. 736.

hinder, delay and defraud creditors cannot be sustained by proof that the conveyance can be deemed in trust for the benefit of the grantor, beyond the cost of his support, and as to the surplus liable to creditors.³⁹

An action by a judgment creditor against his debtor and another creditor, who is alleged to have fraudulently obtained possession of the debtor's property, will be sustained on the plaintiff's establishing a prior equity to that of the other creditor, though he fails to prove fraud, which is the gravamen of the complaint.⁴⁰ In an action by a judgment creditor to set aside a conveyance from husband to wife, through a third person, she may show fraud and collusion between the husband and the creditor with intent to charge her property with the debt of the husband.⁴¹ Where plaintiff sues to set aside a conveyance as fraudulent and introduces evidence that grantee had agreed to pay the grantor's debts over the objection of defendant, plaintiff could not have the complaint amended to conform to the objection.⁴²

6. Joinder of causes of action.

The complaint may set out all the fraudulent conveyances made by the debtor.⁴³ In an action to set aside a general assignment on the ground of fraud, the plaintiff may attack any other instrument which may have been executed by the fraudulent debtor in order to withdraw his property from the claims of creditors.⁴⁴ A judgment creditor bringing an action with the single purpose of reaching such property of his debtor as may be applicable to the judgment and of setting aside certain alleged fraudulent transfers may join in the same action as defendants all parties claiming interest in the property affected, though such parties claim by virtue of entirely distinct and separate conveyances.⁴⁵

The object of the action is single, namely, to reach the property of the debtor which is properly applicable to plaintiff's judgment. It is as proper and natural in such an action to join all parties claiming interest in and parts of that

39. *Third National Bank v. Cornes*, 2 St. Rep. 543.

40. *Heim v. Davenport*, 45 Super. Ct. 523.

41. *Elees v. O'Connor*, 27 Hun, 426.

42. *Zeiser v. Cohn*, 44 Misc. 462, 90 N. Y. Supp. 66. See on appeal 113

App. Div. 9, 98 N. Y. Supp. 1078.

43. *Chandler v. Powers*, 9 St. Rep.

169; *Loos v. Wilkinson*, 110 N. Y. 195.

44. *Chandler v. Powers*, 9 St. Rep. 169.

45. *Dixon v. Coleman*, 28 Misc. 64, 59 N. Y. Supp. 806.

property though under fraudulent conveyances made at different times and of different parcels as it is in the foreclosure of the mortgage to join all parties claiming interest in the property affected though by entirely distinct and separate conveyances.⁴⁶

Where the complaint, in addition to the allegations that the judgment debtor had made an assignment, set forth that other conveyances had been made by the debtor to various persons made defendants, for the purpose of defrauding his creditors, no privity being alleged between the defendants, and the complaint asked to have the assignment and conveyance set aside, it was held there was no misjoinder of parties and causes of action.⁴⁷ But where a creditor's action was brought to reach possession of property transferred by the judgment debtor separately to different defendants, among whom no conspiracy was alleged to exist, and an accounting was demanded against each, it was held that, while the complaint united several causes of action improperly, the objection was waived if not taken by demurrer or answer, and the action should be sustained if either of the causes of action alleged was made out.⁴⁸

Where a complaint to set aside a fraudulent conveyance contained an allegation that the grantee in the conveyance became the real party in interest in the action in which the judgment was obtained, and was liable for costs, but because the conveyance was made prior to docketing the judgment, the grantee held the lands apparently free of the lien, it was held not sufficient to constitute an independent cause of action, and the complaint was not demurrable as improperly uniting several causes of action.⁴⁹ Where fraudulent transactions are separately set forth in a creditor's bill as distinct causes of action and the judgment is reversed only in part, new trial may be confined to the issues as to which the reversal was had.⁵⁰

46. *Dixon v. Coleman*, 28 Misc. 64, 59 N. Y. Supp. 806.

47. *Reed v. Stryker*, 12 Abb. Pr. 47.

48. *Barnard v. Brown*, 43 St. Rep. 602, 17 N. Y. Supp. 313.

49. *Reed v. Davis*, 14 Wkly. Dig. 516.

50. *Schlitz Brewing Co. v. Ester*, 86 Hun, 22, 33 N. Y. Supp. 143, 66 St. Rep. 769; *aff'd*, 157 N. Y. 714.

7. Form of complaint asking for appointment of receiver and injunction.

SUPREME COURT — ULSTER COUNTY.

THE NATIONAL BANK OF RONDOUT
agst.

BENEDICT DREYFUS AND ROSE, HIS WIFE; EDWARD DREYFUS AND FLORA, HIS WIFE; LEWIS GANS AND MARY GANS, HIS WIFE. } 96 N. Y. 676.

The plaintiff, for his complaint, respectfully shows to the court, that heretofore and on or about the 13th day of January, 1906, in this court, in an action then pending in said court in the county of Ulster, in which action this plaintiff, the National Bank of Rondout, was plaintiff and the defendant Benedict Dreyfus was defendant, the said plaintiff duly recovered judgment against the said defendant for the sum of \$3,331.72 damages, and \$166.64 costs; in all the sum of \$3,498.36; that on said day the judgment-roll in said action was duly filed and the judgment duly docketed in said county; that on the 18th day of January, 1906, an execution, in due form of law, against the personal and real property of the said Benedict Dreyfus, was issued upon the said judgment to the sheriff of the county of Ulster, in which said county said defendant then resided and still resides; that said execution was thereafter and prior to the commencement of this action duly returned to the office of the clerk of said county of Ulster, wholly unsatisfied by said sheriff, and that there is still due to the said plaintiff from said defendant upon said judgment the said sum of \$3,498.36, with interest thereon from January 13, 1906; that after the indebtedness which said judgment was based upon and obtained was contracted, but previous to the recovery of said judgment, the said defendant Benedict Dreyfus was the owner in fee-simple and possessed of certain lots and valuable tracts of land situate, lying and being in the city of Kingston, in the said county of Ulster, New York; that said lots were of the value of \$10,000, being fully sufficient to satisfy said judgment and out of which the same might have been fully collected upon the said execution but for the collusive and fraudulent practices and contrivances hereinafter particularly described.

(Here follows description of the property.)

That heretofore and after the said indebtedness was incurred, but previous to the recovery of said judgments, but at what precise date this plaintiff is unable at present to particularly state, the said Benedict Dreyfus and Rose, his wife, by two certain deeds of conveyances in writing, conveyed, or attempted to convey, the above-described premises and real estate to the defendant Edward Dreyfus, one of such deeds or conveyances purporting to convey the six several lots or parcels of land first above described, and which said deed was recorded in the office of the clerk of the county of Ulster, *etc.* (Same recital as to any other deeds.)

That the first of said deeds, above mentioned bears date the 7th day of September, 1904, and is given for the nominal consideration, as therein stated, of \$10,000, and the second of said deeds above mentioned, bears date the 7th day of August, 1904, and is given for the nominal consideration, as therein stated, of \$800, but that both of said deeds were actually executed and delivered long after they bear date, and after the aforesaid indebtedness was incurred, and were absolutely without consideration; that said conveyances were made, executed and delivered by the said Benedict Dreyfus and Rose, his wife, and received and accepted by the said Edward Dreyfus with intent to hinder, delay and defraud the just creditors of the said Benedict Dreyfus of their lawful damages, forfeitures, debts and demands, and particularly to so hinder, delay and defraud the plaintiff herein, and that such conveyances were made, executed and delivered by the said Benedict Dreyfus and Rose, his wife, and accepted by the said Edward Dreyfus in trust for the use of the said Benedict Dreyfus; that the deed to the said Gans was given for the nominal consideration of \$8,200, but that said deed was actually given absolutely without consideration; that said conveyance was made, given, executed and delivered by the said defendant Dreyfus and Flora, his wife, and received and accepted by the said Lewis Gans with intent to hinder, delay and defraud the just creditors of the said Benedict Dreyfus of their lawful suits, damages, forfeitures, debts and demands, and particularly to so hinder, delay and defraud the plaintiff herein, and that such deed or conveyance was made, executed and delivered by the said Edward Dreyfus and Flora, his wife, and accepted by the said Lewis Gans in trust for the use of the said Benedict Dreyfus; that all of said conveyances were part of a collusive and fraudulent conspiracy to prevent the collection of the judgment hereinbefore set forth; that the said defendant Benedict Dreyfus has no other property than that attempted to be conveyed by the said deeds or assignments out of which the judgment hereinbefore set forth can be collected, and that unless such conveyances be set aside by the decree or judgment of this court and the plaintiff be allowed to collect such judgment out of the above-described real estate, the same must remain wholly unpaid; that the said defendant Edward Dreyfus now claims to own and is seized in fee-simple of all and singular of the five several lots or tracts of land last above described, by virtue of the attempted and pretended conveyance of said lots to him, above set forth, and collusively and fraudulently given and accepted as aforesaid; that the said defendant Flora Dreyfus is a married woman, the wife of the defendant Edward Dreyfus, and, therefore, if he obtained any title whatever to said premises by reason of the said conveyances, collusively and fraudulently made as aforesaid, she is seized of an inchoate right of dower therein; that the said defendant Lewis Gans now claims to own and be seized in fee-simple of the six lots or tracts of land first above described, by virtue of the attempted and pretended conveyance of said land to him, above set forth, and collusively and fraudulently given and accepted as aforesaid; that the defendant Mary Gans is a married woman, the wife of the said defendant Lewis Gans, and, therefore, if he has obtained any title whatever to said premises by reason of the said conveyances collusively and fraudulently made as aforesaid, she is seized of an inchoate right of dower therein.

WHEREFORE, The plaintiff demands judgment:

First. That the said deeds or conveyances above described, made by said Benedict Dreyfus and Rose, his wife, to the said Edward Dreyfus, and the deed or conveyance, above described, made by said Edward Dreyfus and Flora, his wife, to the said Lewis Gans, may each be denied and adjudged fraudulent and void as against the creditors of said Benedict Dreyfus and particularly against this plaintiff.

Second. That a receiver of the said real property and of all the property and effects of the said Benedict Dreyfus be appointed.

Third. That the defendants, and each of them, be adjudged to account for all moneys received by them; or either of them, under the deeds or conveyances before described, and for the proceeds, rents and profits of the real estate therein purporting to be conveyed, and that they deliver said property, proceeds, rents and profits to said receiver.

Fourth. That the said defendants, and each of them, be in the meantime enjoined and restrained from selling, transferring, assigning or in any way interfering with said real property, or any part thereof.

Fifth. That the said receiver be authorized and directed to sell or dispose of said real property, or so much thereof as shall be necessary, and out of the proceeds thereof to pay the aforesaid judgment and the costs and expenses of this action, and hold the balance for the further order of this court.

Sixth. And for such further or other relief as the court may seem just.

LINSON & VAN BUREN,
Attorneys for Plaintiff.

8. Another form of complaint.

SUPREME COURT — ULSTER COUNTY.

WILLIAM B. ENNIST

agst.

JACOB L. DEWITT, AS GENERAL ASSIGNEE
OF LUCIUS LAWSON, AND INDIVIDU-
ALLY, CHAUNCEY STEWART, CHARLES
H. PINNEY, AND MARY J. PINNEY,
HIS WIFE; LUCIUS LAWSON, AND ARRI-
ETTA, HIS WIFE, AND OTHERS.

The plaintiff herein respectfully shows to this court that on the 19th day of June, 1905, this plaintiff recovered a judgment in the Supreme Court of this State for the sum of \$606.38, damages and costs, which was duly docketed in Ulster county clerk's office, against Lucius Lawson, and that thereafter and before the commencement of this action, execution was duly issued thereon to the sheriff of Ulster county, in which county the said Lucius Lawson resided at the time of the entry of said judgment, and has ever since resided, and which said execution has heretofore been returned by said sheriff of Ulster county wholly unsatisfied; this plaintiff further shows that on the 20th day of November, 1904, the defendant Lucius Lawson executed and delivered to the grantee named therein an instrument in writing purporting to be a general assignment for the benefit of his creditors, of all his property to defendant Jacob L. DeWitt,

with certain preferences therein set forth, which trust was therein accepted by said DeWitt, which said instrument is recorded in Ulster county clerk's office in book of deeds No. 254, page 295, etc., to which reference is hereby made; that on the 19th day of November, 1904, the said Lucius Lawson made and executed and delivered to the defendant Charles H. Pinney an instrument in writing in and by which he conveyed to said Pinney, for a consideration, as there alleged, of \$1,200, certain property in the town of Hurley, therein described at length, to which conveyance, recorded in book 253 of deeds, page 630, in Ulster county clerk's office, reference is made for a full description of said property; that said instrument was made, executed and delivered by said Lawson in contemplation of the general assignment above set forth, and is part of the scheme for disposing of his property; that at the time of the delivery of said deed and previous thereto it was understood, agreed and arranged by and between the defendant Lawson and the defendant Pinney that the said deed was given to secure said Pinney the sum of \$1,200, due and owing him from Lawson, and that, in case any other or further sum should be realized from sale of said premises by said Pinney, the excess thereof, over and above said sum of \$1,200, should be returned to said Lawson for his sole use and benefit; or in case the said property should be mortgaged for a sum in excess of the sum of \$1,200, the said Pinney would convey the said premises subject to said mortgage to the wife of defendant Lawson for the use and benefit of the said Lawson; that thereafter the defendant Pinney mortgaged said property to one Evangela Hayes for the sum of \$1,500, and out of the proceeds received the sum of \$1,200, being the amount of his debt, and paid out the balance under the direction of said Lawson and for his benefit and at his request; that the said property was in fact at that time and now is worth the sum of \$2,500, and that such value was well known to said Lawson and said Pinney at the time of said transfer, and it was understood and intended said Lawson should receive the benefit of said value over said \$1,200; that said property was not set out or described in the inventory and schedule thereafter made by the assignor, nor any interest therein or equity in relation thereto, and said assignee has never in any wise interfered therewith; that various other items of property, consisting of interest in real estate and also certain personal property, were intentionally omitted from said inventory so made and filed with the county judge of Ulster county as required by law, such interest being a valuable interest in such real estate; that such sale to said Pinney and the assignment in reference thereto, above set forth, were communicated to the defendant Jacob L. DeWitt, before the signing and delivery of said general assignment; that the said assignor and assignee entered into certain agreements and arrangements as to said property as part of a scheme of such assignment, by virtue of which said assignor was to remain in possession of said assigned property, or a part thereof, and manage and control the same, and said Lawson did so manage and control said property and receive the income of a portion thereof after said assignment; that said assignment as well as said deed to Pinney was made by said Lawson with intent to hinder, delay and defraud the creditors of said Lawson and received by said DeWitt with full knowledge of said fraudulent intent on the part of said Lawson; that said assignment was fraudulent and void as against this plaintiff and the other creditors of said

Lawson, and conveyed no title or interest in said property to said assignee, the defendant Jacob L. DeWitt; that the said conveyance to Pinney was fraudulent and void as a conveyance of said property, and is invalid and insufficient to convey any interest in said premises to said Pinney over and above the amount due him, and that he has no further interest in said premises so conveyed; that after the giving of said conveyances the said DeWitt filed his bond as general assignee of said Lawson, and the defendant Chauncey Stewart and Artemas Sahler became his sureties thereon, and the assignor filed a paper purporting to be an inventory of his property, in Ulster county clerk's office on the 18th day of December, 1904, and thereafter proceeded to act as assignee with reference to a portion of the estate of said Lawson; that on the 25th day of June, 1905, the said DeWitt offered for sale at auction at the court house certain real estate of said assignor described in the inventory and schedules filed as aforesaid as follows (insert description); that all the said property was sold and conveyed by said assignee for the sum of \$350, subject to a mortgage for \$3,500, to defendant John S. Everett, although valued in said schedule at \$6,100 over and above said mortgage, and is in fact worth a very considerable sum over and above said mortgage, and the said \$350 is an utterly and entirely inadequate price for said property, and the same was unnecessarily sacrificed; that prior to such sale an action had been brought by the defendant Artemas Sahler against said Lawson and he had recovered a judgment therein for the sum of \$876.83, caused a levy to be made on the personal property of said Lawson included in said assignment, and had caused the sheriff of said Ulster county to levy on some of said personal property and sell the same; and a portion of said real estate had been attached in said action; and said Jacob L. DeWitt had brought an action against said sheriff to recover the value of the property so levied upon and sold; that the defendant, the said sheriff, thereafter, and before said sale, served an answer in said action, setting out that said property was liable to execution, and that the said pretended assignment was made by said Lawson, and accepted by said DeWitt, with intent to hinder, delay and defraud creditors, and was, therefore, void; that at said sale notice of the pendency of said action and of said claim of the invalidity of said assignment was given by the attorneys for said Riseley, and the assignee was requested to delay the sale of said property, but refused to delay the same until after the hearing and determination of said action, and that no person was willing to bid off said property at a fair price by reason of said notice and the doubt as to the validity of the title to be acquired; that the defendant, John S. Everett, was present and heard said notice given, and bought said premises for much less than their full value, with full knowledge of the claim that said assignment was invalid, as so made by creditors, and that the property failed to bring a large price by reason of the doubts as to the validity of such assignment; that it was the duty of said assignee to delay said sale until said question of validity of said assignment was adjudicated in said action, and that by reason of such sale, the creditors of said Lawson suffered great loss; made as aforesaid, the said sale was null and void, and should be vacated, set aside and held for naught; that the conveyance of said premises from said Jacob L. DeWitt to said Everett is dated July 7, 1905, and recorded in Ulster county clerk's office, book of deeds No. 258, page 530; that thereafter, and at the April term, 1906, the said action brought by

said Jacob L. DeWitt as aforesaid, against Joseph Riseley, sheriff, was tried on the merits before a jury, on the issue of the validity of said assignment from said Lawson to defendant DeWitt, and plaintiff's complaint dismissed on the merits, and said assignment held null and void and of no effect as to the said defendant; that thereafter, as plaintiff is informed and believes, the defendant Everett applied to the Ulster County Savings Institution, the holder of a mortgage for \$3,500 on the real property described in said inventory of said Lawson, for an assignment of the said mortgage, and procured the same in the name of his wife, the defendant Sarah C. Everett, for the purpose of protecting the said alleged sale to said Everett, and, as this plaintiff believes, for the purpose of foreclosing and to prevent the plaintiff and other judgment-creditors from realizing on their judgments against said Lawson, and this plaintiff tenders to said defendant Sarah C. Everett the amount due on said mortgage for principal and interest and insurance, and demands an assignment thereof as a judgment-creditor of said Lawson; that all the defendants except Jacob L. DeWitt, as assignee, Chauncey Stewart, John S. Everett and Sarah C. Everett, James E. Pinney and Mary Pinney are described in the inventory filed by Lucius Lawson as creditors of said Lawson, and are made defendants by reason of said interest, and no personal claim or demand is made against them, and the said Stewart is made defendant solely because he is surety for said assignee, and no personal claim is made against him; that a portion of the judgment recovered by Artemas Sahler, Abel A. Crosby, Grove Webster and Charles Reynolds, hereinbefore set forth against said Lawson, remains unpaid, as plaintiff is informed and believes, and that Artemas Sahler, on the 23d day of June, 1905, recovered in the Supreme Court two several judgments against said Lucius Lawson, one for the sum of \$3,447.84 damages and costs, and one for the sum of damages and costs \$433.35, which judgments were subsequently, by order of the Supreme Court, docketed in said county as of the 18th day of June, 1905; that on the 15th day of April, 1906, the defendant Jacob L. DeWitt obtained a judgment in the Supreme Court against Lucius Lawson, docketed in Ulster county clerk's office on that day, for the sum of \$176.38.

WHEREFORE, Plaintiff demands judgment of this court:

First. That the pretended general assignment of Lucius Lawson to Jacob L. DeWitt, hereinbefore set forth, be declared null and void, and the same be set aside, canceled and held for naught, and the defendants Lawson and DeWitt be decreed to convey the real property therein described to a receiver to be appointed herein.

Second. That the deed from Lucius Lawson to James Pinney, hereinbefore set forth, be declared null and void as to any and all sums over that secured by the mortgage to Evangela Hayes, and that said Charles H. Pinney and Mary Pinney be decreed to convey said premises to a receiver to be appointed herein, subject to said mortgage.

Third. That the said sale made by the assignee to defendant, John S. Everett, and the deed executed thereunder dated July 7, 1905, be vacated, annulled, set aside and canceled, and the said Everett and Sarah C., his wife, be decreed to convey the same to a receiver, and the said Everett be decreed to pay over to a receiver the rents and profits of the property received by him.

Fourth. That the said John S. Everett and all other persons be enjoined and restrained during the pendency of this action and per-

petually thereafter from taking possession of any of the property described in the complaint, or from in any wise interfering with any property so described, or from assuming any control over the same, or exercising any act of ownership with reference thereto, or from collecting the rents or profits thereof, and particularly from taking possession of, or interfering with in any manner, any of said property not now in his possession, or occupied by him.

Fifth. That said Sarah C. Everett be enjoined and restrained from foreclosing said mortgage so obtained from the Ulster County Savings Institution, or causing the same to be foreclosed, until the final determination of this action, without notice to this plaintiff of such intention, and failure on the part of the plaintiff to take an assignment thereof and pay the amount due thereon; and that the said defendant be directed to assign the said mortgage to this plaintiff upon payment of said sum so due.

Sixth. That a receiver be appointed herein to collect the rents and profits of the premises herein described during the pendency of this action, and until the sale of such premises, and to make sale thereof under the judgment herein, and to receive and to pay over to this plaintiff and such other parties as may be entitled thereto, the moneys to be realized on the accounting of said John S. Everett and Jacob L. DeWitt.

Seventh. That a referee be appointed to take and state to the court the accounts of Jacob L. DeWitt, as assignee of said Lucius Lawson under the said assignment, and also to take account of and state the amount due the estate, or the amount due said Everett from said assignee, if anything, and to take proof as to the proper parties entitled to the proceeds of the moneys which may be realized from the assignor's estate.

Eighth. That plaintiff have such other and further relief as may be just and agreeable to equity, together with costs of this action.

V. B. VAN WAGONEN,
Plaintiff's Attorney.

9. Form of complaint in action by creditor to set aside transfer of deceased.

NEW YORK SUPREME COURT — COUNTY OF NEW YORK.

THE NATIONAL SHOE AND LEATHER
BANK OF THE CITY OF NEW YORK

agst.

AMELIA F. BAKER AND ROBERT M.
MERRITT.

148 N. Y. 581.

The plaintiff complains and respectfully shows to this court as follows:

1. The plaintiff is a domestic corporation organized under the laws of the United States, pursuant to an act known as "The National Bank Act," and doing business as a banking association at the city of New York, and that previous to the 24th day of November, 1904, one Frederick Baker had an account as depositor with the plaintiff.

2. The plaintiff further alleges, upon information and belief, that previous to the 1st day of January, 1901, the said Frederick Baker

became and was indebted to the plaintiff in the sum of at least \$100, moneys received by him belonging to said plaintiff over and above the amount of any credits or set-offs to which he was entitled and which moneys the said Baker, acting in collusion with one Samuel C. Seely, a bookkeeper, in the employment of the plaintiff, had fraudulently obtained from the plaintiff and appropriated to his own use; and continued so indebted during all the times hereinafter mentioned.

3. That the said Frederick Baker, as the plaintiff is informed and believes, departed this life on the 24th day of November, 1904, being then insolvent; and leaving a last will and testament in and by which the defendant Amelia F. Baker was appointed executrix, and that no letters have been issued to the said Amelia F. Baker as executrix.

4. That plaintiff further alleges, upon information and belief, that with intent to hinder, delay and defraud his creditors, and among others this plaintiff, the said Frederick Baker, being insolvent and being largely indebted to the plaintiff, purchased three certain pieces or parcels of land in the city of New York, more particularly described as follows:

(Here insert description.)

and caused the title of said property to be taken in the name of the defendant Robert B. Merritt; that the consideration for the purchase of the said premises was paid by the said Frederick Baker and that no part of the same was paid by the said Robert B. Merritt, and that the said property was the property of the said Frederick Baker, and that at or about the time the said purchase was made the said Robert B. Merritt executed and delivered to the said Baker a conveyance thereof, with the name of the grantee in blank and with authority to insert the name of any person as grantee, and that the said Baker, with intent as aforesaid, did thereafter and on or about the 1st day of April, 1904, insert or cause to be inserted the name of the defendant Amelia F. Baker, as grantee in said conveyance, and that the same was thereupon recorded in the office of the register of the city and county of New York; and that the said Amelia F. Baker parted with no consideration for the said conveyance and that the said Frederick Baker caused the same to be made to her with intent to hinder and defraud his creditors, and among others this plaintiff.

5. That this action is brought for the benefit of the plaintiff and other creditors, if any, interested in the estate or property of said deceased.

WHEREFORE, The plaintiff demands judgment that the conveyance of the premises hereinbefore described from the said defendant Merritt to the said Amelia F. Baker, be set aside and be declared null and void, and that a receiver be appointed of the said premises and of the rents and profits thereof and that the said Robert B. Merritt and Amelia F. Baker be required to convey the said premises to such receiver for the benefit of the plaintiff and of other creditors, and that the defendant be required to account for the said property and the proceeds thereof to the receiver, and that they be enjoined and restrained during the pendency of this action from interfering with the said property or from conveying, transferring or incumbering the same, and that the plaintiff have such other and further relief as may be just.

PUTNEY & BISHOP,
Attorneys for Plaintiff.

B. Answer and defenses.**1. Attack on judgment.**

A defendant may set up that the plaintiff's judgment was fraudulently recovered,⁵¹ or that it was recovered in violation of an equitable agreement,⁵² or that the court had no jurisdiction to render it. Although the affidavits upon which substituted service of summons is ordered be sufficient to give the court jurisdiction to make the order, they are not conclusive in a creditor's suit, and the defendant may impeach the judgment by showing that the defendant was a person against whom substituted service of summons could not be ordered as a non-resident.⁵³ But an objection to the regularity of the judgment is not available as a defense.⁵⁴ It is not a defense to an action brought by a judgment creditor to reach property of the debtor that the judgment was obtained by perjury, as the judgment involves the determination of the truth of the testimony and the remedy is by motion for a new trial.⁵⁵ The validity of a contract on which the original action was brought, resulting in a judgment which is the basis of the creditor's suit, cannot be inquired into in such resulting action.⁵⁶ Allegations that plaintiffs do not own a judgment, but have assigned it, with a prayer for its cancellation, though insufficient when pleaded as a counterclaim, are sufficient when pleaded as a defense and counterclaim.⁵⁷

2. Denial of fraud.

A denial of fraud in an answer puts the plaintiff to his proof of it, and entitles the defendant to put in evidence all such facts as disprove it.⁵⁸ The fraud in a bill of sale must be pleaded; it cannot be shown under a general denial.⁵⁹ An admission of facts, constituting frauds in pleadings, must prevail over a mere unexplained denial of fraudulent intention.⁶⁰

51. *Richardson v. Trimble*, 38 Hun, 409; s. c., 17 Abb. N. C. 210.

52. *Smith v. Cocheron*, 2 Edw. 501. See to contrary *Mathingly v. Nye*, 8 Wall. 370; Abb. Trial Ev. 741.

53. *Buswell v. Loucks*, 8 Daly, 518.

54. *Sandford v. Sinclair*, 8 Paige, 373; *Platt v. Caldwell*, 9 Paige, 386; *Hone v. Woolsey*, 2 Edw. 289; *Barnard v. Darling*, 1 Barb. Ch. 218.

55. *Gitler v. Russian Co.*, 55 Misc.

553, 106 N. Y. Supp. 886.

56. *Decker v. Decker*, 108 N. Y. 128.

57. *Gitler v. Russian Co.*, 55 Misc. 553, 106 N. Y. Supp. 886.

58. *Van Alstyne v. Norton*, 1 Hun, 537.

59. *Van Dewater v. Gear*, 21 App. Div. 201, 47 N. Y. Supp. 503.

60. *Dykers v. Woodward*, 7 How. Pr. 313; *Churchill v. Bennett*, 8 How. Pr. 309.

3. Failure to exhaust legal remedy.

It is no defense to a judgment creditor's action that the debtor has property out of which the judgment could be collected; and if an execution has been issued and returned unsatisfied, the debtor cannot avail himself of that fact as a defense to the creditor's action, but has his remedy against the sheriff.⁶¹ It is necessary that an execution should be returned unsatisfied.⁶²

ARTICLE VI.

MATTERS OF PRACTICE.

A. Civil Practice Act, § 1195. How discovery may be compelled.

A discovery may be compelled in such action, by directing the person required to make it to appear before the court, or a referee appointed by it, and to be examined under oath concerning the matters pertaining to the discovery. But this section does not affect the right of the plaintiff to cause the deposition of a defendant to be taken as prescribed by statute or rule.⁶³

B. Limitation of action.

A judgment creditor's action is to be brought within ten years after the return of the execution unsatisfied.⁶⁴ The statute of limitations does not begin to run against the right of such creditor until a recovery of the judgment in this State and the return of an execution unsatisfied.⁶⁵

C. Actions by several creditors.

Until an order for judgment in a suit brought for all, in which they can come in, there is nothing to prevent a suit on

61. *Bank of Montreal v. Gleason*, 14 Civ. Pro. 377; *Mead v. Stratton*, 20 Wkly. Dig. 44.

62. *Adsit v. Butler*, 87 N. Y. 585, and cases cited.

63. As to inspection of debtor's books, see *Manley v. Bonnel*, 11 Abb. N. C. 123; *Kelly v. Eckford*, 5 Paige, 548; *Duff v. Hutchinson*, 19 Wkly. Dig. 20; *Stebbins v. Harmon*, 17 Hun, 445; *Bundschur v. Simon*, 23 N. Y. Supp. 714.

64. *Taffet v. Wright*, 2 T. & C. 614; *aff'd*, 59 N. Y. 656. See, also, *Hubbell v. Newburg*, 53 N. Y. 98.

65. *Weaver v. Haviland*, 142 N. Y. 534; *Bergmann v. Lord*, 194 N. Y. 70.

Pleading statute.—A judgment creditor, in an action to set aside a fraudulent conveyance, alleged that execution was returned unsatisfied at a given

date, which was a short time before the action was commenced. Defendant answered that the cause of action alleged in the complaint did not accrue within ten years before the commencement of the action. Plaintiff demurred to the defense. Held, while plaintiff was compelled to allege issue and return of execution unsatisfied, and his cause of action did not accrue until such return, that time and place were not part of the cause of action, and hence defendant was not bound by his plea of the statute to the statement of plaintiff as to date of such issue and return, but might show that the cause of action accrued at some other date, and that it was barred; hence the defense was not demurrable. *Holland v. Grofe*, 193 N. Y. 262.

each separate judgment for similar relief.⁶⁶ But where there are several actions brought on behalf of all, all may be compelled to come in the one first brought.⁶⁷ Where different actions have been brought by creditors for themselves and the other creditors, against an assignee for the benefit of creditors, for an accounting and closing of the trust, the court has power to compel creditors and claimants to come in and prove their claims in the suit brought or interlocutory judgment first obtained, and to stay proceedings in the other actions.⁶⁸ A judgment creditor who has been defeated in his own suit cannot come into an action brought for all and be made plaintiff.⁶⁹

Where an order for an accounting is made under which all creditors may come in, it operates as an interlocutory judgment in favor of each creditor, whether he comes in or not, as effectually as if he had been named as a party after such judgment; no creditor will be allowed to bring or proceed with a separate suit to judgment. Creditors who do not come in are barred after the usual notice to creditors has been published, though they have had no actual knowledge of the proceedings.⁷⁰

D. Discontinuance.

One who sues for himself and all others may discontinue before judgment.⁷¹ But the action cannot be discontinued after the entry of a decree settling the rights and liabilities of the parties.⁷²

E. Abatement and revival.

An action in equity brought by a judgment creditor to remove alleged fraudulent obstruction to a levy under an outstanding execution issued upon his attachment does not abate by reason of the inability of the creditor to bring his case to trial within the life of the execution, namely, within sixty days after the execution was issued.⁷³ But a creditor's action to set aside a general assignment and transfers cannot proceed to judgment after the death of the assignor unless his personal representatives are made a party.⁷⁴

66. *O'Brien v. Browning*, 49 How. 109.

67. *Travis v. Myers*, 67 N. Y. 542.

68. *Travis v. Myers*, 67 N. Y. 542.

69. *O'Brien v. Browning*, 11 Hun, 179; appeal dism'd, 77 N. Y. 630.

70. *Kerr v. Blodget*, 48 N. Y. 62.

71. *Tremain v. Guardian, etc., Co.*, 11 Hun, 286.

72. *Salisbury v. Binghamton Pub. Co.*, 85 Hun, 99, 32 N. Y. Supp. 652,

66 St. Rep. 35.

73. *Schwartzschild & Sulzberger Co. v. Matthews*, 39 App. Div. 477, 57 N. Y. Supp. 338.

74. *First National Bank of Amsterdam v. Shuler*, 153 N. Y. 163.

F. Proof of judgment.

While a transcript of a judgment is not evidence of the contents of the judgment roll so as to operate as an estoppel, it is, under section 382 of the Civil Practice Act, evidence of the fact that a judgment has been duly recovered, and of all the matters which it recites under the provisions of law, for the purpose of showing the right of the party recovering the judgment to maintain a judgment creditor's action.⁷⁵

ARTICLE VII.**INJUNCTION AND RECEIVER.****A. Civil Practice Act, § 1193. Injunction may be issued.**

A temporary injunction restraining the transfer to any person, or the payment or delivery to the judgment debtor, of any money, thing in action or other property or interest which, by the provisions of this article, may be applied to the satisfaction of the sum due to the plaintiff, may be granted in the action. The injunction is deemed to be one in which the right thereto depends upon the nature of the action.

B. Civil Practice Act, § 1194. Receiver may be appointed.

The court, by an order or by the interlocutory or final judgment in the action, may appoint a receiver of any or all of the property of the judgment debtor; and may direct the judgment debtor or any other defendant in the action to convey or deliver to the receiver, as justice requires, any property, real or personal, book, voucher or other paper, or to execute any instrument, which it deems necessary for perfecting or assuring the receiver's title or possession.

C. When injunction granted.

The authority to grant an injunction and appoint a receiver in an action in the nature of a creditor's bill existed before the Code of Civil Procedure and has been continued under the Civil Practice Act.⁷⁶ A clear case must generally be presented for the issuance of an injunction;⁷⁷ and it should not be granted except upon proof that the plaintiff has a cause of action.⁷⁸

In an action by a judgment creditor to discover assets applicable to the payment of his judgment, the court will not grant an injunction restraining the judgment debtor from disposing of its property during the pendency of the action, nor appoint a receiver *pendente lite*, where there is no allega-

⁷⁵ Bailey v. Fransioli, 101 App. Div. 140, 91 N. Y. Supp. 852.

⁷⁶ Hagerty v. Pittman, 1 Paige, 298; Bloodgood v. Clark, 4 Paige, 574; Lent v. McQueen, 15 How. 313; Conner v. Sedgwick, 1 Barb. 210; Whitcomb v.

Fowler, 7 Abb. N. C. 295; Manning v. Stern, 1 Abb. N. C. 409.

⁷⁷ Minzesheimer v. Meyer, 66 How. Pr. 484.

⁷⁸ Werbelovsky v. Michael, 106 App. Div. 138, 94 N. Y. Supp. 156.

tion in the moving papers that the judgment debtor has, either prior or subsequent to the commencement of the action, disposed of any of its property, or has done, or threatens, or is about to do, any act which will injure the plaintiff or tend to render ineffectual any judgment which he may obtain.⁷⁹

A temporary injunction will not be granted where the plaintiff is not entitled in that action to the final relief sought, and where such relief is not claimed to be absolute, but only contingent upon the happening of a future event and upon the termination of proceedings which may thereafter be brought in another court.⁸⁰ In a suit to set aside a transfer by a widow of her dower as fraudulent, allegations made upon information and belief, are not sufficient to authorize equity to restrain the transferee from collecting the rents of the interests transferred.⁸¹ But an injunction is granted when necessary to preserve the rights of the plaintiff.⁸² And an injunction may be granted in a proper case, although the real property in question is located in another State.⁸³

In an action to set aside an alleged fraudulent transfer of stock and for an injunction and a receiver, an injunction *pendente lite*, restraining the incumbering or disposal of the stock may properly be granted, as such relief is essential to the judgment demanded and necessary to make it effectual.⁸⁴

D. Appointment of receiver.

In a creditor's suit, to set aside as fraudulent conveyances of real property made by the debtor, the judgment should not ordinarily provide for the appointment of a receiver, but should merely set the conveyances aside so far as they obstruct the plaintiff's judgment, and leave him to his remedy by execution and a sale of the property thereunder.⁸⁵ And in an action brought before the return of the execution in aid of such execution, a receiver will not be appointed under section

79. *Clark v. King & Bro. Publishing Co.*, 40 App. Div. 405, 57 N. Y. Supp. 975.

80. *Vietor v. Lewis*, 38 App. Div. 316, 57 N. Y. Supp. 16.

81. *Dolan v. Conlin*, 114 App. Div. 570, 99 N. Y. Supp. 1090.

82. *Empire Paving & Construction Co. v. Robinson*, 33 St. Rep. 897; *People's Bank v. Fancher*, 21 N. Y. Supp. 45; *Babcock v. Jones*, 62 Hun, 565; *Candler v. Petit*, 1 Paige, 168;

Bloodgood v. Clark, 4 Paige, 574.

83. *Kirdahi v. Basha*, 36 Misc. 715, 74 N. Y. Supp. 383.

84. *MacKaye v. Soule*, 25 N. Y. Supp. 798, 56 St. Rep. 57.

85. *Bryer v. Foerster*, 14 App. Div. 315, 43 N. Y. Supp. 801; *Harris v. Osnowitz*, 35 App. Div. 594, 55 N. Y. Supp. 172; *National Union Bank v. Riger*, 38 App. Div. 123, 56 N. Y. Supp. 545; *Lazarus v. Rosenberg*, 70 App. Div. 105, 75 N. Y. Supp. 11.

1194.⁸⁶ Where enough money to pay the plaintiff's claim has been deposited in court, it is not necessary to direct the appointment of a receiver as prayed for in the complaint.⁸⁷ A receiver can be appointed in a creditor's suit, after the defendant's death, where the action was begun before his death.⁸⁸ Where the cause is tried before a referee, his report stands as the decision of the court, but the practice is to apply at Special Term to name the receiver.⁸⁹

E. Authority of receiver.

A receiver in an action to set aside a fraudulent conveyance is a common-law receiver.⁹⁰ He may maintain an action to determine priorities between conflicting claims to the fund remaining in his hands after final judgment.⁹¹ As against a judgment creditor not a party to the suit, the title of a receiver appointed in such a suit, to whom the debtor assigns, relates not to the time of filing the bill, but to the date of the assignment.⁹²

ARTICLE VIII.

JUDGMENT AND EFFECT.

A. Civil Practice Act, § 1191. What property may be reached.

The final judgment in the action must direct and provide for the satisfaction of the sum due to the plaintiff, out of any money, thing in action or other personal property belonging to or due to the judgment debtor or held in trust for him, which is discovered in the action; whether the same might or might not have been originally taken by virtue of an execution.

B. Civil Practice Act, § 1192. Interest of judgment debtor in land contract may be reached and applied.

The final judgment in the action also must direct and provide for the satisfaction of the sum due to the plaintiff, out of the interest, if any, of the judgment debtor, in a contract for the purchase of real property by him, either by selling the interest, or by transferring it to the judgment creditor, in such a manner and upon such terms as the court deems most conducive to the interests of the parties. Where the person bound to perform the contract to the judgment debtor is a defendant in the action, the final judgment may direct a specific performance of the contract to the judgment creditor, or, where the interest in the contract is directed to be sold, to the purchaser. The value of the interest of the judgment debtor holding the contract must be ascertained

86. *Home Bank v. Brewster Co.*, 15 App. Div. 338, 44 N. Y. Supp. 54.

87. *St. John Woodworking Co. v. Smith*, 82 App. Div. 348, 82 N. Y. Supp. 1025.

88. *Brown v. Nichols*, 9 Abb. (N. S.) 1, 42 N. Y. 26.

89. *Durant v. Pierson*, 12 N. Y.

Supp. 145, 33 St. Rep. 207.

90. *Badger v. Sutton*, 30 App. Div. 294, 52 N. Y. Supp. 16.

91. *Bamberger v. Fillebrown*, 12 Misc. 328, 33 N. Y. Supp. 614, 67 St. Rep. 321.

92. *Watson v. N. Y. C. R. R. Co.*, 6 Abb. (N. S.) 91; *aff'd*, 47 N. Y. 157.

under the direction of the court; and so much thereof as is necessary must be applied to the payment of the sum due to the plaintiff, and the residue, if any, to the benefit of the judgment debtor.

C. Civil Practice Act, § 1196. Application of provisions for action of discovery; what property cannot be reached.

The provisions of this article authorizing and regulating an action by a judgment creditor for discovery and satisfaction do not apply to a case where a judgment debtor is a corporation created by or under the laws of the State. Nor does it authorize the discovery or seizure of, or other interference with, any property which is expressly exempted by law from levy and sale by virtue of an execution, or any money, thing in action or other property held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor; or the earnings of the judgment debtor for his personal services rendered within sixty days next before the commencement of the action, where it is made to appear, by his oath or otherwise, that those earnings are necessary for the use of a family wholly or partly supported by his labor.

D. Property subject to action.

1. In general.

A judgment creditor's action can only reach property belonging to the judgment debtor or held in trust for him, and the pleadings must present such a trust within the statute.⁹³ In a receiver's action to reach moneys equitably due to the judgment debtor, his interest is not limited by that of the creditors, but he succeeds to the rights of the debtor and may recover all that is equitably due him. His recovery is, therefore, subject to all allowances which are proper against the judgment debtor.⁹⁴ Every species of property belonging to a debtor may be reached and applied to the payment of his debts.⁹⁵ A creditor's bill will lie to reach personal as well as real property claimed to have been transferred in fraud of creditors.⁹⁶ An action will lie to reach a seat in the Exchange, after the refusal of the Exchange to transfer it.⁹⁷ But exempt property cannot be reached.⁹⁸

2. Interest in lands.

The proceeding is a proper remedy to reach the interest of debtor in real estate, such as the interest of a vendee,⁹⁹ an interest in lands as tenant by the curtesy,¹ a right of dower before assignment,² an annuity in lieu of dower,³ or the rents

93. *Niver v. Crane*, 98 N. Y. 40.

94. *Fox v. Hodge*, 17 Wkly. Dig. 412.

95. *Edmeston v. Lynde*, 1 Paige, 641.

96. *McCloskey v. Stewart*, 63 How. Pr. 137.

97. *Platt v. Jones*, 96 N. Y. 24.

98. *Andrews v. Rowan*, 28 How. Pr.

126; *Cooney v. Cooney*, 65 Barb. 524.

99. *Watson v. Lerow*, 6 Barb. 481.

1. *Ellsworth v. Cook*, 8 Paige, 643.

2. *Tompkins v. Fonds*, 4 Paige, 448;

Stewart v. McMartin, 5 Barb. 438.

3. *DeGraw v. Clason*, 11 Paige, 136.

of real estate sold under execution, where the debtor is entitled to remain in possession.⁴ But a wife's inchoate right of dower in real property owned by her husband cannot, during her husband's lifetime, be reached in a creditor's action.⁵

3. Moneys.

Money due from a wife to a husband for services rendered in her separate business cannot be reached in a judgment creditor's action.⁶ Nor can money paid on an illegal contract be reached unless the specific fund can be traced and identified.⁷ Money paid by the government on account of a debt due the debtor may be reached, though it is paid to his heirs with intent to defraud the claim.⁸

4. Partnership funds.

An interest in the effects of a partnership is properly reached in a judgment creditor's action.⁹ But the property of an insolvent partnership cannot be applied to the satisfaction of the individual debts of a member of the firm.¹⁰

5. Chose in action.

The debts, choses in action and other equitable assets of the judgment debtor may be assigned or sold under the decree of this court, so as to vest an equitable interest in the purchaser.¹¹ Thus, a judgment belonging to the debtor,¹² salary earned,¹³ or rights under a patent,¹⁴ may be reached. But salary to be earned cannot be reached,¹⁵ nor can earnings within sixty days before the commencement of the action be applied on the judgment, when such earnings are necessary for the use of a family wholly or partly supported by his labor. As to accrued earnings for services rendered by a husband within such period, the statutory exemption cannot be asserted against the wife in an action to secure payment of alimony, since she is one of the persons for whose benefit the exemption is made.¹⁶ A judgment creditor of a wife

4. *Farnham v. Campbell*, 10 Paige, 598.

5. *Sherman v. Hayward*, 98 App. Div. 254, 90 N. Y. Supp. 481.

6. *Kingman v. Frank*, 64 How. Pr. 520.

7. *Ogden v. Wood*, 51 How. Pr. 375.

8. *Austin v. Tompkins*, 3 Sandf. 22.

9. *Eager v. Price*, 2 Paige, 333; *Taylor v. Perkins*, 26 Wend. 125.

10. *Fuller Electrical Co. v. Lewis*,

101 N. Y. 674.

11. *Edmeston v. Lynde*, 1 Paige, 641.

12. *Egberts v. Pemberton*, 7 Johns. Ch. 208.

13. *Thompson v. Nixon*, 3 Edw. 457.

14. *Gillett v. Bates*, 86 N. Y. 87.

15. *Browning v. Bettis*, 8 Paige, 569; *McCoun v. Dorsheimer*, 1 Clark, 144.

16. *Valentine v. Williams, Inc.*, 159 N. Y. Supp. 815.

whose debt was contracted prior to the granting of a divorce can reach no portion of the alimony awarded to her by such decree.¹⁷ The amount of a policy of insurance on the life of her husband, received by a wife where the policy was issued for the benefit of herself and her children, cannot be made subject to the claims of her creditors.¹⁸ An assignment of an insurance policy upon the life of a husband for the benefit of the wife cannot be compelled, nor can the avails thereof be apportioned in advance of such decree to the payment of debts or held for the benefit of creditors.¹⁹ But a judgment debtor's life insurance policy which provides that he may change the beneficiary at any time is his personal property, and may be reached in a judgment creditor's action against him.²⁰

6. Interest in decedent's estate.

The interest of one as next of kin in a decedent's estate is a proper subject of the action;²¹ but not the interest of one as next of kin of a person living.²² A legacy may be reached.²³

7. Corporate property.

The provisions of sections 1189-1196 of the Civil Practice Act do not apply where the judgment debtor is a corporation created by or under the laws of the State.²⁴ But, nevertheless, under proper circumstances, an action in the nature of a judgment creditor's action may be maintained against a corporation under the general equitable powers of the court.²⁵ An action will lie by a judgment debtor of a domestic corporation to set aside a general assignment for the benefit of creditors, made by it as an obstruction to the enforcement of the plaintiff's judgment, for the right to maintain such an action is not affected by the provisions of section 1196.²⁶ A judgment creditor of a foreign corporation may, after execution returned, sue here an individual having property

17. *Andrews v. Whitney*, 82 Hun, 117, 63 St. Rep. 486, 31 N. Y. Supp. 164; *Romaine v. Chauncey*, 129 N. Y. 566.

18. *Leonard v. Clinton*, 26 Hun, 288.

19. *Baron v. Brummer*, 100 N. Y. 372.

20. *Cavagnaro v. Thompson*, 78 Misc. 637, 138 N. Y. Supp. 819.

21. *McArthur v. Hoysradt*, 11 Paige, 495.

22. *Smith v. Kearney*, 2 Barb. Ch.

533.

23. *Hallett v. Thompson*, 5 Paige, 583.

24. Civ. Prac. Act, section 1196.

25. *Lodi Chemical Co. v. National Lead Co.*, 41 App. Div. 535, 58 N. Y. Supp. 717; *Easton National Bank v. Buffalo Chemical Works*, 48 Hun, 557, 1 N. Y. Supp. 250.

26. *Muller v. Scandinavian Emigrant Co.*, 1 N. Y. Annotated Cases, 397.

of the corporation, to compel its application to his debt.²⁷ Creditors having a lien on the property of a corporation may follow it. Where the property has been divided among the stockholders, a judgment creditor, after execution, may maintain an action against them in the nature of a creditor's bill.²⁸

8. Trust funds.

It is provided in the Real Property Law that, where a trust is created to receive the rents and profits of real property, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum necessary for the education and support of the beneficiary, shall be liable to the claims of his creditors in the same manner as other personal property, which cannot be reached by execution.²⁹ That is to say, such surplus may be reached in a judgment creditor's action.³⁰

Where a judgment debtor is the beneficiary of a trust under and by which the trustees are required to receive and pay over to him the trust estate, an action may be maintained by a judgment creditor, after the return of an execution unsatisfied, to reach the surplus income beyond what is necessary for the suitable support and maintenance of the *cestui que trust* and those dependent on him; this is so whether the trust is personal or real; the remedy of the creditor is not confined to the accumulated surplus; provision may be made in the judgment determining what is a proper allowance for the *cestui que trust*, and directing the application of the balance toward the payment of the judgment.³¹ A receiver in supplementary proceedings may maintain such an action.³² The provisions of section 98 of the Real Property Law concerning the surplus income of a trust fund are for the benefit only of creditors who have recovered judgments against the beneficiary and whose executions have been returned un-

27. *Bartlett v. Drew*, 60 Barb. 648; aff'd, 57 N. Y. 587.

28. *Hastings v. Drew*, 76 N. Y. 9.

29. Real Property Law, section 98.

30. *Howard v. Leonard*, 3 App. Div. 277, 38 N. Y. Supp. 363.

Personal property.—Surplus income of personal property held by another for the debtor's use and not necessary for the support, etc., may be reached. *Hallett v. Thompson*, 5 Paige, 583. But only where it is in excess of the sum needed for the support of the debtor and his family. *Bramhall v.*

Ferris, 14 N. Y. 41. Where the property in the hands of trustees under an invalid trust consists of personal property, which originally belonged to the grantor, and by the terms of the conveyance he is entitled to his support therefrom, the income may be reached by his creditors. *Sloan v. Birdsall*, 34 St. Rep. 804, 11 N. Y. Supp. 814.

31. *Williams v. Thorn*, 70 N. Y. 270; *McEvoy v. Appleby*, 27 Hun, 44; *Tolles v. Wood*, 99 N. Y. 616.

32. *McEwen v. Brewster*, 19 N. Y. Supp. 189.

satisfied in whole or in part.³³ Any successor of a trustee who has been removed is in a position to maintain a creditor's suit against such trustee.³⁴

Where it is sought to reach the income of a fund placed in the hands of trustees to be applied to the benefit of the debtor, a creditor can only claim that which is in excess of the amount sufficient to maintain the debtor in the manner in which he was brought up and accustomed to.³⁵ Where a judgment creditor seeks to compel so much of the income of a *cestui que trust* as exceeds what is necessary for his suitable support and maintenance to be applied to the payment of his debt, the court, in determining what is the proper amount to be allowed for the expenses of the *cestui que trust*, will consider the manner in which he has been brought up, the habits acquired by him, and his ability to take care of his property. To entitle a plaintiff to succeed in such an action he must prove that there is a surplus of income, and where he fails to do so, his complaint will be dismissed.³⁶ The creditor by the commencement of the action acquires a lien upon the accrued or unexhausted surplus, or that subsequently arising, superior to the claims of general creditors or assignees of the *cestui que trust*.³⁷ Where the judgment directed payment of plaintiff's debt and costs from the surplus, on failure of the trustees to do so after proper demand, execution against their individual property was held proper. It seems that the remedy of defendants, in case the judgment is not correct in stating the amount in their hands, is by motion to correct the judgment.³⁸

The remedy of a creditor seeking to reach the surplus income of a trust fund is not confined to that already accrued, but a decree may provide for an application of future accumulations.³⁹ Where a son's interest was limited to such amounts as the executors in the exercise of their judgment should see fit to apply to his support, and the balance remained a part of the trust estate to which the children were entitled, the court had no power to direct the application of any part thereof to the son's debts.⁴⁰

The provisions of section 1196 refusing the remedy to recover a trust fund do not forbid an action to recover the

33. *Butler v. Boudouine*, 84 App. Div. 215, 82 N. Y. Supp. 773, 13 Anno. Cases, 188.

34. *Stokes v. Amerman*, 121 N. Y. 337, 31 St. Rep. 391.

35. *Stover v. Chapin*, 21 St. Rep. 38, 4 N. Y. Supp. 496.

36. *Kilroy v. Wood*, 42 Hun, 636.

37. *Tolles v. Wood*, 99 N. Y. 616.

38. *Thorn v. Williams*, 81 N. Y. 381.

39. *Wetmore v. Wetmore*, 79 Hun, 268, 60 St. Rep. 569, 29 N. Y. Supp. 440, aff'g 31 Abb. N. C. 239, 8 Misc. 51, 58 St. Rep. 751, 28 N. Y. Supp. 377; modified, 149 N. Y. 520.

40. *Myers v. Russell*, 60 Misc. 617, 112 N. Y. Supp. 520.

surplus.⁴¹ Nor is the action precluded when the trust fund is created by the debtor.⁴² Nor does it prohibit the maintenance of a creditor's action to reach a vested remainder in a fund held in trust, to receive the income and apply it to the use of a person other than the judgment debtor.⁴³ The restriction of section 1196 to the effect that its provisions do not apply to property held in trust for the judgment debtor, was intended to refer to the interest of the beneficiary, inalienable under the Personal Property Law, and a judgment creditor may reach a judgment debtor's interest in remainder in a fund held by a trustee for the benefit of a third person.⁴⁴ What is protected is the income from a trust fund created by a third person, and that only to the extent necessary for the support of the beneficiary.⁴⁵

Where a will creates a trust in personal property during the life of testator's wife, and directs the trustees upon the wife's death to divide the property equally and pay it to his son and daughter if they are then living, there is a gift to the son of a contingent future interest, which is "property" within the meaning of section 1189 of the Civil Practice Act, and may be reached by a judgment creditor of the son through a suit in equity.⁴⁶ The income of a fund received by a judgment debtor from trustees of his wife's estate, who agreed to set apart the fund and pay him the income for five years on his withdrawing his contest of her will, is not the income of a trust created by a third person so as to be exempt from liability to creditors.⁴⁷

E. Contents of judgment.

1. Conveyance set aside only so far as necessary.

Where a transfer of personal property is valid as between the transferor and the transferee, the court, in an action brought by a creditor of the transferor to set aside the transfer as fraudulent to him, will, in a proper case, set the transfer aside only so far as it is necessary to do so in order to pay the amount due to the plaintiff as fixed by his judgment and the expense of executing it. Judgment in such an action, setting aside the transfer and appointing a receiver of

41. *Schenck v. Barnes*, 156 N. Y. 316.

42. *Kene v. Hill*, 102 App. Div. 370, 92 N. Y. Supp. 805.

43. *Bergmann v. Lord*, 194 N. Y. 70.

44. *Bergmann v. Lord*, 51 Misc. 213, 99 N. Y. Supp. 748; *aff'd*, 113 App. Div. 899.

45. *Keeney v. Morse*, 34 Misc. 114,

69 N. Y. Supp. 535; *aff'd*, 71 App. Div. 104, 75 N. Y. Supp. 728.

46. *National Park Bank of New York v. Billings*, 144 App. Div. 536, 129 N. Y. Supp. 846; *aff'd*, 203 N. Y. 556.

47. *Everett v. Peyton*, 49 App. Div. 630, 62 N. Y. Supp. 910.

the defendant's property, should provide that upon the satisfaction of the plaintiff's judgment and the payment of the expenses of enforcing it, the property be returned to the transferee.⁴⁸ Where the plaintiff is the only creditor seeking relief and his claim will be satisfied by the vacating of a particular transfer of a sum of money, it is not essential that the judgment should vacate all of the transfers shown to be fraudulent.⁴⁹ A judgment which decrees that a deed is fraudulent as to the creditor who has brought an action to set it aside and as to other creditors of the common debtor, leaves the deed operative as between the parties to it.⁵⁰ But, where all the transfers are fraudulent, the court is not bound to discriminate between them and set aside only such as will enable the plaintiff to satisfy his claim and leave the others undisturbed.⁵¹ A receiver appointed in supplementary proceedings cannot recover judgment for more of the proceeds of the fraudulent conveyance than equals the judgment he represents and the expenses of the receivership and reference.⁵² He can obtain a decree setting aside the transfer only so far as it is necessary to satisfy the judgment upon which he was appointed, with the costs of the action.⁵³

2. Personal judgment.

Where no relief is demanded against the debtor, and he has not answered, a personal judgment cannot be taken against him.⁵⁴ And judgment creditors, suing for equitable relief, cannot have personal judgment for the debt against the debtor enforceable by execution.⁵⁵ Judgment cannot be taken for damages alone.⁵⁶ But a court of equity may adapt its relief to the exigencies of the case, and when nothing more is required, may order a sum of money to be paid by the defendant to the plaintiff, or give him a personal judgment therefor, to be enforced by execution.⁵⁷ Thus, as against the grantee, the creditor may have a personal judgment in lieu of a decree setting aside the transfer.⁵⁸ If no accounting is necessary, the rendition of a money judgment in favor of the

48. *Comyns v. Ryker*, 83 Hun, 471, 65 St. Rep. 72, 31 N. Y. Supp. 1042.

49. *Fox v. Erbe*, 100 App. Div. 343, 91 N. Y. Supp. 832.

50. *Knapp v. Crane*, 14 App. Div. 120, 43 N. Y. Supp. 513.

51. *Metcalf v. Moses*, 161 N. Y. 587, modifying 35 App. Div. 596, 55 N. Y. Supp. 179.

52. *Stiefel v. Berlin*, 28 App. Div. 103, 51 N. Y. Supp. 147, 27 Civ. Pro.

216.

53. *Bostwick v. Menck*, 40 N. Y. 383; *Verplanck v. Van Buren*, 76 N. Y. 247.

54. *Kelly v. Downing*, 42 N. Y. 71.

55. *Clafin v. Maguire*, 45 Super. Ct. 521.

56. *Sage v. Mosher*, 28 Barb. 287.

57. *Bailey v. Hornthal*, 154 N. Y. 648.

58. *Fox v. Erbe*, 100 App. Div. 343, 91 N. Y. Supp. 832.

plaintiff is proper.⁵⁹ In an action to set aside a transfer of real and personal property for fraud and undue influence, two of the defendants were adjudged not guilty of fraud, it was held that as to them plaintiff was not entitled to a personal judgment, but only to a return of the property and a personal judgment in the event of their failure to comply with the decree.⁶⁰

3. Sale of property.

Where an action is brought by a judgment creditor, on behalf of all other judgment creditors as well as himself, to set aside fraudulent conveyances, a judgment is not improper directing the appointment of a receiver to take a conveyance of, and to sell the real estate. Where, in such an action, the holder of a lien or other interest is made a party defendant, and the validity of the lien or claim is made an issue in the action, and is disposed of adversely to such defendant, a sale and conveyance by such receiver will vest in his grantee a title superior to such lien or claim.⁶¹ The property may be sold on execution by the sheriff, and where it does not appear there are other creditors, the judgment should declare the conveyance void as to plaintiff only.⁶² In an action to set aside as fraudulent a sale of both real and personal property, the personal property should be first subjected to the payment of plaintiff's claim.⁶³ If a suit is brought on behalf of all judgment creditors a sale by the receiver bars the claim of a defendant asserting a lien but who failed in his defense.⁶⁴

59. *Wahlheimer v. Truslow*, 106 App. Div. 73, 94 N. Y. Supp. 137.

60. *Ingersoll v. Cunningham*, 95 App. Div. 571, 88 N. Y. Supp. 711.

61. *Shand v. Handley*, 71 N. Y. 319; *Clift v. Moses*, 75 Hun, 517, 57 St. Rep. 347, 27 N. Y. Supp. 728; *aff'd*, 151 N. Y. 628.

Remedies.—In *Chautauqua County Bank v. White*, 6 N. Y. 236, it was held the proper practice to order the lands sold by a receiver and the proceeds applied in satisfaction of the judgment, and the purchaser at the sale acquires all the title and interest which the debtor had in the lands at the time of his conveyance to the receiver, or the fraudulent conveyance may be annulled and the creditor permitted to proceed to a sale on his execution. See cases cited, opinion of

Gardner, J. page 252; opinion by *Gridley*, J., page 255. As to the title obtained by sale by a receiver appointed by the court on decree in a judgment creditor's bill, see *Chautauqua County Bank v. Riseley*, 19 N. Y. 369.

Where it appears the conveyance was for a valuable consideration, but with fraudulent intent, plaintiff cannot have it set aside as fraudulent, but can have a judgment of sale, and for payment from proceeds. *Orr v. Gilmore*, 7 Lans. 345.

62. *Kennedy v. Barandon*, 67 Barb. 209; *Union Bank v. Warner*, 12 Hun, 306.

63. *Vrooman v. Clow*, 25 Wkly. Dig. 139.

64. *Shand v. Hanley*, 71 N. Y. 319.

4. Directing conveyance to receiver

In a suit to reach a debtor's interest in his deceased father's estate the proper decree has been said to provide for a receiver of the property, equitable assets and choses in action, including interest in the father's estate, and to order defendants to assign to the receiver.⁶⁵ The court may compel a debtor to convey land situated in another State.⁶⁶ A judgment declaring a deed from a judgment debtor to his wife to be fraudulent as to his creditors, and certain judgments to be a lien on the premises described, and containing a provision allowing further application to be made at the foot thereof, does not authorize an order requiring a tenant to attorn; the remedy is by a sale under the lien of the judgment.⁶⁷ Where the judgment declares the transfer to be void and directs the parties to account, it has been thought proper after such accounting has been had to enter a supplementary judgment at the foot of the first judgment directing the defendants to turn over the property mentioned or its value.⁶⁸ An assignment to a receiver becomes void as soon as the object of the suit is accomplished; and when the purpose is fulfilled, the property reverts to the grantor without reassignment.⁶⁹

5. Effect of foreclosure of mortgage pending creditor's action.

A suit to avoid a mortgage as fraudulent, as against creditors, will not be defeated by its foreclosure and sale thereunder pending the action.⁷⁰ Where there are several judgments against a debtor who has fraudulently conveyed his real estate, and one creditor prosecutes a suit in which others do not join and contribute to the expense, and the conveyance is declared void as against creditors, the receiver appointed in such a case is entitled to priority in the surplus, on the foreclosure of a prior mortgage, over the judgment creditors.⁷¹

6. Form of judgment appointing receiver.

(Title.)

This action having been referred to R. Bernard, Esq., counselor at law, to hear and determine, and the said referee having, on the 5th day of January, 1908, duly made and filed his report in writing

65. *McArthur v. Hoysradt*, 11 Paige, 495.

66. *Bailey v. Rider*, 10 N. Y. 363.

67. *Whyte v. Denike*, 53 App. Div. 425, 65 N. Y. Supp. 1081.

68. *James Gould Co. v. Maheady*, 38 Hun, 294.

69. *Anderson v. Treadwell*, 1 Edw. 201.

70. *Smith v. Shaul*, 21 Wkly. Dig. 91.

71. *Warden v. Browning*, 12 Hun, 497.

directing that the several conveyances of real estate set forth in the complaint be adjudged fraudulent and void as against this plaintiff, and that a receiver be appointed to sell said estate, and on application to the court, Grove Webster, Esq., of the city of Kingston, Ulster county, N. Y., having been duly appointed such receiver, and the costs of the plaintiff having been duly adjusted at \$545.21; now, on motion of Linson & Van Buren, attorneys for the plaintiff, it is adjudged that a certain deed, bearing date the 7th day of September, 1904, and certified to have been executed by the grantors on that date, executed by the defendants Benedict Dreyfus and Rose, his wife, to the defendant Edward Dreyfus, and which deed is recorded in the county clerk's office of Ulster county, in liber of deeds No. 194, page 600, August 25, 1905 (then follow with description), was and is fraudulent and void as to this plaintiff, and no title or interest as against these plaintiffs was conveyed by said deed, and said premises and the whole thereof are subject to the payment of a certain judgment obtained by this plaintiff against the defendant Benedict Dreyfus, and docketed in Ulster county clerk's office on the 13th day of January, 1896, for the sum of \$3,498.36. And it is further adjudged that a certain deed or conveyance of real estate, bearing date the 14th day of February, 1896, and certified to have been acknowledged on that day, executed by the defendants Edward Dreyfus and Flora, his wife, to the defendant Lewis Gans, and which said deed was recorded in Ulster county clerk's office on the 21st day of February, 1896, in book of deeds No. 198, at page 28, etc., and which said deed purported to convey the six lots hereinbefore described, as described in a deed from Benedict Dreyfus and wife to Edward Dreyfus, dated September 7, 1904, was and is fraudulent and void as against this plaintiff, and no title or interest as against these plaintiffs was conveyed by said deed, and said premises, and the whole thereof, are subject to the payment of the judgment against the defendant Benedict Dreyfus, such deed to the contrary notwithstanding. And it is further adjudged that Grove Webster, Esq., receiver of said property hereinbefore described, proceed to sell said real estate at public auction, first giving notice, as is required by law and the practice of this court on sales of mortgaged premises or foreclosure by action, or so much thereof as may be necessary to pay the judgment of the plaintiff hereinbefore described, with interest thereon from the date of its rendition, and also the costs of the plaintiff, as taxed, with the interest thereon from the date of the taxation, together with his fees and the expenses of the sale; that he pay such costs with the interest thereon to the plaintiff's attorneys, and the amount of said judgment, with the interest thereon, to the plaintiffs or their attorneys, and that he execute a deed or deeds to the purchaser or purchasers of said premises on said sale; that either of the parties hereto may become the purchasers at said sale; that he make a report to the court of his proceedings under this judgment; that the purchaser or purchasers at said sale be let into possession of the property purchased by them on production of the receiver's deed for the property purchased.

C. B. SMITH,
Deputy Clerk.

F. Lien of plaintiff.

1. In general.

A judgment creditor, by the commencement of an action to discover property belonging to the debtor, secures a lien upon all of the choses in action and equitable assets of the debtor.⁷² A receiver, appointed in supplementary proceedings, acquires, from the commencement of a creditor's action by him, a lien upon the equitable estate of the debtor in the lands in suit.⁷³ This lien is created as between the parties to the action, by the commencement of the action, without the filing of *lis pendens*.⁷⁴ He gets no specific lien until he files his bill,⁷⁵ and the lien does not relate back.⁷⁶ Service of process must be made before it becomes effective.⁷⁷ But until a receiver is appointed, however, a judgment creditor obtains no lien on personal property, such as to prevent a levy and sale on execution by a junior creditor.⁷⁸

While the commencement of an action in the nature of a creditor's bill creates a lien upon the choses in action and equitable assets of the judgment debtor, it does not create a lien upon his tangible personal property subject to levy under execution unless the creditor procures the appointment of a receiver.⁷⁹ The lien is said to attach on appointment of a receiver and his filing security.⁸⁰

2. Priority over other creditors.

The lien of the plaintiff upon real estate is not superior to the liens of other judgment creditors whose judgments were previously docketed. As to real estate, judgment creditors acquire liens thereon in the order in which their judgments are docketed, and their priority is not affected by suits

72. *Green v. Griswold*, 15 Civ. Pro. 220; *Claffin v. Gordon*, 39 Hun, 57; *Hayden v. Bucklin*, 9 Paige, 512; *Utica Ins. Co. v. Power*, 3 Paige, 365; *Beck v. Burdett*, 1 Paige, 305; *Jeffries v. Cockrane*, 47 Barb. 557; *aff'd*, 48 N. Y. 671; *Talcott v. Thomas*, 50 St. Rep. 621; *Metcalf v. Del Valle*, 64 Hun, 245.

73. *Storm v. Waddell*, 2 Sandf. Ch. 494; *Kennedy v. McGuire*, 15 Hun, 70.

74. *Wahlheimer v. Truslow*, 106 App. Div. 73, 94 N. Y. Supp. 138.

75. *Beck v. Burdett*, 1 Paige, 305; *Edmeston v. Lynde*, 1 Paige, 637; *Corning v. White*, 2 Paige, 567;

Scouton v. Bender, 3 How. 185; *Roberts v. Albany, etc.*, R. R. Co., 25 Barb. 662.

76. *Ballou v. Boland*, 14 Hun, 355; *Edmonston v. McLoud*, 16 N. Y. 543.

77. *Fitch v. Smith*, 10 Paige, 9; *Boynton v. Rawson*, Clarke, 584; *Safford v. Douglas*, 4 Edw. 537.

78. *Davenport v. Kelly*, 42 N. Y. 193; *Albany City Bank v. Schemerhorn*, Clarke, 297.

79. *Kitchen v. Lawery*, 127 N. Y. 53; *First National Bank of Amsterdam v. Shuler*, 153 N. Y. 163; *Claffin v. Gordon*, 39 Hun, 57.

80. *Mann v. Pentz*, 2 Sandf. Ch. 257; *Wilson v. Allen*, 6 Barb. 542.

brought to set aside a fraudulent transfer of such real estate.⁸¹ A direction in a judgment setting aside an assignment, as against creditors, which gives the plaintiff in the suit priority over other creditors, is proper so far as it affects the assignor, but prior creditors cannot be thus deprived of their liens.⁸² The priority which is acquired by the diligent plaintiff is in the equitable assets and choses in action of the debtor. A judgment creditor who brings an action to set aside a transfer of life insurance policy by a judgment debtor as fraudulent obtains a lien and preference over the receiver appointed in supplementary proceedings and over all other creditors.⁸³ And the plaintiff creditor may procure a preference over those creditors who did not have judgments at the time of the commencement of the action.⁸⁴

After the appointment of an assignee in bankruptcy, a creditor of the bankrupt can gain no preference by bringing an action to set aside the conveyance as fraudulent in case the assignee fails or refuses to do so.⁸⁵ But an equitable lien acquired by a creditor's bill is not affected by subsequent proceedings in bankruptcy, where the creditor obtained his judgment against the bankrupt and commenced his action as a judgment creditor more than four months before the filing of the petition in bankruptcy.⁸⁶ A judgment creditor of an insolvent corporation generally procures no preference by filing a bill.⁸⁷ And a creditor of a deceased obtains no prior lien by the commencement of an action to avoid a conveyance by the deceased.⁸⁸

81. *White's Bank of Buffalo v. Farthing*, 101 N. Y. 344; *Wilkinson v. Paddock*, 57 Hun, 191, 11 N. Y. Supp. 442; *aff'd* without opinion, 125 N. Y. 748; *N. Y. Life Ins. Co. v. Mayer*, 12 St. Rep. 119; *aff'd* without opinion, 108 N. Y. 655. Compare *Brooks v. Wilson*, 53 Hun, 173, 6 N. Y. Supp. 116; *rev'd*, 125 N. Y. 256.

82. *Claffin v. Smith*, 21 Wkly. Dig. 212.

83. *Metcalf v. Del Valle*, 64 Hun, 245, 46 St. Rep. 105, 19 N. Y. Supp. 16.

84. *Claffin v. Gordon*, 39 Hun, 54.

85. *Holmes v. Little*, 86 Hun, 226, 33 N. Y. Supp. 225, 66 St. Rep. 789. See, also, *Dunn Salmon Co. v. Pillmore*, 55 Misc. 546, 106 N. Y. Supp. 88.

86. *Jasper v. Rozinski*, 228 N. Y. 349.

87. *Lopez v. Merchants & Farmers Nat. Bank*, 18 App. Div. 427, 46 N. Y. Supp. 91; *Lodi Chemical Co. v. National Lead Co.*, 41 App. Div. 535, 58 N. Y. Supp. 717; *Masters v. Rossie. etc., Co.*, 2 Sandf. Ch. 301.

88. *Campbell v. Heiland*, 55 App. Div. 95, 66 N. Y. Supp. 1116. In an action by a creditor to set aside as fraudulent an assignment by a deceased debtor of certain policies of insurance on his life, the insurance money was deposited by the insurer with a trust company to abide the action. No letters of administration were issued on the estate of the deceased, and no proceeding was pending in the Surrogate's Court. *Held*, that if it was proper for the Supreme Court to hold and administer the fund, an interlocutory judgment should have been entered directing the appoint-

ment of a referee to advertise for and take proof of the claims of creditors and report thereon, and that the validity of plaintiff's claim should be first determined and finally adjudicated by

the court before the trust company should be required to pay over the money, except the costs of the action. Continental Nat. Bank v. Moore, 83 App. Div. 419, 82 N. Y. Supp. 302.

JUDICIAL SALES.

See REAL PROPERTY, PROVISIONS RELATING TO.

LEGISLATURE CONTEMPTS.

See CONTEMPT.

LIENS ON CHATTELS, FORECLOSURE OF.

See CHATTELS, FORECLOSURE OF LIEN ON.

LIEN OF ATTORNEYS.

See ATTORNEYS AND COUNSELORS.

LOST NEGOTIABLE PAPER.

- A. Civil Practice Act, § 333. Proof of lost negotiable paper.
- B. Right of action.
- C. Instruments covered by statute.
- D. When instrument deemed lost.
- E. Contents of bond.
- F. Tender of bond on trial is sufficient.

A. Civil Practice Act, § 333. Proof of lost negotiable paper.

1. Where, upon the trial of an action, it appears that a negotiable promissory note or bill of exchange, upon which the action or a counterclaim interposed in the action is founded, was lost while it belonged to the party claiming the amount due thereupon, he may prove the contents thereof by parol or other secondary evidence and may recover or set off the amount due thereupon as if it was produced.

2. For that purpose, he must give to the adverse party a written undertaking, in a sum fixed by the judge or the referee, not less than twice the amount of the note or bill, with at least two sureties, approved by the judge or the referee, to the effect that he will indemnify the adverse party, his heirs and personal representatives, against any claim by any other person, on account of the note or bill, and against all costs and expenses, by reason of such a claim.

3. But where an action is prosecuted or defended by the people of the State, or by a public officer in their behalf, the people or the public officer may prove the contents of a lost note or bill of exchange, by parol or other secondary evidence, and may recover or set off the amount due thereupon, without giving any security to the adverse party.

B. Right of action.

The right to recover upon a lost instrument upon the giving of indemnity does not rest upon the statute. The right has always existed in a court of equity to provide for the saving of the rights of the owner of a lost instrument by the giving of indemnity. The right was recognized in a court of equity, but was denied to a court of law, and the statute was enacted for the sole purpose of giving to a court of law the same power to allow a recovery as existed without the statute in a court of equity.¹ The committee of a lunatic may, in his representative capacity, maintain an action on a note payable to the lunatic, although the committee knew that the note has been lost and never found it after diligent search.²

C. Instruments covered by statute.

Indemnity is not necessary unless the instrument is negotiable and there is no presumption of negotiability.³ The in-

1. Matter of Cook, 86 App. Div. 58 N. Y. Supp. 341, aff'g 26 Misc. 586, 83 N. Y. Supp. 1009. 872, 56 N. Y. Supp. 385.

2. Dupignac v. Quick, 27 Misc. 500, 3. Wright v. Wright, 54 N. Y. 437;

demnity is not required by this statute in an action on a lost savings bank pass book;⁴ but the statute may apply to lost coupons.⁵ The statute does not apply to an action brought against a security and trust company by a person who held, but has lost or inadvertently destroyed, a certificate or receipt by which the company promised to her "or her assigns" a named sum of money, and who seeks by her action to compel issue to her of a new certificate.⁶ But, in case of a negotiable promissory note, the indemnity must be offered, although it was lost before indorsement or negotiation.⁷

D. When instrument deemed lost.

The indemnity is not required if the note has been accidentally destroyed.⁸ The payee of commercial paper, who has not the possession of it, and cannot surrender it on payment cannot recover against the maker when it appears that the paper is in the hands of another, who produces it and claims title to it. The giving of a bond as required by this statute does not relieve such a plaintiff of his difficulty.⁹

E. Contents of bond.

The bond must be conditioned that the principal as well as the sureties will indemnify the defendant.¹⁰

F. Tender of bond on trial is sufficient.

It is not necessary that the indemnity be offered before the action is brought or before the case is put on trial; an offer of security at the time of the trial is sufficient.¹¹ If it does not appear when the note in suit was lost and the complaint is dismissed at the very opening of the trial and before

Pintard v. Tackington, 10 Johns. 103; McNair v. Gilbert, 3 Wend. 344; Mills v. Albany Exchange Savings Bank, 28 Misc. 251, 59 N. Y. Supp. 149; Terwilliger v. Terwiller, 27 N. Y. Supp. 284.

4. Mills v. Albany Exchange Savings Bank, 28 Misc. 251, 59 N. Y. Supp. 149.

5. Rolston v. Central Park, etc., R. Co., 21 Misc. 439, 47 N. Y. Supp. 650, aff'g 20 Misc. 656, 46 N. Y. Supp. 383.

6. Zander v. N. Y. Security & Trust Co., 39 Misc. 98, 78 N. Y. Supp. 900; aff'd, 81 App. Div. 635, 81 N. Y. Supp.

1151, 178 N. Y. 208.

7. Frank v. Wessels, 64 N. Y. 155.

8. Scott v. Meeker, 20 Hun, 161; Des Arts v. Leggett, 16 N. Y. 582; Hoxie v. Kennedy, 10 St. Rep. 786; Terwilliger v. Terwilliger, 27 N. Y. Supp. 284.

9. Read v. Marine Bank of Buffalo, 136 N. Y. 454.

10. Howe Machine Co. v. Avery, 16 Hun, 555.

11. Dupignac v. Quick, 27 Misc. 500, 58 N. Y. Supp. 341; Church v. Stevens, 56 Misc. 572, 107 N. Y. Supp. 310; Brookman v. Metcalf, 4 Robt. 568.

any opportunity had been given to plaintiff to furnish the bond of indemnity, a contention that the complaint was properly dismissed is without merit.¹²

12. Church v. Stevens, 56 Misc. 572, 107 N. Y. Supp. 310.

LUNATIC, APPOINTMENT OF COMMITTEE FOR,

See COMMITTEE OF INCOMPETENT.

LUNATICS, SALE OF REAL ESTATE OF.

See INFANT OR INCOMPETENT, SALE OF REAL ESTATE OF.

MANDAMUS.*

ARTICLE I.

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* For other matters relating to the order of mandamus, see **Bender's Village Laws; B., C. & G. Consolidated Laws.**

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ARTICLE I.**INTRODUCTORY.****A. Civil Practice Act, § 1313. Writs of mandamus abolished.**

The alternative and peremptory writs of mandamus are hereby abolished. The relief heretofore obtained by either of such writs under the provisions of the code of civil procedure shall hereafter be obtained by orders as provided in this article. Wherever in any statute reference is made to a writ of mandamus, such reference shall be deemed to refer to a mandamus order as provided in this article, and the relief given by any such statute by means of a writ shall be obtained by an order as provided in this article.

B. Nature and history of writ of mandamus.

A writ of mandamus is a command issuing from a court of law of competent jurisdiction in the name of the State or sovereign directed to some inferior court, officer, corporation, or person, requiring them to do some particular thing which is therein specified and which appertains to their

office or duty.¹ It is an extraordinary remedy, and the power to entertain it has been exercised only in the past by the higher courts of common-law jurisdiction, where it properly belongs.² A mandamus is not an ordinary proceeding. It is known as a high prerogative writ, and it is issued in the exercise of an extraordinary power, and although it is to a certain extent assimilated to an action, it is not made an action. The court grants the writ in the exercise of the general supervisory power, and to prevent a failure of justice, and when there is no other specific legal remedy for a legal right.³ It is an ancient common-law writ,⁴ and the forms of procedure and the rules which governed in the Court of Chancery have no application to it.⁵ The writ of mandamus is a State writ and should be issued in the name of the people of the State, but where it is awarded upon the application of a private person, it must show that it was issued on the relation of that person.⁶ And being a State writ and issuing in the name of the people, it should not be entitled in an action but as a distinct and separate proceeding.⁷

In this State, however, a drastic change was made by Civil Practice Act, enacted in 1920 to go into effect in 1921.⁸

C. General purpose of mandamus.

The primary object of the proceeding is to compel official action.⁹ It is fundamentally distinguished from the order of

1. 3 Bla. Com. 110; 4 Bacon, Abr. 495; Am. & Eng. Encyc. of Law, vol. 14, p. 91.

The Legislature may provide a remedy by mandamus so long as the constitutional guaranty of due process of law is observed. *Public Service Commission v. New York R. Co.*, 77 Misc. 487, 136 N. Y. Supp. 720.

2. *People ex rel. v. Bd. of Excise*, 3 St. Rep. 253.

3. *People ex rel. Lumley v. Lewis*, 28 How. Pr. 159; *aff'd*, 28 How. Pr. 470.

As a suit.—A mandamus is said by Chief Justice Marshall to be a suit within the meaning of the Constitution, for it is a litigation of a right in a court of justice. *Weston v. Charleston*, 2 Pet. (U. S.) 449; *Holmes v. Jennison*, 14 Pet. (U. S.) 540. Taney, C. J., said in *Commonwealth v. Dennison*, 24 How. (U. S.) 66: "It is well settled that a mandamus in

modern practice is nothing more than an action at law between the parties, and it is not now regarded as a prerogative writ. It undoubtedly came into use by virtue of the prerogative power of the English crown and was subject to regulations and rules which have long since been disused. But the right to the writ and the power to issue it have ceased to depend upon any prerogative power, and it is now regarded as an ordinary process in cases to which it is applicable."

4. *People ex rel. White v. Alderman*, 31 App. Div. 438, 52 N. Y. Supp. 643.

5. *People ex rel. Byrne v. French*, 12 Abb. N. C. 156.

6. *People ex rel. Mason v. Bd. of Supervisors of Wayne*, 45 Hun, 63.

7. *Youmans v. Terry*, 32 Hun, 625.

8. The writ is abolished, and an equivalent remedy is secured through an order.

9. *People ex rel. Harris v. Com'rs*,

certiorari, in that the latter is not to compel action, but to review official or judicial action.¹⁰ When the duty sought to be performed is solely of a ministerial character, the court can direct the performance of the act.¹¹ Mandamus does not lie to discover dishonesty and fraud, but merely to compel the performance of strictly legal duties.¹² Where a public officer announces that he will not comply with the requirements of a statute, mandamus lies to compel him to do so.¹³ But mandamus will not be granted merely for the purpose of defining the powers and duties of public officers independent of any direct personal interest upon the part of him who seeks the relief.¹⁴

D. Classification of orders.

A mandamus order is either alternative or peremptory.¹⁵ In this respect the Civil Practice Act follows the Code of Civil Procedure, which classified writs of mandamus as alternative and peremptory writs. There are two occasions

149 N. Y. 30; *People v. Barnes*, 114 N. Y. 317; *People v. Hayes*, 106 App. Div. 563; *People v. Saratoga Co.*, 106 App. Div. 381; *People v. Matthias*, 92 App. Div. 16, 87 N. Y. Supp. 196; *aff'd*, 179 N. Y. 242; *People v. Woodbury*, 88 App. Div. 593, 85 N. Y. Supp. 161; *aff'd*, 179 N. Y. 525; *Matter of Obelisk Waterproof Co.*, 111 Misc. 1, 182 N. Y. Supp. 303; *Matter of Abrams v. Town Auditors*, 45 Hun, 272. "The primary object of the writ of mandamus is to compel action. It neither creates nor confers power to act, but only commands the exercise of powers already existing, when it is the duty of the person or body proceeded against to act without its agency. While it may require the performance of a purely ministerial duty in a particular manner, this command is never given to compel the discharge of a duty involving the exercise of judgment or discretion, in any specified way, for that would substitute the judgment or discretion of the court issuing the writ for that of the person or persons against whom the writ was issued. In such cases its sole function is to set in motion, without directing the manner of performance. * * *

When the law requires a public officer

to do a specified act, in a specified way, upon a conceded state of facts, without regard to his own judgment as to the propriety of the act, and with no power to exercise discretion, the duty is ministerial in character, and performance may be compelled by mandamus, if there is no other remedy; when, however, the law requires a judicial determination to be made, such as a decision of a question of fact or the exercise of judgment in deciding whether the act should be done or not, the duty is regarded as judicial and mandamus will not lie to compel performance." *People ex rel. Harris v. Com'rs*, 149 N. Y. 30; quoted with approval, *People ex rel. Sims v. Collier*, 175 N. Y. 196.

10. See chapter on Certiorari.

11. *Matter of Obelisk Waterproof Co.*, 111 Misc. 1, 182 N. Y. Supp. 303.

12. *People ex rel. Heinrich v. Travis*, 175 App. Div. 721, 161 N. Y. Supp. 860.

13. *People ex rel. Hotchkiss v. Smith*, 152 App. Div. 514, 137 N. Y. Supp. 387; *aff'd*, 206 N. Y. 231.

14. High's Extraordinary Legal Remedies, § 33.

15. Civil Practice Act, § 1314.

when an alternative order is granted. In the first place it may be granted on an application therefor; or, secondly, it may be granted on an application for a peremptory order when the petitioner is not entitled to the peremptory order because a question of fact arises. And there may be said to be two occasions for the granting of a peremptory order. In the first place, it may be granted on an application therefor under section 1319 of the Civil Practice Act; or the final order after a decision of the issues made by the return to an alternative order may be said to be a peremptory order of mandamus.

An alternative order of mandamus is in the nature of an order to show cause. It affects no substantial right because it determines nothing for or against either party, except questions as to the jurisdiction of the court.¹⁶

ARTICLE II.

WHEN ORDER MAY BE GRANTED.

A. In general.

The Code of Civil Procedure did not, and the Civil Practice Act does not, prescribe the cases when mandamus is a proper remedy.¹⁷ Although the remedy is considerably changed by the Civil Practice Act, it is thought that the order is available in the same cases that the writ was available under the Code of Civil Procedure. Mandamus is the proper remedy when a ministerial officer refuses to perform his duty.¹⁸ The petitioner must have the right to the performance of some particular act or duty at the hands of the officer in question.¹⁹ One who applies for an order of mandamus must show himself legally and equitably entitled to some right properly the subject of the order, and that such right is legally demandable from the respondent.²⁰ Mandamus will not lie to compel

16. *People ex rel. Ackerman v. Lumb*, 6 App. Div. 26, 39 N. Y. Supp. 514; *People ex rel. Wilson v. African W. M. E. Church*, 156 App. Div. 386, 141 N. Y. Supp. 394; *People ex rel. Elmira Advertiser Assn. v. Gorham*, 169 App. Div. 891, 155 N. Y. Supp. 727; *People v. Ransom*, 2 N. Y. 490; *People v. Mitchell*, 39 St. Rep. 767, 15 N. Y. Supp. 505.

17. *People ex rel. White v. Alderman*, 31 App. Div. 438, 52 N. Y. Supp. 643.

18. *Dental Soc. of N. Y. v. Jacobs*,

103 App. Div. 86, 92 N. Y. Supp. 590; *Matter of Gardner*, 124 App. Div. 654, 109 N. Y. Supp. 95; *Matter of Obelisk Waterproof Co.*, 111 Misc. 1, 182 N. Y. Supp. 303; *People ex rel. Contracting Co. v. Craig*, 114 Misc. 216, 187 N. Y. Supp. 123; *Judges of Oneida Common Pleas v. People*, 19 Wend. 92.

19. *People ex rel. White v. Alderman*, 31 App. Div. 438, 52 N. Y. Supp. 643.

20. *Matter of Hunt*, 70 Misc. 1, 126 N. Y. Supp. 411.

a public officer to perform a duty not imposed upon him by law.²¹

B. Clear legal right to order must exist.

An order of mandamus is issued only when there is a clear legal right to be enforced.²² The remedy is not available in cases of doubtful right, and may properly be refused in the exercise of judicial discretion even where the applicant has a cause of action for damages.²³ It cannot be said that a right is clear where it involves the validity of a statute or ordinance, the authority to enact which depends upon the determination of a legislative body with respect to a question of fact.²⁴ But where the duty to perform an act depends solely on whether a statute is unconstitutional and void, the question may be determined on a petition for an order of mandamus.²⁵ It is only where, upon both the facts and the law, it clearly appears that there cannot be a defense to the claim, that the court will exercise its discretionary power by compelling the payment of a debt in advance of a judgment

21. *People ex rel. Jones v. Thompson*, 147 App. Div. 150, 132 N. Y. Supp. 215; *People ex rel. Kelly v. Dooley*, 169 App. Div. 423, 155 N. Y. Supp. 326.

22. *People ex rel. McMackin v. Board of Police*, 107 N. Y. 235; *People ex rel. Lehmaier v. Interurban Ry. Co.*, 177 N. Y. 296; *Dental Soc. of N. Y. v. Jacobs*, 103 App. Div. 86, 92 N. Y. Supp. 590; *People ex rel. Ajas v. Board of Education*, 104 App. Div. 162, 93 N. Y. Supp. 300; *Matter of Clements*, 191 App. Div. 279, 181 N. Y. Supp. 230; *People ex rel. Conners v. Board of Education*, 197 App. Div. 5, 188 N. Y. Supp. 686; *People ex rel. McDermott v. Board of Estimate*, 146 App. Div. 515, 131 N. Y. Supp. 604; *People ex rel. Title Guarantee & Trust Co. v. Ruoff*, 159 App. Div. 819, 145 N. Y. Supp. 80; *People ex rel. Elmira Advertiser Assn. v. Gorman*, 169 App. Div. 891, 155 N. Y. Supp. 727; *Matter of Brooklyn Improvement Co. v. Pounds*, 174 App. Div. 448, 161 N. Y. Supp. 150; *People ex rel. Mehlin & Sons Piano Co. v. Lauer*, 80 Misc. 438, 141 N. Y. Supp. 296; *Matter of Hurlbut*, 88 Misc. 679, 152 N. Y. Supp. 426; *People ex rel. Clements v. Williams*, 100 Misc. 569, 160 N. Y. Supp. 560; Pub-

lic Service Com. v. Richmond L. & R. Co., 163 N. Y. Supp. 64; *Matter of Obelisk Waterproof Co.*, 111 Misc. 1, 182 N. Y. Supp. 303; *People v. Thompson*, 25 Barb. 73.

Public Service Commissions.—Although under the Public Service Commissions Law, mandamus may be an appropriate process for the purpose of having violations or threatened violations, of anything required of a common carrier by law or order of the commission stopped and prevented, where the only failures of the carrier to obey the order of the commission were at specified hours on two days named, each about two months before the proceeding was commenced, there is no such clear legal right to the writ shown as to make the issuing of the mandamus imperative on the court. *Matter of Public Service Com. v. I. R. T. Co.*, 219 N. Y. 355.

23. *Cullen v. N. Y. Telephone Co.*, 106 App. Div. 250, 94 N. Y. Supp. 290.

24. *Matter of Stubbe v. Adamson*, 173 App. Div. 305, 159 N. Y. Supp. 751; *aff'd*, 220 N. Y. 459.

25. *People ex rel. Ferguson v. Vroman*, 101 Misc. 233, 166 N. Y. Supp. 923.

obtained after a trial had in the regular way.²⁶ Whether the petitioner has a clear legal right and is entitled to have the thing done may be inquired into both by the party moved against and by the tribunal applied to.²⁷ In order to entitle one to a mandamus he is required to show himself legally and equitably entitled to some right properly the subject of the remedy; that it is legally demandable from the person to whom the order is directed and, also, that such person has power to perform the duty required.²⁸

C. Controverted questions of fact.

It is not the province of mandamus to adjust controverted questions of law and fact; an action is a better remedy for a litigation involving such difficulties.²⁹ And, if there is a material dispute as to the facts, the court may exercise its discretion in refusing the remedy. At common law there was no method for a trial of issues raised by a return; the return being taken as conclusive. But, under the present practice, a trial of issues created by the petition and return may be had.³⁰ Hence, the raising of issues of fact by a return to an alternative order does not necessarily dispose of the proceeding. A peremptory order will not issue when the facts alleged in the petition are in any essential respect controverted by affidavit.³¹

D. Correction of wrongful acts.

Mandamus is an appropriate remedy to compel the performance of a neglected official duty, but it is not the proper remedy to correct a wrongful act, or to review an incorrect decision.³² The correction of erroneous decisions is the function of an order of certiorari,³³ not of an order of mandamus.³⁴

26. *People ex rel. Lentilhon v. Coler*, 61 App. Div. 223, 70 N. Y. Supp. 482; appeal dismissed, 168 N. Y. 6.

27. *People ex rel. Third Ave. R. R. Co. v. Newton*, 112 N. Y. 399; *People ex rel. N. Y. Exchange Bank v. Stupp*, 49 Hun, 544, 2 N. Y. Supp. 537, 18 St. Rep. 500.

28. *People ex rel. Donohoe v. Greene*, 95 App. Div. 397, 88 N. Y. Supp. 601.

29. *People ex rel. Ajas v. Board of Education*, 104 App. Div. 162, 93 N. Y. Supp. 600; *Matter of McNeile*, 107 App. Div. 338, 95 N. Y. Supp. 146.

30. See *infra*, Art. VII, Trial of issues.

31. See *infra*, Art. V-B, Applica-

tion for peremptory order in first instance.

32. *People ex rel. Holden v. Woodbury*, 88 App. Div. 593, 85 N. Y. Supp. 161; *aff'd*, 179 N. Y. 525; *People ex rel. Osborn v. Gilon*, 18 Civ. Pro. 112.

33. See chapter on Certiorari.

34. *People ex rel. Holden v. Woodbury*, 88 App. Div. 593, 85 N. Y. Supp. 161; *aff'd*, 179 N. Y. 525; *People ex rel. Osborn v. Gilon*, 18 Civ. Pro. 112; *People ex rel. Equitable L. Assoc. v. Chapin*, 39 Hun, 230; *aff'd*, 103 N. Y. 635; *Matter of Abrams v. Town Auditors*, 45 Hun, 272; *Judges of Oneida Common Pleas v. People*, 18 Wend. 92.

An order of mandamus cannot be addressed to a judicial tribunal to require it to decide in a particular manner. And this rule applies to every body whose action is in its nature judicial.³⁵ The remedy is not available to correct an abuse in administrative acts.³⁶ Mandamus is a remedy to command action, and cannot be made to serve the purpose of a writ of error, an appeal, or an order of certiorari. A mandamus will not be granted commanding a board to do over again what it has done, but with a different result.³⁷ The office of an order of mandamus is to compel the performance of an act which the law specifically enjoins and not to undo an act already done.³⁸

E. Anticipated wrongs.

The office of a mandamus is not to redress an anticipated evil or wrong, but is only invoked to remedy a wrong which has been suffered.³⁹ A mandamus cannot properly be made to do either a prohibitory or reviewing duty; its purpose is purely mandatory.⁴⁰ Thus, in a proceeding to reinstate a member of an organization or to prevent his threatened expulsion, the court will not intervene by an order of mandamus until the wrong has been suffered.⁴¹ An order of mandamus is not the appropriate remedy to compel performance of a continuing duty or duty arising in the future.⁴² But, while ordinarily courts will not assume jurisdiction to decide questions in advance of some action taken or refused, actually involving the rights of persons interested, where the situation is exceptional and extraordinary, and the facts warrant the remedy, a peremptory order of mandamus may issue.⁴³ Where the purpose of a proceeding is not to compel an official to do something that he ought to do but to prevent him from doing something that he ought not to do, the remedy by mandamus is not available.⁴⁴ However, if mandamus is the only remedy available, the fact that it seeks to prevent the doing of a ministerial act and not to compel its performance does not

35. *People ex rel. Equitable Life Assoc. v. Chapin*, 39 Hun, 230; *aff'd*, 103 N. Y. 635.

36. *People ex rel. Adams Co. v. Woodbury*, 88 App. Div. 443, 85 N. Y. Supp. 174.

37. *People ex rel. Myers v. Barnes et al.*, 114 N. Y. 317.

38. *Dental Soc. of N. Y. v. Jacobs*, 103 App. Div. 86, 92 N. Y. Supp. 590.

39. *Matter of Rooney*, 26 Misc. 73, 56 N. Y. Supp. 483; *Brown v. Duane*, 60 Hun, 98, 14 N. Y. Supp. 450.

40. *Abrams v. Town Auditors*, 45 Hun, 272.

41. *Brown v. Duane*, 60 Hun, 98, 14 N. Y. Supp. 450.

42. *Matter of Public Service Commission v. Interborough Rapid Transit Co.*, 172 App. Div. 324, 158 N. Y. Supp. 480.

43. *People ex rel. Hotchkiss v. Smith*, 206 N. Y. 231.

44. *Southern Leasing Co. v. Williams*, 96 Misc. 358, 160 N. Y. Supp. 440.

necessarily prevent the issuance of the order.⁴⁵ A mandamus will not lie to test the validity of a restrictive condition in proposals for bids for a contract, as the order will not be granted to meet an anticipated evil.⁴⁶

F. Impossibility of performance.

An order of mandamus should not be issued, if compliance therewith is impossible.⁴⁷ It will issue only where it is within the power of the defendant to perform the act.⁴⁸ The remedy should not be granted where the defendant has been legally enjoined from doing what the petitioner seeks to have done.⁴⁹ If the return alleges inability of the defendant to comply, the issue thereby raised should be tried, and it is error to grant a motion for judgment on the pleadings.⁵⁰

G. Necessity of absence of other remedy.

To entitle a party to a writ of mandamus, he must be possessed of a clear legal right to have exercised an office or franchise or to have a service performed by the party to whom he seeks to have the order directed, and must be without a legal remedy to which he can resort to compel the performance of the duty.⁵¹ Or, as the rule is frequently stated, mandamus will issue only in those cases where a clear legal right is made to appear and there is no other adequate or legal remedy to obtain it.⁵² It may be refused, when there is

45. *People ex rel. Conklin v. Boyle*, 98 Misc. 364, 163 N. Y. Supp. 72; *aff'd*, 178 App. Div. 908, 164 N. Y. Supp. 1107.

46. *Matter of Rooney*, 26 Misc. 73, 56 N. Y. Supp. 483.

47. *Public Service Commission v. International Ry. Co.*, 224 N. Y. 631.

48. *People ex rel. Hoffman v. Tedcastle*, 12 Misc. 469, 68 St. Rep. 136, 34 N. Y. Supp. 257.

49. *People v. West Troy*, 25 Hun, 179; *People v. Supervisors of Ulster*, 30 Hun, 146.

50. *Public Service Commission v. International Ry. Co.*, 224 N. Y. 631.

51. *Bayard v. United States*, 127 U. S. 246; *Ex parte Hughes*, 114 U. S. 147; *People ex rel. Mott v. Supervisors of Greene*, 64 N. Y. 600; *People v. Hayt*, 66 N. Y. 606; *People v. Brooklyn*, 1 Wend. 318; *People v. Supervisors of New York*, 18 Abb. 8; *People v. Easton*, 13 Abb. N. S. 159;

Clark v. Miller, 47 Barb. 38; *People v. Supervisors of Greene*, 12 Barb. 217; *Ex parte Nelson*, 1 Cowen, 417; *Ex parte Lynch*, 2 Hill, 45; *People v. Starr*, 55 How. Pr. 388; *People v. Supervisors of Chenango Co.*, 11 N. Y. 563; *People v. Booth*, 49 Barb. 31; *People v. Wood*, 35 Barb. 653, 2 Abb. 90; *People ex rel. Moulton v. Mayor of New York*, 10 Wend. 393; *People v. Thompson*, 25 Barb. 73.

52. *People ex rel. McMackin et al. v. Bd. of Police*, 107 N. Y. 235; *People ex rel. Lehmaier v. Interurban Ry. Co.*, 177 N. Y. 296; *People ex rel. McCabe v. Matthies*, 179 N. Y. 242; *People ex rel. White v. Alderman*, 31 App. Div. 438, 52 N. Y. Supp. 643; *People v. Supervisors of Chenango*, 11 N. Y. 563; *People v. Supervisors of Greene*, 12 Barb. 217; *People v. Canal Board*, 13 Barb. 444; *People v. Croton Board*, 26 Barb. 240; *People v. Supervisors of Richmond*, 21 How. 335; *Peo-*

a remedy by action.⁵³ If another remedy exists, the court may exercise its discretion in denying the remedy by mandamus.

Where the defendant may amply protect his rights by the ordinary procedure in the criminal courts, an order of mandamus will not be granted to compel a county clerk to allow an inspection of the indictment.⁵⁴ But, although a remedy by an action is available, the court may grant the order of mandamus when it is sought to compel a corporation or ministerial officer to perform a duty required by law.⁵⁵ The order may be granted though there is a remedy by certiorari.⁵⁶ It is a proper remedy, when an action is doubtful.⁵⁷ The remedy by action in the Court of Claims does not necessarily bar mandamus.⁵⁸ The remedy may be allowed, although the applicant therefor may have an adequate legal remedy, unless the objection is set up in the return.⁵⁹

ple v. Corporation of Brooklyn, 1 Wend. 324; People v. Supervisors of Columbia, 10 Wend. 363; People v. Mayor of New York, 10 Wend. 397; People v. Easton, 13 Abb. N. S. 159; People v. Fay, 3 Lans. 398; People ex rel. Badgley v. Supervisors of Greene, 1 Hun, 1; People v. Auditors of Shawangunk, 1 How. N. S. 224; People ex rel. v. Supervisors, 18 Abb. 8; People ex rel. v. Coffin, 7 Hun, 608; People ex rel. v. Bd. of Apportionment, 64 N. Y. 627; People ex rel. v. Campbell, 72 N. Y. 496; Clark v. Miller, 54 N. Y. 528; People ex rel. v. Green, 11 Hun, 56; People ex rel. v. Hawkins, 46 N. Y. 9.

53. Ex parte The Fireman's Ins. Co., 6 Hill, 243; Shipley v. Mechanics' Bank, 10 Johns. 484; People ex rel. v. Coal Co., 10 How. 544; In the Matter of Boice, 2 Cow. 444; People v. The Mayor of New York City, 25 Wend. 680; People v. The Supervisors of Chenango Co., 11 N. Y. 563; People v. The President of Brooklyn, 1 Wend 318; People v. Tioga Common Pleas, 19 Wend. 73; s. c., 13 Abb. 374; People v. Fernando Wood, Mayor, etc., 35 Barb. 653; People v. Stevens, 5 Hill, 616; People v. Dikeman, 7 How. 124; People v. Green, 11 Hun, 61; People v. French, 24 Hun, 263.

54. Matter of Haydorn v. Carroll,

184 App. Div. 151, 171 N. Y. Supp. 601.

55. People v. Supervisors, 70 N. Y. 228; People ex rel. Donohoe v. Greene, 95 App. Div. 397, 88 N. Y. Supp. 601; Buck v. City of Lockport, 6 Lans. 251; People ex rel. v. Myer, 10 Wend. 393; McCullough v. Mayor of Brooklyn, 23 Wend. 458; People v. Steele, 2 Barb. 398; and People v. Supervisors of Chenango, 11 N. Y. 573.

56. Matter of Bronx Parkway Com. v. Common Council, 106 Misc. 579, 175 N. Y. Supp. 207; aff'd, 190 App. Div. 957, 179 N. Y. Supp. 943; People ex rel. v. Taylor, 30 Hun, 78.

57. People v. Havemeyer, 16 Abb. N. S. 219; People v. Supervisors, 11 N. Y. 563; People v. Green, 58 N. Y. 295; People v. Steele, 2 Barb. 417; People v. Canal Board, 13 Barb. 440; Clark v. Miller, 47 Barb. 38, 54 N. Y. 528.

58. People ex rel. Grannis v. Roberts, 45 App. Div. 145, 61 N. Y. Supp. 148.

59. Matter of Mahoney v. Board of Education, 179 App. Div. 782, 167 N. Y. Supp. 222.

When objection raised.—A defense that the contractors have an adequate remedy in the right to a determination of their claim by the Court of Claims should be set up in the return

H. Discretion of court in granting order.

The right to an order of mandamus is not an absolute legal right;⁶⁰ to a considerable extent the court is invested with discretionary power.⁶¹ The order will not always be granted, though there is no other remedy.⁶² It will be granted to prevent a failure of justice, but not to promote manifest injustice.⁶³ It is a remedial process and may be issued to remedy a wrong, but not to promote one;⁶⁴ to compel the discharge of a duty which ought to be performed, but not to compel the performance of an act which will work a public and private mischief, or to compel a compliance with the strict letter of the law in disregard of its spirit or in aid of a palpable fraud.⁶⁵ The petitioner must come into court with clean hands, and he cannot invoke this extraordinary remedy to gain an advantage which would not be accorded him in a court of law or equity.⁶⁶ The order will not be granted to compel the performance of a futile act,⁶⁷ or when the whole issue has become academic.⁶⁸ It will not be granted to enforce action under a statute so badly drawn that it cannot be

to the application, and the objection cannot be taken for the first time on the hearing. *People ex rel. Grannis v. Roberts*, 45 App. Div. 145, 61 N. Y. Supp. 148.

60. *People ex rel. Gas Light Co. v. Common Council*, 78 N. Y. 56; *People ex rel. McMackin v. The Board of Police*, 107 N. Y. 235; *People ex rel. Pierce Co. v. Sohmer*, 167 App. Div. 437, 153 N. Y. Supp. 195.

61. *People v. Thompson*, 99 N. Y. 641; *People ex rel. New York Underground Ry. Co. v. Newton*, 126 N. Y. 656; *Matter of Sage*, 70 N. Y. 220; *People ex rel. Slavin v. Wendell*, 71 N. Y. 171; *People ex rel. Faile v. Ferris*, 76 N. Y. 326; *People ex rel. Nichol v. New York Infant Asylum*, 122 N. Y. 190; *People ex rel. Gas Light Co. v. Common Council of Syracuse*, 78 N. Y. 56; *People v. Chapin*, 104 N. Y. 96; *People ex rel. Britton v. Am. Press Assoc.*, 148 App. Div. 651, 133 N. Y. Supp. 216; *People ex rel. Lindgren v. McGuire*, 151 App. Div. 413, 136 N. Y. Supp. 88; *People ex rel. Pierce Co. v. Sohmer*, 167 App. Div. 437, 153 N. Y. Supp. 195; *People*

ex rel. Contracting Co. v. Craig, 114 Misc. 216, 187 N. Y. Supp. 123.

62. *Ex parte Ostrander*, 1 Denio, 679; *People v. Dowling*, 55 Barb. 197.

63. *People ex rel. Canavan v. Collins*, 20 App. Div. 341, 46 N. Y. Supp. 727; *People ex rel. Pierce Co. v. Sohmer*, 167 App. Div. 437, 153 N. Y. Supp. 195.

64. *People ex rel. Canavan v. Collins*, 20 App. Div. 341, 46 N. Y. Supp. 727; *People ex rel. Pierce Co. v. Sohmer*, 167 App. Div. 437, 153 N. Y. Supp. 195.

65. *People ex rel. Canavan v. Collins*, 20 App. Div. 341, 46 N. Y. Supp. 727; *People ex rel. Pierce Co. v. Sohmer*, 167 App. Div. 437, 153 N. Y. Supp. 195; *Matter of Burke v. Connolly*, 76 Misc. 337, 135 N. Y. Supp. 179.

66. *People ex rel. Pierce Co. v. Sohmer*, 167 App. Div. 437, 153 N. Y. Supp. 195.

67. *People ex rel. Lindgren v. McGuire*, 151 App. Div. 413, 136 N. Y. Supp. 88.

68. *Matter of Ovens v. Marks*, 173 App. Div. 138, 159 N. Y. Supp. 424.

enforced, or where it is of doubtful constitutionality.⁶⁹ In general, however, the motives with which a mandamus is sought, unless very reprehensible, will not be closely scrutinized.⁷⁰

The discretion of the court to grant or refuse mandamus is not absolute, but is governed by legal rules, and its exercise is subject to review upon appeal.⁷¹ When the remedy is refused and it appears that there is a clear legal right and that there is no other legal remedy, the order or judgment may be reversed.⁷²

I. Title to public office.

As a general rule, an action in a nature of *quo warranto*, not mandamus, is the proper remedy to try the title to public office.⁷³ Thus, an order of mandamus will not usually be granted to enable one to secure a public office, when another person is actually filling the office under a color of right;⁷⁴ and particularly is this true when the present incumbent is not a party to the proceeding.⁷⁵ Mandamus will not be granted on the application of a claimant to a public office for the purpose of determining the validity of his claim where there is a serious question in regard thereto, and another person is exercising the functions of the office.⁷⁶ The title of one claiming a public office filled by another holding under color of right will not be determined in a mandamus

69. *People v. Robinson*, 14 Hun, 226, 76 N. Y. 422; *People v. Canal Board*, 4 Lans. 272.

70. *Matter of Crosby*, 28 Misc. 300, 59 N. Y. Supp. 865; rev'd on other grounds, 43 App. Div. 618, 59 N. Y. Supp. 340.

71. *People ex rel. Millard v. Chapin*, 104 N. Y. 96; *Fish v. Weatherwax*, 2 Johns. Cas. 215; *People ex rel. v. Common Council*, 78 N. Y. 56.

72. *People ex rel. Gas Light Co. v. Common Council*, 78 N. Y. 56; *People ex rel. King v. Gallagher*, 93 N. Y. 466.

73. *People v. Lane*, 55 N. Y. 217; *Matter of Gardner*, 68 N. Y. 467; *People ex rel. Ward v. Drake*, 43 App. Div. 325, 60 N. Y. Supp. 309.

The necessity of resorting to *quo warranto* cannot be evaded by disabling a citizen from entering upon an office to which he claims to have been elected by means of a writ of

mandamus, and then claiming that because he has not made an actual entry into the office, the action of *quo warranto* will not lie. *People ex rel. Faile v. Ferris*, 16 Hun, 219 (221).

74. *People ex rel. Wren v. Goetting*, 133 N. Y. 569; *Matter of Torney*, 7 Misc. 260, 57 St. Rep. 465, 23 Civ. Pro. 333, 27 N. Y. Supp. 913; s. c. on appeal, 11 Misc. 291, 65 St. Rep. 452, 32 N. Y. Supp. 277; *People v. Steele*, 2 Barb. 397; *People v. Stevens*, 5 Hill, 616.

75. *People v. Sohmer*, 211 N. Y. 565.

76. *People ex rel. Lewis v. Brush*, 146 N. Y. 60, 65 St. Rep. 753; *People ex rel. Rumph v. Supervisors*, 89 Hun, 38, 69 St. Rep. 386, 34 N. Y. Supp. 1128; *People ex rel. Steingotter v. Bd. of Canvassers of Erie*, 18 St. Rep. 799, 2 N. Y. Supp. 561; *People ex rel. Wilson v. Village of Mt. Vernon*, 59 Hun, 204, 36 St. Rep. 318, 13 N. Y. Supp. 447; aff'd, 129 N. Y. Supp. 657.

proceeding where the question of title turns upon the construction of statutory provisions which are not entirely clear and unambiguous.⁷⁷

Title to office cannot be tried in a mandamus proceeding to compel the board of canvassers to reconvene and certify the votes received by each candidate.⁷⁸ Where the question of the eligibility of a person to an office held by another person under a claim of right turns on the construction of statutory provisions, his remedy to try title to the office is by an action in the nature of *quo warranto*, and not by an order of mandamus.⁷⁹ In a proceeding by a police captain in mandamus to procure reinstatement to office after removal, his title to the office cannot be determined.⁸⁰ It is not the proper office of an order of mandamus to restrain a party claiming to be a public officer from exercising his office, or to enjoin one claiming to have been elected or appointed to office from qualifying.⁸¹ An order denominated a mandamus, but manifestly a restraining order in the nature of an injunction, is not an appropriate remedy for the determination of the question whether a given person is or is not a water commissioner of a village.⁸² The rule that mandamus will not issue to determine title to office holds even where it is a question as to title to office in an incorporated society.⁸³ While the title to an office in a religious corporation cannot be tried and ascertained by mandamus proceedings, yet, if the facts are undisputed which determine the right of a person to be given a certificate of election or to be recognized as the duly elected officer, mandamus proceedings are proper to compel the giving of such certificate or due recognition of such election.⁸⁴

J. Control of official discretion.

The general rule is that mandamus will not lie to review the determination of public boards or officers in matters involving the exercise of discretion or judgment, if they have proceeded within their jurisdiction, and in substantial com-

77. *People ex rel. Wren v. Goetting*, 133 N. Y. 569; *People ex rel. Seward v. Village of Sing Sing*, 54 App. Div. 555, 66 N. Y. Supp. 1094; *People ex rel. Woodill v. Tighe*, 145 App. Div. 606, 130 N. Y. Supp. 402; *aff'd*, 206 N. Y. 740.

78. *People ex rel. Kathan v. Bd. of Canvassers of Hamilton Co.*, 75 App. Div. 110, 77 N. Y. Supp. 620

79. *People ex rel. Thompson v. Hinsdale*, 43 Misc. 182, 88 N. Y. Supp. 206.

80. *People ex rel. McLaughlin v. Bd. of Police Comrs. of the City of Yonkers*, 174 N. Y. 450.

81. *People v. Ferris*, 76 N. Y. 326.

82. *People ex rel. Requa v. Neubrand*, 32 App. Div. 49, 52 N. Y. Supp. 280.

83. *People ex rel. Nicholl v. N. Y. Infant Asylum*, 122 N. Y. 190.

84. *Matter of Williams*, 57 Misc. 327, 107 N. Y. Supp. 1105.

pliance with the forms of law.⁸⁵ Where an officer or body is clothed with discretion, and may do or omit to do the act or thing according to the judgment of the person or body authorized to act, then a mandamus can only issue to compel a decision in case of a refusal to decide, and when a decision is made the remedy by mandamus ends. The court cannot on mandamus review the decision made, or compel a decision the other way because the court may disagree as to the justice or propriety of the conclusion reached. The broad distinction is between duties mandatory and peremptory and those involving discretion and judgment. In the one case the public agent cannot refuse to act or to do the thing required, and in the other the court is not permitted to substitute its judgment for that of the person or body clothed by the law with the power to decide.⁸⁶

The order will only be granted where there is a discretion to be exercised for the purpose of putting the officer, court, or board in motion, but will not control his or its action, or dictate the decision to be made or judgment to be rendered.⁸⁷

Mandamus proceeds upon the theory of a clear legal right; it is to correct the neglect or refusal of an officer or board to do that which by law it is bound to do; if the officer or board has discretion, the court will not control the exercise of

85. *People v. Common Council*, 78 N. Y. 33; *People v. Supervisors of Westchester*, 12 Barb. 446; *Ex parte Baily*, 2 Cow. 479; *Ex parte Bassett*, 2 Cow. 458; *People v. N. Y. Common Pleas*, 19 Wend. 113; *People v. Contracting Board*, 27 N. Y. 378; *People v. Booth*, 49 Barb. 31; *People v. Taylor*, 1 Abb. N. S. 200; *Hutchinson v. Com'rs*, 25 Wend. 692; *People ex rel. v. Leonard*, 74 N. Y. 443; *Bearns v. Gould*, 77 N. Y. 95; *People v. Common Council*, 20 Alb. L. J. 269; *People v. Common Council*, 9 Wkly. Dig. 68; *People ex rel. Wooster v. Mahar*, 141 N. Y. 330; *People v. Board of Education*, 212 N. Y. 463, aff'g 160 App. Div. 557, 145 N. Y. Supp. 853; *People ex rel. Kelly v. Dooley*, 169 App. Div. 423, 155 N. Y. Supp. 326; *People ex rel. Elmira Advertiser Assn. v. Gorham*, 169 App. Div. 891, 155 N. Y. Supp. 727; *Kiesel v. Crain*, 166 N. Y. Supp. 456; *People ex rel. Krekler v. Butler*, 166 N. Y. Supp. 467; *People ex rel. Adams Co. v. Woodbury*, 88

App. Div. 443, 85 N. Y. Supp. 174; *Kane v. Gaynor*, 144 App. Div. 196, 129 N. Y. Supp. 280; *People ex rel. Lewis v. Fowler*, 189 App. Div. 335, 178 N. Y. Supp. 500; *Application of N. Y. v. Com'rs of Land Office*, 25 Misc. 202, 55 N. Y. Supp. 101; *People ex rel. Park Circle Amusement Co. v. Board of Police*, 36 Misc. 89, 72 N. Y. Supp. 583; *People ex rel. Bloy v. Walker*, 113 Misc. 592, 184 N. Y. Supp. 879.

86. *People ex rel. Wooster v. Mahar*, 141 N. Y. 330, 57 St. Rep. 425.

87. *People v. Brennan*, 39 Barb. 651; *Howland v. Eldredge*, 43 N. Y. 457; *People v. Contracting Board*, 27 N. Y. 378; *People v. Booth*, 49 Barb. 31; *People v. Common Council*, 78 N. Y. 33; *People v. Canal Appraisers*, 73 N. Y. 443; *People v. Fairman*, 91 N. Y. 385; *Matter of Obelisk Waterproof Co.*, 111 Misc. 1, 182 N. Y. Supp. 303; *People ex rel. Bloy v. Walker*, 113 Misc. 592, 184 N. Y. Supp. 879.

that discretion; it may tell the officer to act, but it will not compel him to act in a particular way; if he has no power to act, the court will not compel him to do that which the law does not.⁸⁸ On the other hand, whenever a party has a legal right and is entitled to a remedy, and the court, official, or corporation, whose duty it is to act, refuses to do so, the remedy lies.⁸⁹ When the act, the doing of which is sought to be compelled, is final, the right to have the act performed may be inquired into.⁹⁰

When the law requires a public officer to do a specified act, in a specified way, upon a conceded state of facts without regard to his own judgment as to the propriety of the act and with no power to exercise discretion, the duty is ministerial in character and performance may be compelled by mandamus if there is no other remedy.⁹¹

While the general rule is that mandamus will not lie to compel the performance of a power the exercise of which lies in the discretion of the officer against whom the order is sought, to that rule there is the well-recognized exception that the action of the officer must not be capricious or arbitrary, and if such be the character of the reasons for refusing to act the order will lie.⁹² If his action is arbitrary, tyrannical or unreasonable, or is based upon false information, the petitioner may have a remedy to right the wrong which he has suffered.⁹³

K. State officers.

1. Executive.

The courts of this State have no power to issue a mandamus to the Governor to compel his performance of a duty imposed upon him by virtue of his office; and this inability extends to ministerial duties as well as to those involving

88. *Hamburger v. Bd. of Estimate and Apportionment of N. Y.*, 109 App. Div. 427, 96 N. Y. Supp. 130; appeal dismissed, 184 N. Y. 577.

89. *People ex rel. v. Clerk Marine Court*, 3 Abb. Pr. 309; *People ex rel. v. Hayt*, 66 N. Y. 606; *Adrianse v. Supervisors*, 12 How. Pr. 224; *People ex rel. v. Taylor*, 1 Abb. N. S. 200; *People ex rel. v. St. Patrick's Cathedral*, 10 Wkly. Dig. 124; *People v. Wendell*, 71 N. Y. 171; *People v. Thompson*, 25 Baro. 73; *People v. Green*, 63 Barb. 390; *People v. Martin*, 62 Barb. 570; *People v. Inspectors*,

44 How. Pr. 322; *People v. Haws*, 12 Abb. Pr. 204; *People v. Hawkins*, 46 N. Y. 9.

90. *People ex rel. v. Canal Appraisers*, 13 Hun, 64.

91. *Matter of Troy Press Co.*, 94 App. Div. 514, 88 N. Y. Supp. 115; *aff'd*, 79 N. Y. 529.

92. *People ex rel. Empire City Club v. State Racing Commission*, 190 N. Y. 30.

93. *People ex rel. Lodes v. Dept. of Health*, 189 N. Y. 187; *People ex rel. Hultman v. Gilchrist*, 114 Misc. 651.

executive judgment and discretion, and to action by the Governor as an *ex officio* member of a board of public officers. But a mandamus can run to the Lieutenant-Governor and Speaker of the Assembly during the recess of the Legislature, provided they have not succeeded to executive power.⁹⁴ A mandamus will not lie against the other members constituting a majority of a public board of which the Governor is a member, as they alone do not constitute the board.⁹⁵

2. Comptroller.

Mandamus may be a proper remedy to compel the State Comptroller to perform a statutory duty.⁹⁶ Mandamus will lie to the State Comptroller to compel the full payment of a judge's salary.⁹⁷ It will lie to the Comptroller to compel him to issue warrants to a university for the payment of money appropriated by Congress for the maintenance of educational institutions.⁹⁸ Where a surrogate has vacated a transfer tax which was assessed without jurisdiction, mandamus will lie to compel the Comptroller to direct the county treasurer to refund. Or the Comptroller may be directed to refund an excessive payment of transfer tax.⁹⁹ A peremptory mandamus will issue requiring the State Comptroller to either admit or reject claims for refund of moneys paid for stock transfer tax stamps affixed to stock certificates under an unconstitutional law.¹

While mandamus lies to compel the Comptroller to act, it does not lie to direct him how to act, nor will the court instruct him in advance as to how he shall perform his duties.² An audit is not a remedy to recover money, and the court will not compel him to reaudit the expenditures of commissioners appointed under a special statute, when, being the auditing officer, he is accused of participating in the alleged illegal expenditure, for the court will not compel him to be a judge in his own case.³ The power of the Comptroller to

94. *People ex rel. Broderick v. Mor-*
ton, 156 N. Y. 136.

95. *Matter of Broderick*, 25 Misc.
534, 56 N. Y. Supp. 99.

96. *People v. Allen*, 42 N. Y. 404.

97. *People ex rel. Bockes v. Wemple*
115 N. Y. 302.

98. *People ex rel. Cornell Univer-*
sity v. Davenport, 117 N. Y. 540.

99. *People ex rel. Metropolitan T.*
Co. v. Travis, 107 Misc. 377, 176 N.
Y. Supp. 765; *aff'd*, 191 App. Div.
129, 180 N. Y. Supp. 659.

1. *People ex rel. Noyes v. Schmer,*
81 Misc. 522, 143 N. Y. Supp. 475;
aff'd, 159 App. Div. 929, 143 N. Y.
Supp. 1138; *Matter of Coogan*, 27
Misc. 563, 59 N. Y. Supp. 111; *aff'd*,
45 App. Div. 628, 61 N. Y. Supp. 1144;
1144; *aff'd*, 162 N. Y. 613.

2. *People ex rel. Heinrich v. Travis,*
175 App. Div. 721, 161 N. Y. Supp.
860.

3. *People ex rel. Heinrich v. Travis,*
175 App. Div. 721, 161 N. Y. Supp.
860.

audit claims against the canal fund is a judicial one, and he cannot be compelled by mandamus to exercise it in any particular manner.⁴

Mandamus will lie to a State Comptroller to compel him to hear and determine an application made by a purchaser of real estate, at a city tax sale, to cancel the sale and refund the purchase money, where such purchaser presents proof to show that the tax was invalid.⁵ But the remedy will not lie to the Comptroller to make any particular decision or to set aside a decision already made as to who is entitled to purchase money paid upon the invalid sale of land for taxes; and upon such proceedings the sufficiency of the evidence upon which the decision was based may not be reviewed.⁶ Where the Comptroller has refused an application to cancel the sale of land for taxes upon the ground that the sale was regular, he cannot be compelled by mandamus to reach a different conclusion.⁷ The remedy against the Comptroller by a party aggrieved as to cancellation of taxes is by certiorari and not by mandamus.⁸

3. Secretary of State.

An order of mandamus may be granted against the Secretary of State.⁹ He may be compelled by mandamus to file a proper certificate of incorporation.¹⁰ The remedy is available to compel him to furnish a contractor for public printing with necessary material from which the printing is to be done, although he had previously made arrangements for such printing with another party.¹¹

4. Attorney-General.

In a proper case, an order of mandamus may be granted to compel the Attorney-General to perform his duty.¹² But it does not lie to compel him to bring suit.¹³ The Attorney-General should not be required by mandamus to approve a contract made by a receiver with an attorney and counsel

4. *People ex rel. Grannis v. Roberts*, 163 N. Y. 70.

5. *People ex rel. Ostrander v. Chapin*, 105 N. Y. 309.

6. *People ex rel. Milhard v. Chapin*, 104 N. Y. 96.

7. *People ex rel. v. Chapin*, 3 St. Rep. 38, 103 N. Y. 635.

8. *People v. Chapin*, 39 Hun, 230; *aff'd*, 103 N. Y. 635.

9. *People v. Nelson*, 3 Lans. 394, 46 N. Y. 477; *People v. Beach*, 57 How.

Pr. 337.

10. *People ex rel. Browne v. Koenig*, 133 App. Div. 756, 118 N. Y. Supp. 136.

11. *People ex rel. Weed-Parsons Co. v. Palmer*, 14 Misc. 41, 68 St. Rep. 166, 35 N. Y. Supp. 222.

12. *People v. Tremain*, 17 How. Pr. 10.

13. *People v. Fairchild*, 67 N. Y. 334.

selected by him.¹⁴ The remedy will not lie to the Attorney-General to compel him to attach his certificate to an application for incorporation pursuant to section 10 of the Insurance Law.¹⁵ But the Attorney-General may be required to certify to a judgment which has been certified by the clerk of the court, as required by section 1494 of the Civil Practice Act.¹⁶

5. Superintendent of Public Works.

Mandamus will not lie to the Superintendent of Public Works to award to the petitioner a public contract where the statute providing therefor states that the contract shall "be let to the lowest bidder, . . . except such portions thereof as in the judgment of the Superintendent of Public Works and State Engineer cannot be so done to the best interest of the State." Where the contention of the petitioner in such a case is that the bid of the successful bidder was too indefinite, he is merely entitled to have such bid set aside, and then to require such officers either to accept his bid or to advertise anew.¹⁷ Upon an application for a peremptory mandamus by a bidder for work on canals, the court is not limited to a consideration of the reasons stated by the Superintendent of Public Works for not considering the applicant's bid, but will consider any proper reason for not considering its bid or awarding the contract to it; and, upon such an application, the applicant must disclose a condition of affairs which warrants the court in exercising its discretion to issue a peremptory order.¹⁸ Mandamus may run against the auditor of Canal Department,¹⁹ or to compel canal appraisers to make a return on appeal.²⁰

6. Military officers.

An order of mandamus will not issue to restore to duty a suspended officer of the National Guard, where the Governor has approved the order suspending the officer and denied his application for restoration.²¹ Nor will it be granted to review the act of a commanding officer in discharging a private on

14. *Matter of Candee v. Cunneen*, 92 App. Div. 71, 86 N. Y. Supp. 723.

15. *People ex rel. Woodward v. Rosendale*, 76 Hun, 103, 27 N. Y. Supp. 837; *aff'd*, 142 N. Y. 126.

16. *People ex rel. Fargo v. Rosendale*, 76 Hun, 112, 57 St. Rep. 377, 27 N. Y. Supp. 825; *aff'd*, 142 N. Y. 670.

17. *Matter of Hilton Bridge Constr.*

Co., 13 App. Div. 24, 43 N. Y. Supp. 99.

18. *People ex rel. Lord Constr. Co. v. Stevens*, 67 Misc. 529, 124 N. Y. Supp. 769.

19. *People v. Bell*, 38 N. Y. 386.

20. *People v. Canal Appraisers*, 73 N. Y. 443.

21. *People ex rel. Smith v. Roe*, 51 App. Div. 404, 64 N. Y. Supp. 612.

a surgeon's 'certificate,'²² or to restore one to the roll of militia where the case is not clear.²³ The retirement of a commissioned officer because of age limit under the military law is not a removal from office or an infringement of constitutional rights and he is not entitled to a peremptory order of mandamus to compel his reinstatement.²⁴ The remedy is refused to a militia officer as against the Governor.²⁵

7. Other state officers.

An order of mandamus may be granted to compel the State Treasurer to perform an official duty.²⁶

Where a person had been convicted of murder, and while incarcerated in the State prison his photographs and measurements were taken, pursuant to a statute, in accordance with the Bertillon system, the Superintendent of State Prisons cannot be compelled by mandamus, after the prisoner's conviction has been reversed and he has been subsequently acquitted, to surrender to him such photographs and measurements.²⁷ Nor will it lie to the Commissioners of the Land Office to compel them to direct the payment of original purchase moneys, on the ground that the title of the people has failed, such a determination involving a judicial function.²⁸

The duty imposed on the board of docks of New York City, of examining applications for grants of land under water, determining whether such grants conflict with the rights of the city or the public interests and reporting its conclusions to the Commissioners of the Land Office is merely advisory, and the commissioners cannot be compelled by mandamus to insert conditions in the grant which were reported to them by the board of docks but rejected by them.²⁹

A manufacturer of a fertilizer is not entitled to mandamus to require the Commissioner of Agriculture to issue a certificate under section 222 of the Agricultural Law, where the moving papers are absolutely silent as to whether or not the material will enrich the soil, and the opposing affidavits tend strongly to show that it is not efficient in the production of crops.³⁰

22. *In re Dederick*, 77 N. Y. 595.

23. *People v. Clark*, 54 How. Pr. 488.

24. *Matter of Kirby*, 76 Misc. 313, 134 N. Y. Supp. 905.

25. *People v. Schrugham*, 25 Barb. 216.

26. *People v. Bristol*, 1 Lans. 45.

27. *Matter of Molineux*, 41 Misc. 154, 83 N. Y. Supp. 943; *aff'd*, 88 App.

Div. 618; *aff'd*, 177 N. Y. 395.

28. *People ex rel. Harris v. Com'rs*, 149 N. Y. 26.

29. *Matter of City of N. Y. v. Com'rs of the Land Office*, 25 Misc. 202, 55 N. Y. Supp. 101.

30. *Matter of National Stonemenal Co. v. Wilson*, 181 App. Div. 236, 168 N. Y. Supp. 241.

Mandamus will not lie to require the Superintendent of the Insurance Department to correct the report of examiners appointed by him to examine into the condition of an insurance company, as no such duty is imposed upon him by law.³¹

L. County officers.

1. Board of supervisors.

Mandamus is a proper remedy to compel a board of supervisors to perform a ministerial duty. The board may be compelled to reassemble and perform duties neglected at annual meeting.³² Mandamus lies to compel the reconvening of the board of supervisors of a county for the purpose of making a constitutional apportionment of the county into Assembly districts.³³ An order of mandamus will be granted to compel a board of supervisors to approve a bond presented by the successful bidder for a printing contract which does not contain an illegal clause required by the specification for bids.³⁴

Where a valid statute directed the board of supervisors to borrow money and issue bonds, and the board showed its intent to disregard the statute, a peremptory order of mandamus will issue to compel the performance of such duty.³⁵

The act of a board of supervisors in designating a newspaper for the publication of the session laws cannot be set aside by a peremptory order of mandamus.³⁶ But as the duty of a board of supervisors in relation to the designation of newspapers to publish laws is not absolutely ministerial and clerical, but involves to some extent judgment and discretion, mandamus will not lie to compel it to act in a particular manner in relation thereto.³⁷ Although certiorari will not lie to review the action of a board of supervisors in making an improper designation, mandamus may lie to compel them to perform their official duty.³⁸

31. *People ex rel. Long Island Mut. F. I. Co. v. Payn*, 26 App. Div. 584, 50 N. Y. Supp. 334.

32. *People v. Supervisors*, 8 N. Y. 317.

33. *Matter of Timmerman*, 51 Misc. 192, 100 N. Y. Supp. 57.

34. *People ex rel. Single Paper Co. v. Edgecomb*, 112 App. Div. 604, 98 N. Y. Supp. 965.

35. *People ex rel. Bd. of Com'rs for Erection of a New Courthouse in Oneida Co. v. Bd. of Supervisors of*

Oneida Co., 36 Misc. 597, 73 N. Y. Supp. 1098; *aff'd*, 68 App. Div. 654, 74 N. Y. Supp. 1142.

36. *People ex rel. Elmira Advertiser Assn. v. Gorman*, 169 App. Div. 891, 155 N. Y. Supp. 727. Compare *People v. Supervisors of Greene*, 13 Abb. N. C. 421.

37. *Matter of Brown*, 19 Misc. 693, 44 N. Y. Supp. 1096.

38. *People ex rel. Guernsey v. Somers*, 153 App. Div. 623, 138 N. Y. Supp. 1136; *aff'd*, 208 N. Y. 621.

In passing a resolution reviving the distinction between town and county poor, pursuant to section 138 of the Poor Law, and in apportioning the taxes among the different towns, the board of supervisors discharges legislative and not judicial functions, and certiorari will not issue to review its action.³⁹ Mandamus will not lie to a board of supervisors to compel them to act under a law which is unconstitutional.⁴⁰

The secretary of a county committee of a political party cannot by mandamus compel a board of supervisors to appoint as an election commissioner one of the persons certified by the committee to the supervisors under section 194 of the Election Law.⁴¹

A person who, it is conceded, was elected to fill a vacancy in the office of supervisor, and who received a certificate of election, may maintain a mandamus proceeding to compel the board of supervisors to recognize him as a member of the body, without making the incumbent elected by the common council, whose term had expired, a party to the proceeding.⁴² But mandamus will not generally lie to a board of supervisors requiring it to recognize the petitioner's right to a public office where there is a serious question in regard thereto, and another person is exercising the functions of the office. The remedy in such case is by *quo warranto*.⁴³

The auditing of claims against the county is one of the most important duties of a board of supervisors. If the board refuses to consider a claim, mandamus is a proper remedy to compel it to take some action.⁴⁴ Thus, it will lie to compel the board to audit the claims of county officers.⁴⁵ But where a bill has been withdrawn and no subsequent demand for its audit has been made, the claimant is not entitled to a mandamus to compel the board of supervisors

39. *People ex rel. Allen v. Supervisors of Westchester*, 113 App. Div. 773, 99 N. Y. Supp. 348.

40. *People ex rel. Pond v. Supervisors of Monroe Co.*, 47 St. Rep. 456, 19 N. Y. Supp. 978; *rev'd on other grounds*, 47 St. Rep. 702.

41. *People ex rel. Mullarkey v. Supervisors of Montgomery*, 180 App. Div. 125, 167 N. Y. Supp. 323.

42. *People ex rel. Howard v. Supervisors of Erie Co.*, 42 App. Div. 510, 59 N. Y. Supp. 476; *aff'd*, 160 N. Y. 687.

43. *People ex rel. Rumph v. Supervisors*, 89 Hun, 38, 69 St. Rep. 386,

34 N. Y. Supp. 1128.

44. *People v. Board of Supervisors*, 45 N. Y. 196; *People ex rel. Goodwin v. Coler*, 48 App. Div. 492, 62 N. Y. Supp. 964; *Matter of Equitable Trust Co. v. Hamilton*, 177 App. Div. 390, 164 N. Y. Supp. 58.

An adjournment of a board of supervisors without making an audit is a sufficient refusal to justify mandamus. *People v. Supervisors of Richmond*, 20 N. Y. 253.

45. *People v. Supervisors*, 32 N. Y. 473; *People v. Supervisors*, 45 N. Y. 196; *Bright v. Supervisors*, 18 Johns. 242.

to convene and audit the bill.⁴⁶ And if they audit it erroneously, the proper remedy is generally certiorari, not mandamus.⁴⁷ Where a board of supervisors has considered the whole of an account upon its merits, and has in good faith exercised its judgment and rendered a decision as to what should be allowed, mandamus cannot thereafter issue to compel it again to audit the account and allow the claimant a greater sum.⁴⁸ But the board may be compelled by mandamus to audit a legal claim, where there is no discretion as to the amount to be paid.⁴⁹ And while the order will not issue to interfere with the discretion of supervisors where they have a discretion to exercise, if they refuse to audit for any sum a legal claim on the ground it is illegal, mandamus will issue.⁵⁰ The rejection of a claim by the board of supervisors of a county, on the ground that the county is not liable therefor, may be reviewed by mandamus as well as by certiorari.⁵¹ The remedy will lie to a board of supervisors to compel it to audit an account where it refuses to do so, on the ground that it has no power.⁵²

Mandamus will lie to compel supervisors to hear and determine whether services were rendered to the county by a justice of the peace, and if they were rendered, to audit the claim. If the board refused to audit, on the ground that the services were not rendered, the remedy will not lie, but if they refused to audit merely on a question of law, mandamus is a proper remedy.⁵³ Although a board of supervisors acts judicially in auditing claims, yet where no question of fact exists and the amount of services rendered is undisputed and the rate of compensation established by law or by undisputed contract, the board cannot reduce the amount of such claim upon the ground that it is a *quasi-judicial* tribunal, and,

46. *People ex rel. Tripp v. Bd. of Supervisors of Cayuga Co.*, 22 Misc. 616, 50 N. Y. Supp. 16, 84 St. Rep. 16.

47. *People ex rel. Andrus v. Bd. of Supervisors of Saratoga County*, 106 App. Div. 381, 94 N. Y. Supp. 1012.

48. *People ex rel. O'Mara v. Supervisors of Cayuga*, 40 St. Rep. 238, 16 N. Y. Supp. 254; *aff'd*, 43 St. Rep. 77; *People ex rel. O'Mara v. Supervisors of Cayuga County*, 40 St. Rep. 239, 16 N. Y. Supp. 256.

49. *Boyce v. Supervisors*, 20 Barb. 294.

50. *People ex rel. Smart v. Bd. of Supervisors of Washington Co.*, 66

App. Div. 66, 72 N. Y. Supp. 568; *Matter of Obelisk Waterproof Co.*, 111 Misc. 1, 182 N. Y. Supp. 303; *People v. Supervisors*, 51 N. Y. 401; *Hall v. Supervisors*, 19 Johns. 259.

51. *Matter of Schenectady Illuminating Co.*, 88 Misc. 634, 151 N. Y. Supp. 425.

52. *People ex rel. Anibal v. Supervisors of Fulton*, 53 Hun, 254, 6 N. Y. Supp. 591.

53. *Matter of Ramsdale v. Supervisors*, 8 App. Div. 550, 40 N. Y. Supp. 840, *rev'g* 16 Misc. 213, 38 N. Y. Supp. 890.

therefore, mandamus will issue to compel the performance by the board of its duty in respect to the payment of such claim.⁵⁴

Mandamus will lie to revoke an audit in excess of what is allowed by law.⁵⁵ The remedy will not issue to compel a board of supervisors to disallow a bill already audited when certificate has been issued therefor and passed to third party and bill is for services actually rendered. The remedy is by *certiorari* in case audit was illegal.⁵⁶

A peremptory order will not be issued to a board of supervisors to enforce a claim against the county where the question of the liability of the county therefor has not been determined.⁵⁷ Before the remedy will lie to the board to assess against a town a judgment against a commissioner of highways, it must appear that it is a valid claim against the town.⁵⁸ If it appears that the claim in question is not a proper charge against the county, the board will not be required to audit it.⁵⁹ The remedy will not lie to a board of supervisors to audit an account as a county charge, where it was shown to be a town and not a county charge.⁶⁰

Mandamus will not lie to compel a board of supervisors to allow a claim by a district attorney for expenses incurred in proceedings for the extradition of fugitives from justice.⁶¹ Mandamus lies to a board of supervisors to compel it to provide for the payment of a judgment of the County Court of Sessions for costs on appeal in a bastardy proceeding

54. *People ex rel. Morrison v. Supervisors of Hamilton*, 56 Hun, 459, 31 St. Rep. 473, 10 N. Y. Supp. 88; *aff'd*, 127 N. Y. 654.

55. *People v. Supervisors*, 73 N. Y. 173.

Reconsideration of audit.—An audit by a board of supervisors, unless fraudulent or illegal, is not subject to revision by some other board of supervisors. But a different situation is presented when the same board, which has considered once, elects to consider again. The board may disallow to-day, and on further consideration allow to-morrow. It may allow to-day, and to-morrow disallow or reduce. The purpose of the audit is to fix the items that are to enter into the annual appropriation. Finality is not reached while the life of the board endures,

until the end has been attained. *Equitable Trust Co. v. Hamilton*, 226 N. Y. 241.

56. *People v. Supervisors of Greene*, 14 Abb. N. C. 29.

57. *People ex rel. Nichols v. Supervisors of Queens Co.*, 60 Hun, 387, 39 St. Rep. 863, 15 N. Y. Supp. 461.

58. *People v. Auditors of Esopus*, 74 N. Y. 311; *People v. Supervisors of Ulster*, 93 N. Y. 397.

59. *People v. Supervisors of Greene*, 13 Abb. N. C. 447; *People v. Supervisors*, 39 Hun, 299.

60. *People ex rel. McGrath v. Supervisors of Westchester*, 119 N. Y. 126.

61. *People ex rel. Gardenier v. Bd. of Supervisors*, 2 N. Y. Supp. 361; *rev'd*, 56 Hun, 17, which was *aff'd*, 134 N. Y. 1.

rendered against a town liable for the support of its own poor.⁶²

Where the board of county supervisors has rejected certain items of a sheriff's bill, and, on the return of an alternative order of mandamus to compel the allowance of such items, specific information is given as to the reasons for the disallowance, it is proper to issue a peremptory order to compel the allowance of such items as are legal charges.⁶³

Mandamus is an appropriate remedy to compel a board of supervisors to strike out an illegal levy,⁶⁴ to restore to the rolls property stricken off improperly,⁶⁵ to cause taxes illegally assessed to be repaid,⁶⁶ to compel the repayment of taxes on property assessed in two towns,⁶⁷ or to compel a board to obey an order of the County Court, as to correction of the amount of the tax.⁶⁸ An order of mandamus may issue to compel a board of supervisors to levy a tax on towns for their respective proportion of the cost of maintenance of State roads,⁶⁹ or to issue a warrant for military tax.⁷⁰

Where a board of supervisors makes a mathematical error in distributing the tax laid on bank stock, it acts ministerially and mandamus will lie to correct the error.⁷¹

Where a judgment directs county supervisors to collect a tax, and place the proceeds in the hands of the county treasurer as a sinking fund for plaintiff town, and the supervisors collected the tax and paid the same over to the treasurer without any directions, and he used it for county purposes, the town is entitled to a peremptory mandamus to compel the board of supervisors to again levy and collect the sum, and pay it over to the county treasurer for the benefit of the town.⁷² The fact that there was refunded to relator so much as was represented by State, county, and highway taxes, and not such part thereof as related to school and highway taxes, was of no avail to the board of supervisors under the mandamus proceedings to compel repay-

62. *People ex rel. Crouse v. Supervisors*, 70 Hun, 560, 53 St. Rep. 796, 24 N. Y. Supp. 397.

63. *People ex rel. Gray v. Bd. of Supervisors of Livingston Co.*, 89 App. Div. 152, 85 N. Y. Supp. 284.

64. *People v. Supervisors*, 17 Wkly. Dig. 139.

65. *People v. Supervisors*, 4 Hill, 20; s. c., 7 Hill, 504.

66. *People v. Supervisors*, 36 How. Pr. 1; *People v. Supervisors*, 51 N. Y. 401.

67. *People v. Supervisors*, 85 N. Y.

612.

68. *People v. Supervisors of Ulster*, 65 N. Y. 300.

69. *People ex rel. Carlisle v. Supervisors of Onondaga*, 217 N. Y. 424.

70. *People v. Supervisors*, 8 N. Y. 317.

71. *People ex rel. Lawyer v. Bd. of Supervisors of Schoharie Co.*, 39 Misc. 162, 79 N. Y. Supp. 145.

72. *People ex rel. Town of Walton v. Board of Supervisors of Delaware Co.*, 173 N. Y. 297.

ment of school and highway taxes, even though three years had passed.⁷³

2. County treasurer.

Mandamus is a proper remedy to compel the county treasurer to issue his warrant for the collection of a tax.⁷⁴ It will issue to county treasurer to pay a valid audit by supervisors,⁷⁵ unless the supervisors had no jurisdiction to audit,⁷⁶ or a portion of claim is fraudulent,⁷⁷ or paid.⁷⁸

Mandamus will lie to a county treasurer to compel him to invest moneys received as taxes as required by law.⁷⁹ Mandamus will lie to the treasurer of a county commanding him to receive forthwith money tendered by the petitioner as assignee of a mortgage upon property sold for taxes, and to deliver a receipt for such payment, certifying that the same was in full redemption of the premises.⁸⁰

Sections 150 and 151 of the Tax Law make it the duty of the county treasurer of Nassau county to advertise and sell real estate in his county whenever a tax charge on such real estate shall remain unpaid for six months from the 1st day of February and his failure to act will give the Supreme Court the right to issue, upon proper application, an order of mandamus compelling the county treasurer to perform his duty, but an injunction is not proper with such order.⁸¹

Where a fund in the hands of the treasurer of Monroe county was realized from the collection of an assessment imposed for the construction of a sewer, under the Laws of 1892, chapter 603, which provides that the necessary funds are to be obtained in the first instance by the issue of certificates of indebtedness, and the statute imposed no corporate or personal obligation upon any municipality interested in the improvement and grants no specific authority to any court to direct the distribution of the fund realized from the assessment among the certificate-holders, a holder of cer-

73. *People ex rel. Erie Ry. Co. v. Bd. of Supervisors of Erie Co.*, 51 Misc. 200, 99 N. Y. Supp. 1062.

74. *People v. Brown*, 55 N. Y. 180; *People v. Halsey*, 37 N. Y. 344.

75. *People v. Stout*, 23 Barb. 338; *People v. Edmonds*, 19 Barb. 468; *People v. Edmunds*, 15 Barb. 529; *People v. Fitzgerald*, 54 How. 1; *People v. Earle*, 16 Abb. N. S. 64. See *Healey v. Dudley*, 5 Lans. 115; *People v. Starr*, 55 How. Pr. 388.

76. *People v. Lawrence*, 6 Hill, 244.

77. *People v. Wendell*, 71 N. Y. 171.

78. *People v. Cromwell*, 102 N. Y. 477.

79. *Spaulding v. Arnold*, 125 N. Y. 194.

80. *People ex rel. Maloney v. Edwards*, 56 Hun, 377, 10 N. Y. Supp. 335.

81. *People ex rel. Carman v. Lewis*, 102 App. Div. 408, 92 N. Y. Supp. 642.

tificates is confined to common-law remedies and is entitled to compel the payment to him by mandamus of his proportion of the fund realized.⁸²

Income taxes coming into the possession of a county treasurer after May 10, 1920, should be distributed under section 382 of the Tax Law, as amended by chapter 694 of the Laws of 1920, which gives to incorporated villages within a town a certain percentage of the income tax, notwithstanding the county treasurer had apportioned the tax for 1920 before the act as amended took effect. But where the county treasurer has actually paid out the money according to said apportionment, mandamus is not the proper remedy to compel the payment to a village of its share under section 382 of the Tax Law, as amended.⁸³

3. Register or county clerk.

Mandamus is a proper remedy to compel a county clerk or register to record a deed,⁸⁴ or file a satisfaction piece.⁸⁵ The obligation imposed upon such official to permit the books, maps, and records of his office to be examined is absolute in its character and may be enforced by mandamus.⁸⁶ He has, however, power to exercise his discretion as to the good order of the office and preservation of the records. To that extent his powers and duties are not subject to interference or control by mandamus.⁸⁷ The order will not lie to compel a registrar of deeds to receive satisfactions of mortgages and to discharge the same where the mortgages had not yet been paid and the petitioner was not the holder of any satisfaction piece; the reason for the refusal of the order being that it sought to compel action of a public officer in case of the happening of some future event.⁸⁸

⁸². *People ex rel. Security Trust Co. v. Treasurer of Monroe Co.*, 191 N. Y. 15, rev'g 121 App. Div. 84, 105 N. Y. Supp. 576.

⁸³. *Matter of Kimball*, 196 App. Div. 679.

⁸⁴. *Ex parte Goodell*, 14 Johns. 325.

Defective acknowledgment.—As to a grantor whose acknowledgment is defective the record of the conveyance is not notice to subsequent purchasers but where a deed executed by several grantors was properly acknowledged as required by law by all but one of the number, the grantee is entitled to a writ of mandamus directing the register of the county in which the

property is situated to record such a deed as a conveyance of the grantors who have properly acknowledged the deed. The register should not be compelled, however, to index the conveyance against the grantor whose acknowledgment is not in proper form. *People ex rel. Oatlaw Corp. v. Donegan*, 226 N. Y. 84.

⁸⁵. *People v. Miner*, 37 Barb. 466; *People v. Sigel*, 46 How. Pr. 151.

⁸⁶. *People v. Supervisors*, 64 N. Y. 600; *People v. Wendell*, 71 N. Y. 171; *Fiedler v. Mead*, 24 N. Y. 114.

⁸⁷. *People ex rel. Title Guaranty Co. v. Reilly*, 38 Hun, 429.

⁸⁸. *People ex rel. Sayles v. Fitz-*

Where a county clerk has been advised by the State Board of Tax Commissioners that a certain mortgage is taxable and such information has also been communicated to the mortgagee, a peremptory order of mandamus should not be issued to compel the county clerk to record a certificate of satisfaction and discharge the mortgage, especially where the State Board of Tax Commissioners is not made a party.⁸⁹

4. Other county officers.

An order of mandamus may be granted to compel a sheriff to execute a deed.⁹⁰ It will run against the commissioner of jurors in New York city to compel him to strike the name of a person not liable for jury duty from the list.⁹¹ It may issue to a clerk of a court to compel him to issue an execution on a judgment.⁹² It will run to loan commissioners to compel them to pay over money.⁹³ A peremptory writ of mandamus will lie to compel a notary public who has taken an acknowledgment to execute a certificate stating that he knew the person executing the instrument, where he does not deny that he knew him.⁹⁴ It will not be granted to interfere with the discretion of excise commissioners.⁹⁵ A county comptroller is subject to mandamus for the auditing of claims against the county under practically the same circumstances as the order will issue against the board of supervisors for that purpose.⁹⁶

M. Town officers.

1. Town board.

A town board will not be compelled by mandamus to decide in a particular way, when it concerns the exercise of a judicial function, though they can be compelled to determine the fact.⁹⁷ A peremptory order will issue to the town board to fill a vacancy occasioned in the office of the justice of the peace by the acceptance by the former incumbent of the office of town

gerald, 37 St. Rep. 540, 3 N. Y. Supp. 663; aff'd without opinion, 128 N. Y. 620.

89. *People ex rel. Title Guarantee & Trust Co. v. Ruoff*, 159 App. Div. 819, 145 N. Y. Supp. 80.

90. *Van Rensselaer v. Sheriff of Albany*, 1 Cow. 501; *People v. Fleming*, 2 N. Y. 484; *People v. Beebe*, 1 Barb. 379.

91. *People v. Taylor*, 45 Barb. 129.

92. *People v. Gale*, 22 Barb. 502;

s. c., 3 Abb. Ct. App. Dec. 491.

93. *People v. Cotes*, 1 How. Pr. 160.

94. *People ex rel. Sayville Steamboat Co. v. Kempner*, 49 App. Div. 121, 63 N. Y. Supp. 199.

95. *Kelly v. Excise Com'rs*, 54 How. 327.

96. See *Matter of Obelisk Waterproof Co.*, 111 Misc. 1, 182 N. Y. Supp. 303.

97. *Matter of Abrams v. Bd. of Town Auditors*, 45 Hun, 272.

clerk.⁹⁸ Mandamus will lie to compel a town board to meet with the town superintendent of highways to divide road funds pursuant to section 105 of the Highway Law.⁹⁹ And mandamus will not lie to compel the town board to give its consent to a contract proposed by the highway commissioner.¹ A person who is a citizen of the State, a freeholder and taxpayer in a town, though not a resident, is entitled to a mandamus compelling the trustees to cause buildings used for private purposes to be removed from a dock owned by the town.²

2. Town auditors.

The town auditors may be compelled by mandamus to convene and consider a claim duly presented against the town.³ Where a town board of auditors rejects a claim because the claimant, after notice, refuses to offer other evidence than the affidavit required by Town Law, there is in fact a refusal to audit the claim, so that mandamus will lie to compel the board to perform its duty in that respect.⁴ But they will not be directed to audit it in any particular manner. If their audit is erroneous, the remedy of the claimant is generally by certiorari or appeal to the board of supervisors, not by mandamus.⁵ Where a board of town auditors in compliance with an order of mandamus requiring them to meet and audit a claim has decided that it is not a valid claim against the town and should be rejected, a second order will not issue to compel an audit and allowance of the claim.⁶ Mandamus should not issue against a town board to compel it to audit and allow relator's claims where the absolute liability of the town for such claims is not established.⁷

While a mandamus will not lie to review the exercise of a power, judicial or discretionary, of a town board, or to direct

98. *People ex rel. Earwicker v. Dillon*, 38 App. Div. 539, 56 N. Y. Supp. 416.

99. *People ex rel. Dare v. Howell*, 174 App. Div. 118, 160 N. Y. Supp. 959.

1. *People ex rel. Fellows v. Early*, 106 App. Div. 269, 94 N. Y. Supp. 640.

2. *People ex rel. Swan v. Doxsee*, 136 App. Div. 400, 120 N. Y. Supp. 962; *aff'd*, 198 N. Y. 605.

3. *Richmond Gas Light Co. v. Town of Middletown*, 59 N. Y. 228; *Colby*

v. Town of Day, 75 App. Div. 211, 77 N. Y. Supp. 1022; *rev'd*, 177 N. Y. 548; *People v. Auditors of Welford*, 53 Barb. 555; *aff'd*, 38 How. 23; *People v. Bd. of Audit*, 4 Hun, 94.

4. *People ex rel. Rhodes v. Mole*, 85 App. Div. 33, 82 N. Y. Supp. 747.

5. *People ex rel. Anderson v. Snedeker*, 75 Misc. 194, 132 N. Y. Supp. 765.

6. *People ex rel. McCabe v. Matthews*, 179 N. Y. 242.

7. *People ex rel. Lane v. Case*, 46 St. Rep. 219, 19 N. Y. Supp. 625.

what the result of its exercise shall be, yet where such board refuses to audit an account, on the ground that no consent or authority had been given to the relator to perform the services, and the matter turns upon the power given to the relator by a resolution of the board, the interpretation and effect of such resolution may properly be determined upon the hearing of an order of mandamus.⁸ And, if town auditors arbitrarily cut down per diem services allowed by law, it is no audit and mandamus will lie.⁹

A disallowance of an entire bill which has already been allowed at about one-third of its face by a town board, in the absence of the claimant, who had procured an order of mandamus, requiring its audit item by item, is not to be a judicial determination which precludes the granting of another order requiring the board to audit the bill after notice to the claimant.¹⁰

Boards of audit in allowing accounts are limited to the powers conferred upon them by the statute and when they transgress their limitations their acts, like those of any other tribunal of limited jurisdiction, are void, and an audit by them is only conclusive when they act within their jurisdiction.¹¹ Mandamus will lie at the suit of a claimant to compel a board of town auditors, to make out and file with the town clerk a certificate of the rejection of the claim.¹² A mandamus will lie to compel a town board which has allowed a claim in part to make and deliver the duplicate certificates of audit.¹³

3. Supervisor.

Where neither the jurisdiction of a town board to audit a claim presented against the town, nor the legality of such audit is questioned, and where the total amount of the audit has been collected and paid over to a supervisor with directions to pay the claimant, a peremptory mandamus will issue to compel payment of the claim.¹⁴ Where a board of supervisors proceeding under the Conservation Law has levied the

8. *People ex rel. Slater v. Smith*, 83 Hun, 432, 64 St. Rep. 419, 31 N. Y. Supp. 749.

9. *People v. Town Auditors*, 82 N. Y. 80.

10. *People ex rel. Hamm v. Bd. of Town Auditors*, 43 App. Div. 22, 59 N. Y. Supp. 615; *Colby v. Town of Day*, 75 App. Div. 211, 77 N. Y. Supp. 1022.

11. *People ex rel. Smith v. Clarke*,

174 N. Y. 259.

12. *People ex rel. Boyce v. Page*, 105 App. Div. 212, 94 N. Y. Supp. 660.

13. *People ex rel. Remington v. Manning*, 37 App. Div. 141, 55 N. Y. Supp. 781. Compare *People ex rel. Ripp v. Town Board of Lewis*, 27 Misc. 469, 59 N. Y. Supp. 248.

14. *Matter of Mefford*, 113 App. Div. 529, 99 N. Y. Supp. 400.

sum claimed by the Conservation Commission to be due from the town for the expenditures of the Commission in fighting fires in said town, and such money has been duly collected and paid over to the supervisor, he may be compelled by a peremptory order of mandamus, to pay over such moneys to the Conservation Commission.¹⁵ Where in a proceeding for mandamus to compel the supervisor of a town to issue bonds under section 35 of the Drainage Law, it appeared that in the original proceeding for the drainage of the land the town was not a party; that the bonds while in form the obligations of the town are to be paid by the property adjudged by the commissioners to have been benefited by the improvement, and that the only interest of the town in the matter is to collect the assessment made upon the land benefited, the supervisor has no standing to litigate the question of the performance of the work, for it affects only those who are assessed.¹⁶

4. Town superintendent of highways.

Mandamus lies to compel a town superintendent of highways to perform his statutory duties,¹⁷ such as to work a road,¹⁸ or to open a road after a decision on appeal.¹⁹ His act in filing and recording descriptions of abandoned highways is not a judicial act, and may be reviewed upon mandamus to compel the opening of such a highway.²⁰ Where a petition alleges that a filing in the town clerk's office by the superintendent of highways of a certificate of qualified abandonment of a highway pursuant to section 234 of the Highway Law is colorable only and part of a wrongful and fraudulent scheme to permanently abandon the road and deprive petitioner and the public of its benefit, the petitioner will be granted an alternative order of mandamus requiring the superintendent of highways to cancel such certificate and put the highway in a suitable condition for travel.²¹ Where obstructions have been placed across a highway, a town superintendent may be compelled by mandamus to remove them and attach the highway to the proper road district.²²

15. *Matter of Attorney-General v. Taubenkeimer*, 178 App. Div. 321, 164 N. Y. Supp. 904.

16. *People ex rel. Mount Vernon Trust Co. v. Millard*, 133 App. Div. 139, 117 N. Y. Supp. 474.

17. *Matter of Marvin*, 91 Misc. 287, 155 N. Y. Supp. 28.

18. *People v. Collins*, 19 Wend. 56.

19. *People v. Champion*, 16 Johns.

61; *People v. Barber*, 12 Barb. 193; *People v. Com'rs*, 1 Cow. 23; *Ex parte Sanders*, 1 Cow. 544. But see *People v. Com'rs*, 8 N. Y. 476.

20. *People ex rel. Groat v. Marlette*, 94 App. Div. 292, 88 N. Y. Supp. 379.

21. *Matter of Marvin*, 91 Misc. 287, 155 N. Y. Supp. 28.

22. *People ex rel. De Groat v. Marlett*, 41 Misc. 151, 83 N. Y. Supp. 962.

He may be compelled by mandamus to remove bathhouses erected upon a highway, above high water mark, so as to cut off access to the water.²³ A mandamus will not issue to compel him to ascertain, describe, and record what is claimed to be an old road; it is for him to decide the fact, and it is beyond the competency of the court to dictate his decision.²⁴

5. Overseer of poor.

Mandamus will not lie to compel an overseer of the poor to prosecute actions for penalties.²⁵

6. Assessors.

Mandamus is a proper remedy to compel assessors to conform to an order of the County Court,²⁶ or to ascertain whether consents for town bonding have been obtained, and if so, to make necessary affidavits,²⁷ or to compel assessors to strike from the rolls non-residents illegally assessed,²⁸ or to reduce an assessment when illegal, unless the affidavits to procure the reduction are not in the form required by law.²⁹ But, in making assessments, assessors act in a quasi-judicial manner, and they will be set in motion, but they will not be directed as to the amount of an assessment.³⁰

7. Water commissioners.

Where water commissioners appointed under article XIII of the Town Law, authorizing the establishment of water districts in towns, enter into a contract for the construction of a water plant, the duty of the town under the act to raise the money necessary for the payment of the plant under the contract may be enforced by mandamus in case of non-action on the part of the town.³¹ For an alleged breach of a contract made by commissioners, or for a failure to pay any debt incurred by them in their official capacity, mandamus is the only appropriate remedy to compel action on their part, and certiorari may be invoked where such action is challenged as unlawful.³²

23. *People ex rel. Butler v. Hawxhurst*, 123 App. Div. 65, 107 N. Y. Supp. 746.

24. *People v. Hulse*, 38 Hun, 388.

25. *People v. Leonard*, 74 N. Y. 443.

26. *People v. Supervisors*, 65 N. Y. 300.

27. *Howland v. Eldredge*, 43 N. Y. 457.

28. *People v. Assessors*, 44 Barb. 148.

29. *People v. Supervisors*, 15 Barb. 607.

30. *Howland v. Eldridge*, 43 N. Y. 457; *People ex rel. Osborn v. Gilon*, 18 Civ. Pro. 112. See, also, *People v. Fowler*, 55 N. Y. 252.

31. *Holroyd v. Town of Indian Lake*, 180 N. Y. 318, aff'g 85 App. Div. 246, 83 N. Y. Supp. 533.

32. *People ex rel. Farley v. Winkler*, 203 N. Y. 445.

N. School officers.

Mandamus is not a proper remedy to review a judicial or discretionary act of school officers.³³ Thus, the dismissal of a teacher is not generally reviewable by an order of mandamus.³⁴ And, if the dismissed teacher has a remedy by appeal to the Commissioner of Education, an additional reason is furnished for denying an order of mandamus.³⁵ Where a proceeding of a board of education involves simply a matter of school discipline, it is not subject to review by mandamus. Thus, where a teacher is dismissed on a charge of neglect of duty, the proceedings will not be reversed by mandamus.³⁶ The remedy will not lie to a board of education to compel the reinstatement of a petitioner to the position of teacher in a public school, when the right thereto is not clear and another appointee occupies the place, and where the dismissal was the result of a trial which may not be reviewed upon mandamus.³⁷

An order of mandamus may be granted to compel a board of education or other school officials to perform a ministerial duty. Thus, a principal of a public school in New York city may be compelled to prepare a pay-roll and certify to its correctness.³⁸ The custodian of the school moneys may be compelled by mandamus to pay a draft properly drawn on the school moneys.³⁹ A board of education may be required by mandamus to make a requisition for the payment of the bill of an attorney designated to act for it by a justice of the Supreme Court.⁴⁰ The remedy is available to compel a board of education to fix the salary of a principal of a school.⁴¹ The

33. *People v. Easton*, 13 Abb. N. S. 159.

34. *Jordan v. Bd. of Education*, 14 Misc. 119, 69 St. Rep. 622, 35 N. Y. Supp. 247; *Matter of O'Connor*, 113 Misc. 472, 185 N. Y. Supp. 49; *aff'd*, 196 App. Div. 807, 188 N. Y. Supp. 236; *People v. School Officers*, 18 Abb. Pr. 165. Compare *People ex rel. Stanley v. Van Siclen*, 43 Hun, 537.

Views on war.—Mandamus will not lie to review the discretion of a board of education in dismissing a public school teacher because of her views upon the war with Germany and the attitude she would take and was taking in regard to her duties as a teacher in relation to the war. Her remedy is by appeal to the Commissioner of Education. *Matter of McDowell v.*

Board of Education, 104 Misc. 564, 172 N. Y. Supp. 590.

35. *People ex rel. Keyser v. Bd. of Education*, 32 Misc. 63, 66 N. Y. Supp. 149. See, also, *Matter of O'Connor*, 196 App. Div. 807, 188 N. Y. Supp. 236.

36. *People v. Board of Education*, 212 N. Y. 463.

37. *Jordan v. Bd. of Education*, 14 Misc. 119, 35 N. Y. Supp. 247.

38. *Matter of Gleese*, 50 Super. Ct. 473.

39. *Dannat v. Mayor*, 66 N. Y. 585.

40. *People ex rel. Allison v. Bd. of Education*, 26 App. Div. 208, 49 N. Y. Supp. 915.

41. *People ex rel. Harris v. Bd. of Estimate and Apportionment*, 131 App. Div. 358, 115 N. Y. Supp. 907.

remedy will not lie to a board of education to compel the payment of the salary of a public school teacher who has been removed from office and subsequently reinstated. The most that such an one could require would be to have his name put upon the pay-rolls. He should be left to this action at law to enforce payment.⁴² Where a city board of school superintendents is required to make out and file a list of holders of teachers' certificates eligible to promotion, the making of such list is a ministerial duty, enforceable by mandamus.⁴³

The action of the Board of Regents in denying an application for a license to practice osteopathy may be executive, not judicial, and mandamus is the proper remedy to compel its issuance.⁴⁴

Before applying for a mandamus to a board of education to compel the admission of a child to a ward school, the petitioner must have exhausted all other remedies; it seems that such admission will not be compelled where there is no room to seat the child.⁴⁵

Before an attendance officer of a school board in the city of New York can invoke the remedy of mandamus for his reinstatement after a removal claimed to be illegal, by the borough superintendent, he is required to appeal to the school board, which is part of the appointing power.⁴⁶ Where the petitioner has been appointed janitor by the school commissioners, and another has been appointed by the city engineer and superintendent of public buildings, and both present drafts for salary for the comptroller to countersign, the right will not be determined on mandamus.⁴⁷

O. Municipal officers.

1. In general.

A mandamus will lie against a municipal corporation to compel it to perform its legal functions, although a legal remedy also exists.⁴⁸ A mandamus will not be granted

42. *People ex rel. Steinson v. Bd. of Education*, 60 Hun, 486, 15 N. Y. Supp. 308.

43. *Matter of Brooklyn Teachers' Assoc.*, 85 App. Div. 47, 83 N. Y. Supp. 1; *aff'd*, 176 N. Y. 564. See, also, *Matter of Stebbins*, 41 App. Div. 269, 58 N. Y. Supp. 468, as to lists of eligible principals.

44. *People ex rel. Scott v. Reid*, 135 App. Div. 89, 119 N. Y. Supp. 866.

45. *People ex rel. Ulrich v. Bd. of Education*, 4 N. Y. Supp. 102.

46. *People ex rel. Carll v. White*, 59 App. Div. 17, 69 N. Y. Supp. 30.

47. *People ex rel. Gaffigan v. Ricker-son*, 56 App. Div. 588, 67 N. Y. Supp. 248.

48. *People ex rel. Sherrill v. Gugenheimer*, 28 Misc. 735, 59 N. Y. Supp. 913; *aff'd*, 47 App. Div. 9, 62 N. Y. Supp. 4.

against a common council on the ground that it has failed and refused to perform a duty, unless it has been put in default by a demand for the precise relief sought.⁴⁹ Mandamus will not lie to compel the commissioner of public safety of a city of the second class to enforce the Sunday laws.⁵⁰ But it has been held that mandamus will lie to compel the mayor of a city to enforce the law prohibiting the operation of jitneys without the consent of the city authorities and the certificate of the Public Service Commission.⁵¹ Mandamus will not lie to compel a city officer to perform an act which will work a public and private mischief, or to compel compliance with the letter of the law in disregard of its spirit or in aid of a public fraud.⁵²

2. Election or appointment of officers.

An order of mandamus may be procured to compel a common council to order an election to fill a vacancy,⁵³ or to compel a city clerk to give notices of an election,⁵⁴ or to compel a local board of health to appoint a health officer to fill a vacancy,⁵⁵ or to compel a mayor to administer the oath of office to a person legally elected.⁵⁶

Mandamus will not lie to the common council of a city compelling it to declare a candidate elected when the question as to which person was elected is contested, and the members of the common council under the city charter are judges as to such election.⁵⁷ Nor will mandamus lie to a board of village trustees to compel them to fill an alleged vacancy in office, where it is already occupied under color of title.⁵⁸ But man-

49. *People ex rel. Drake v. Common Council*, 26 Misc. 522, 57 N. Y. Supp. 617.

50. *People ex rel. Clapp v. Listman*, 40 Misc. 372, 82 N. Y. Supp. 263; *aff'd*, 84 App. Div. 633, 82 N. Y. Supp. 784.

Excise Law.—Mandamus will not lie to police commissioners to enforce the Excise Law unless it appears that such officers do not intend to enforce the statute. *In re Whitney*, 3 N. Y. Supp. 838, 24 St. Rep. 968.

51. *People ex rel. Weatherwax v. Watt*, 115 Misc. 120, 188 N. Y. Supp. 559.

52. *People ex rel. Wood v. Assessors*, 137 N. Y. 201, 50 St. Rep. 404.

53. *People v. Common Council*, 77 N. Y. 503.

54. *Matter of Markland v. Scully*, 203 N. Y. 158.

55. *People ex rel. Lynch v. Pierce*, 149 App. Div. 286, 133 N. Y. Supp. 802.

The common council is vested with discretion in the matter of appointing the nominees of the mayor for health office and it cannot be compelled to do so by mandamus. *Matter of City of Rensselaer*, 31 Misc. 512, 64 N. Y. Supp. 704.

56. *Ex parte Heath*, 3 Hill, 42; *Ackley's Case*, 4 Abb. 35.

57. *Halloran v. Carter*, 35 St. Rep. 884, 13 N. Y. Supp. 214.

58. *People ex rel. Wilson v. Village of Mt. Vernon*, 59 Hun, 204, 13 N. Y. Supp. 447.

damus will lie to compel the mayor of a city, presiding at a meeting of the common council, to put a motion relative to the appointment of standing committees of the council, when the exercise of discretion is not involved, and the refusal is placed simply on the ground that the proposed action is *ultra vires*.⁵⁹

A petitioner, who has obtained an alternative order of mandamus to determine his right to the position of chief of police or policeman in a village, and who is alleged by the return to be physically unable to perform the duties, should not be required to submit to a physical examination, where it does not appear that relator's disability cannot be established by other available evidence.⁶⁰ Under a statute providing that it shall be the duty of the commissioner of public safety of a city to provide for physical examination of all members of the park police force, and appoint all members found physically qualified members of the city police force, the determination of the physical qualifications of the persons examined is an exercise of judgment amounting to a judicial act, and the correctness of such determination cannot be reviewed by mandamus.⁶¹

3. Appropriations.

Under a statute empowering the register of Kings county to appoint certain employees at salaries not exceeding a maximum amount, if the board of estimate and apportionment refuses to make the necessary appropriation, a peremptory order of mandamus may issue directing an appropriation for the payment of such salaries due and to become due.⁶² Where a city board of apportionment and assessment refuses to include in the estimate of sums to be raised by tax a sum directed by statute to be repaid to lot owners who have paid their assessments, the proper remedy to compel them to do so is by mandamus.⁶³ The court has no authority to compel, by mandamus, the acting chief city magistrate of the board of magistrates of the city of New York to prepare, certify and forward to the civil service commission a payroll allotting salaries to certain probation officers or to compel the board of estimate and apportion-

59. *People ex rel. Hayes v. Brush*, 110 App. Div. 720, 96 N. Y. Supp. 500.

60. *People ex rel. Mosher v. Roosa*, 43 App. Div. 611, 60 N. Y. Supp. 244.

61. *People ex rel. Apfel v. Casey*, 66 App. Div. 211, 72 N. Y. Supp. 945.

62. *People ex rel. O'Loughlin v. Prendergast*, 219 N. Y. 377.

63. *People ex rel. Lucey v. Molloy*, 35 App. Div. 136, 54 N. Y. Supp. 1084; *aff'd*, 161 N. Y. 621.

ment to readjust its budget so as to provide salaries for said officers.⁶⁴

4. Opening or closing streets.

Mandamus may issue to the common council of a city compelling them to proceed in the matter of the widening of a street.⁶⁵ Where a street is closed and a request is made that a proceeding be instituted for the appointment of commissioners to ascertain damages, which request is refused, the corporation counsel may be compelled by mandamus to institute proceedings to ascertain the damage sustained by the closing.⁶⁶ In mandamus proceedings against the comptroller of a city, the court will not consider questions as to the propriety of items included in an award of damages made by commissioners authorized by law to ascertain the amount of damages to lands suffered by reason of changes in the grade of streets or avenues.⁶⁷ But, when a municipal board of public works has statutory jurisdiction over street improvements, etc., its discretion exercised pursuant to statute in changing the grade of streets is not subject to judicial review.⁶⁸ And mandamus will not lie to compel common council to confirm assessment of damages, there being another remedy.⁶⁹

A village will not be compelled by mandamus to carry a street across railroad tracks.⁷⁰ A peremptory mandamus cannot be granted to compel the commissioner of public works to permit the opening of a street by a street railway company, in order to make an authorized change of motive power to electricity, where the papers show disputed allegations and conclusions as to the necessity of the proposed excavation, the uses of the street and buildings, the feasibility of using the tracks of an existing electric railway company, damage to subterranean structures, and as to the possibility of obtaining the consents of property-owners.⁷¹

64. *People ex rel. Kelly v. Dooley*, 169 App. Div. 423, 155 N. Y. Supp. 326.

65. *People v. Common Council of Brooklyn*, 22 Barb. 404.

66. *People ex rel. Winthrop v. Delaney*, 120 App. Div. 801, 105 N. Y. Supp. 746.

67. *People ex rel. Purdy v. Fitch*, 147 N. Y. 355.

68. *People ex rel. City of Geneva v.*

G., W., etc., Traction Co., 112 App. Div. 531, 98 N. Y. Supp. 119; *aff'd*, 186 N. Y. 516.

69. *People v. Brooklyn*, 1 Wend. 318. See, also, *Bagley v. Green*, 1 Hun, 1.

70. *People ex rel. Lawrence v. Clark*, 40 App. Div. 214, 58 N. Y. Supp. 12.

71. *Matter of 42d St., M. & St. N. Ave. R. Co. v. Collis*, 24 Misc. 321, 53 N. Y. Supp. 669.

5. Assessment for local improvements.

Where a contract for the construction of a sewer in a village provides for payment as soon after the completion and acceptance of the work, "as the assessment for the construction of the same shall have been collected by the trustees, and not before," the proper remedy for the contractor, if the trustees refuse to levy and collect the assessment, is by mandamus to compel them to proceed.⁷² When a judgment has been entered canceling an assessment for street opening, the plaintiff, by mandamus, may compel the municipal authorities to make a formal cancellation on the books.⁷³

6. Removal and reinstatement of employees.

Where a municipal employee is removed after a hearing on charges against him, the action of the removing officer or board is judicial in its nature, and cannot be reviewed by mandamus.⁷⁴ Certiorari is usually the proper remedy in such a case.⁷⁵ And an order of mandamus will not be granted where the petitioner has given up his position.⁷⁶

Where there has been no determination of a question presented to the appointing power for a judicial determination and the rights secured to an employee have been disregarded, there is no judicial proceeding which can be reviewed by certiorari.⁷⁷ Where no trial had been had before a police commissioner, who has dismissed a member of the force, his remedy is by mandamus, and not certiorari.⁷⁸ If the commissioners of police wrongfully dismiss a member of the force because of an alleged conviction of a crime, he will have his remedy by mandamus for restoration.⁷⁹ The order may be procured to compel police commissioners to allow a policeman on trial to have counsel.⁸⁰ Where a city employee was notified after 5 P. M. one day to appear the next day at 10 A. M. to answer charges, and an adjournment was refused,

72. *Harrison v. Village of New Brighton*, 110 App. Div. 267, 97 N. Y. Supp. 246.

73. *People ex rel. Jardine v. Brush*, 115 App. Div. 688, 101 N. Y. Supp. 312; aff'd, 188 N. Y. 544.

74. *People ex rel. Holden v. Woodbury*, 88 App. Div. 593, 85 N. Y. Supp. 161; aff'd, 179 N. Y. 525; *People ex rel. Segee v. Hayes*, 106 App. Div. 563, 94 N. Y. Supp. 754; *People ex rel. Hanrahan v. McAdoo*, 110 App. Div. 894, 96 N. Y. Supp. 1069; *People ex*

rel. Meeks v. Drummond, 156 App. Div. 926, 141 N. Y. Supp. 315; aff'd without opinion, 210 N. Y. 624; *People v. Police Comm'rs*, 12 Abb. N. S. 181.

75. See chapter on Certiorari.

76. *People v. Board*, 26 N. Y. 316.

77. *People ex rel. Segee v. Hayes*, 106 App. Div. 563, 94 N. Y. Supp. 754.

78. *Matter of Elder*, 118 App. Div. 25, 103 N. Y. Supp. 617.

79. *People v. French*, 102 N. Y. 583.

80. *Matter of Ryan*, 1 Law Bull. 81.

he was not given a fair opportunity to explain as required by the city charter and was entitled to a peremptory order of mandamus to compel the department head to give him a hearing.⁸¹

The power to detail patrolmen for detective duty in the city of Buffalo and to revoke such details is vested exclusively in the superintendent of police; and an application for a peremptory mandamus, commanding the police board of that city to reinstate the petitioners as detective sergeants, will be denied.⁸²

Where a patrolman had been assigned to duty in the detective bureau of the city of New York, with rank of detective sergeant, prior to the enactment of the Laws of 1901, page 122, chapter 466, section 290, providing for the maintenance of a bureau of detectives, and served as such until June 17, 1902, when he was reduced in rank not in the manner provided by law for sergeants and other police officers, and remanded to duty as a patrolman, with reduced salary, he was entitled to an order of mandamus requiring the police commissioner to reinstate him as detective sergeant.⁸³ An inspector of police promoted to that rank to take the place of one removed from office but reinstated by the court, upon being returned to his former rank because of the limitation of the number of inspectors by law, cannot compel his recognition as an inspector by mandamus, but must resort to quo warranto. The fact that the promotion was made under the civil service rules does not affect the principle.⁸⁴

Where a chief of the fire department in New York city was relieved from command and from his duties until the expiration of the time for which he had been granted a leave of absence for the benefit of his health, on an application for peremptory mandamus to compel the fire commissioner to reinstate him before the expiration of such leave of absence the only question that can be considered is the fire commissioner's power to make the order.⁸⁵

7. Pensions for employees.

The remedy of any member of the New York city fire department aggrieved by the action of the commissioners in determining his pension is to correct that determination by

81. *People ex rel. LaChicotte v. O'Keefe*, 80 Misc. 344, 141 N. Y. Supp. 82.

82. *Matter of Pritchard*, 51 Misc. 483, 101 N. Y. Supp. 711.

83. *Sugden v. Partridge*, 174 N. Y. 87.

84. *People ex rel. Baldwin v. McAdoo*, 110 App. Div. 432, 96 N. Y. Supp. 362.

85. *Matter of Croker*, 78 App. Div. 184, 79 N. Y. Supp. 640.

a direct proceeding, such as mandamus, not by action.⁸⁶ But a board of police will not be compelled by mandamus to retire a policeman and put him on the pension list, where he sought to be retired, for the purpose of evading trial and arraignment for misconduct.⁸⁷

The discretionary power conferred on the police commissioners of the city of New York by the Laws of 1897, page 132, chapter 378, section 355, re-enacted by the Laws of 1901, page 154, chapter 466, section 355, authorizing the commission to grant a pension to a member of the police force who has served twenty years, cannot be controlled by mandamus.⁸⁸ And mandamus will not lie to police commissioners to require them to place the name of a widow of an officer upon the pension-roll where it is a matter of discretion with the board.⁸⁹

The certificate of a police surgeon is not final and conclusive evidence of the disability of a member of the New York police force, where the order for his retirement is made in opposition to his wishes, and to his claim that he is possessed of good health and that he is fully able to discharge all the duties of his position.⁹⁰ Where issue is joined as to the truth of such a certificate, the person affected thereby has a right to have it tried and determined by an alternative order of mandamus. The provision of section 790 of the Greater New York charter, relating to retirement upon a certificate that a member of the fire department is permanently disabled so as to be unfit for duty, is not satisfied by a certificate that a member is disabled from the performance of the duties of his position or of fire duty. But the commissioner has dis-

86. *Ramsay v. Hayes*, 187 N. Y. 367.

87. *People ex rel. Tuck v. French*, 108 N. Y. 105.

88. *Matter of Friel*, 101 App. Div. 155, 91 N. Y. Supp. 454; *aff'd*, *Friel v. McAdoo*, 181 N. Y. 558.

89. *People ex rel. Bliel v. Martin*, 11 N. Y. Supp. 123, 32 St. Rep. 440; *aff'd*, 131 N. Y. 196.

Widow's pension.—Under a statute providing for pensions to widows of firemen in a city fire department “in every case the commissioner shall determine the circumstances thereof; but nothing herein contained shall render any payment of said pension obligatory on said commissioner,” who in his discretion “may for proper cause, and after investigation, at any time order such pension or any part

thereof to cease,” held, that a fireman’s widow presenting a case *prima facie* entitling her to a pension might have an alternative writ of mandamus to the commissioner to determine the circumstances of the case and to place her name on the pension-roll, and that a statement of the commissioner in his answering affidavit that in the exercise of his best judgment and discretion he declined to place the petitioner upon the roll would not defeat her application for the writ. *Matter of Tobin*, 64 App. Div. 375, 72 N. Y. Supp. 184.

90. *Matter of Hodgins v. Bingham*, 196 N. Y. 123. Compare *People ex rel. Price v. Bingham*, 125 App. Div. 722, 110 N. Y. Supp. 136.

cretionary power to retire a member found to be disqualified for the performance of his duties provided that, should the member's disability be caused by injuries received in the service disqualifying him only from performing active duty on the uniformed force, he shall be employed at the same salary in some other position. In such a case, the certificate of the medical officers is not conclusive on the question whether the disability was caused by injuries received in service; and, where that question is in issue in a proceeding for a writ of mandamus on the application of a member of the department who has served upward of twenty years, it should be tried out under an alternative order.⁹¹

8. Auditing of claims against municipality.

A municipal officer or body charged with the duty of auditing claims against the municipality may, in some cases, be required by mandamus to exercise such duty.⁹² The remedy will run against a city board of auditors,⁹³ but not to interfere with their discretion.⁹⁴ The duty of the comptroller of the city of New York to examine a claim, illegal in form, and certify his opinion whether it should be paid or compromised under section 246 of the charter may be enforced by mandamus.⁹⁵ The order will lie to a board of estimate and apportionment to compel it to examine the relator's claim against the city, where it was authorized so to do by act of the Legislature. The authority to audit it carries with it the duty, and is of a mandatory character.⁹⁶

The order will lie to a common council to compel the audit and payment of a claim against the city when the charter directs them so to do, even though the statute under which the award was made was repealed before the claim was audited.⁹⁷ Where the right of a party to payment is clear and there are funds on hand applicable to such payment, the court may, in the exercise of a sound discretion, compel by mandamus a ministerial municipal officer to audit and pay the claim, although the party has a remedy by action, unless the

91. *People ex rel. Cunningham v. Hayes*, 66 Misc. 531, 122 N. Y. Supp. 104.

92. *People ex rel. Kings Co. Gas Co. v. Schieren*, 89 Hun, 220, 35 N. Y. Supp. 64, 69 St. Rep. 243.

93. *People v. Green*, 44 How. Pr. 201.

94. *People v. Bd. of Apportionment*, 52 N. Y. 224; *People v. Cooper*, 24 Hun, 337.

95. *People ex rel. Dady v. Prendergast*, 203 N. Y. 1.

96. *People ex rel. Kellner v. The Mayor, etc.*, 3 Misc. 131, 23 N. Y. Supp. 1060.

97. *People ex rel. Reynolds v. City of Buffalo*, 2 Misc. 7, 49 St. Rep. 576, 21 N. Y. Supp. 601; *aff'd*, 140 N. Y. 300.

city has repudiated or denied the existence of the obligation.⁹⁸ There being no authority conferred on the tenement commissioner of New York city to audit claims, all of which are to be audited by the comptroller, mandamus will not issue requiring such commissioner to audit and pay or cause to be audited a claim for salary preferred by an employee.⁹⁹

A contract liability may be enforced against a municipal corporation by mandamus; but the order should not be granted where facts are presented in opposition which tend to show that the city may be able to interpose a successful defense to the whole or any part of the claim.¹ Mandamus will not issue to compel the payment of a claim which is based upon an evasion of the provisions of the city charter requiring contracts to be let to competitive bidding.² Mandamus will not lie to compel payment by a city, where the city repudiates or denies the obligation.³ It will not compel a board to pay full salary to a sick policeman.⁴ Where a city violates a contract, and proof is necessary to ascertain the amount of damages, the remedy is by action and not by mandamus.⁵ Services rendered on behalf of a city not under an express contract do not afford a basis for mandamus to compel the audit of the claim therefor, but the claimant must resort to an action.⁶

An order of peremptory mandamus will not be granted on the petition of a property owner in a village claiming that such property has been injured by the crossing of a highway, he having a complete remedy at law.⁷

9. Payment of claims audited.

When a claim against a municipality has received the approval required by statute, the payment may be frequently enforced by statute. Where the proper authority has audited a claim, the comptroller and auditor may be directed to pay it.⁸ Thus, officials may be required to countersign a warrant.⁹

98. *People ex rel. Beck v. Coler*, 34 App. Div. 167, 54 N. Y. Supp. 639.

99. *People ex rel. O'Brien v. Butler*, 120 App. Div. 751, 105 N. Y. Supp. 631.

1. *People ex rel. Cranford v. Coler*, 26 Misc. 509, 57 N. Y. Supp. 461.

2. *People ex rel. Uvalde Asphalt Co. v. Grout*, 98 N. Y. Supp. 185.

3. *People ex rel. Gargan v. York*, 31 Misc. 549, 65 N. Y. Supp. 559.

4. *People v. French*, 24 Hun, 263.

5. *Utica Waterworks Co. v. City of Utica*, 31 Hun, 426.

6. *People ex rel. Dunn v. Metz*, 115 App. Div. 269, 100 N. Y. Supp. 913.

7. *Matter of Jones*, 85 App. Div. 265, 83 N. Y. Supp. 1012.

8. *People v. Earle*, 16 Abb. N. S. 64; *People v. Earle*, 47 How. 368; *People v. Earle*, 46 How. 308; *People v. Earle*, 46 How. 267; *People v. Flagg*, 16 Barb. 503; *People v. Brennan*, 45 Barb. 457. See, also, *People v. Green*, 56 N. Y. 476; *People v. Brennan*, 18 Abb. 100.

9. *People v. Opdyke*, 40 Barb. 306; *People v. Havemeyer*, 3 Hun, 97;

It must, however, be a valid claim,¹⁰ and the remedy will not be granted if the claimant is not entitled to his money.¹¹

While mandamus will issue to the officers of a city to compel the examination and audit of claims, yet it will not issue to direct the mayor to draw a certified warrant upon the treasury, where the duty involved the consideration of evidence upon the subject and the judicial determination of facts.¹² And the order may be denied if there is not sufficient money in the treasury to pay the claim,¹³ though if the money has been wrongfully applied the order may be granted.¹⁴ But where the moneys sought to be reached have been paid to another claimant, and the fund to which it belonged is a special fund, mandamus will not lie.¹⁵ Where money has been raised by taxation to pay a draft signed by the president and clerk of a village and drawn upon its treasurer, mandamus for payment of the draft, directed to his successor as treasurer, may be issued, and it is no answer that the money raised has been used for other purposes and has never come to the hands of the present treasurer.¹⁶ The relief has been granted to compel a comptroller to pay a deputy clerk of Special Sessions.¹⁷ But a comptroller of a city will not be compelled to pay a salary which he has already paid to one *de facto* in office under color of title.¹⁸ Where a claim against the city of New York for services as a city surveyor has not been audited, and the charges for such services have not been certified to be just and reasonable, mandamus will not lie to compel payment.¹⁹

People v. Havemeyer, 47 How. 494;
People v. Havemeyer, 16 Abb. N. S. 219;
People v. Crissey, 91 N. Y. 616.

10. People v. Bd. of Apportionment, 3 Hun, 11; *aff'd*, 64 N. Y. 627; People v. Green, 66 Barb. 630.

11. People v. Tieman, 30 Barb. 193; People v. Booth, 32 How. 17; People v. Wood, 13 Abb. 374.

12. People ex rel. Kings Co. Gas Co. v. Schieren, 89 Hun, 220, 35 N. Y. Supp. 64, 69 St. Rep. 243.

13. People v. Connolly, 2 Abb. N. S. 315. Compare People v. Stout, 23 Barb. 338; People v. Haws, 12 Abb. Pr. 192.

Greater New York charter, section 226, requires the heads of departments and boards to send to the board of estimate and apportionment a statement of the salaries of their officers,

and the board of estimate and apportionment to make a necessary appropriation. Held, that one claiming a compensation as a police officer could not maintain mandamus to compel the board of police commissioners to pay the sum claimed by him; it appearing that no appropriation had been made therefor by the board of estimate and apportionment. People ex rel. Daly v. York, 66 App. Div. 453, 73 N. Y. Supp. 331; *aff'd*, 171 N. Y. 627.

14. People v. Comptroller, 77 N. Y. 45.

15. People v. O'Keefe, 100 N. Y. 572.

16. People ex rel. Rohr v. Owens, 110 App. Div. 30, 96 N. Y. Supp. 1054.

17. People v. Green, 58 N. Y. 295.

18. Matter of Grady, 15 App. Div. 504, 44 N. Y. Supp. 578.

19. People ex rel. McLaughlin v.

Mandamus will lie to the comptroller of a city to compel him to pay the quota of State taxes imposed upon a city, where it was his statutory duty so to do.²⁰ The Supreme Court has full authority to issue an order of mandamus compelling the city chamberlain of the city of New York to pay over to the State Treasurer, in accordance with section 44 of the State Finance Law, funds which have remained in his hands for a period of twenty years. The order should not be limited to the amount unclaimed, but should be made applicable to any sum paid into court, and which shall have remained in his hands for a period of twenty years. Such an order does not change the title to the funds, but merely the depository thereof.²¹

10. Awarding of contracts.

Where the contracting board of a municipality is required by law to award a contract to the lowest bidder, and the person making the lowest bid has in all respects complied with the law, the board will be compelled by mandamus to award him the contract.²² But where, pending the formal acceptance of the lowest bid for a city improvement and the execution of a formal contract, the proposed improvement is abandoned, with a *bona fide* intention of carrying it out in a cheaper form than at first proposed, a peremptory order of mandamus will not issue at the suit of the lowest bidder to compel the execution of the contract with him.²³ And mandamus will not lie against the mayor of the city to compel him to draw his warrant on a city treasurer in favor of a contractor, where it appears that there were other bids lower than those of the relator, and the municipal charter provided that contract work shall be let to the lowest bidder.²⁴ Where the lowest bidder on a municipal contract has no remedy at law for the refusal of the municipal authorities to execute a contract which they have drawn up awarding the work to him, he is entitled to an order of mandamus compelling them to execute it.²⁵ Where a contractor is

Prendergast, 70 Misc. 6, 107 N. Y. Supp. 1057.

20. *People v. Myers*, 50 Hun, 479, 20 St. Rep. 268, 3 N. Y. Supp. 365; *aff'd*, 112 N. Y. 676.

21. *People v. Keenan*, 110 App. Div. 537, 97 N. Y. Supp. 77; *aff'd* without opinion, 185 N. Y. 600; *Matter of People v. Maltbie*, 184 App. Div. 743, 172 N. Y. Supp. 483.

22. *People ex rel. Matthews & Co. v.*

City of Buffalo, 5 Misc. 36, 25 N. Y. Supp. 50.

23. *People ex rel. Fisher v. Lennon*, 147 App. Div. 640, 132 N. Y. Supp. 567.

24. *People ex rel. Coughlin v. Gleason*, 121 N. Y. 631.

25. *People ex rel. Lynch v. Lennon*, 147 App. Div. 537, 132 N. Y. Supp. 620.

entitled to be awarded a contract and he has a remedy at law, mandamus will not generally lie.²⁶

Mandamus lies to compel the comptroller to pass on the sufficiency of the bonds of a contractor.²⁷ The duty of a city comptroller, expressly imposed by statute, to indorse upon a contract for a municipal improvement his certificate that there is an unexpended fund applicable to the payment of the contract may be enforced by mandamus.²⁸ The order may issue to compel a city clerk to affix the seal to a contract.²⁹ The signing of a contract by a mayor and city clerk, after a resolution in relation thereto has been passed over a veto, is a ministerial act, which may be compelled by mandamus.³⁰ Where, however, the contract for the purchase of real estate is alleged to require the payment of a sum about \$9,000 in excess of what it is worth, or that the contract is tainted with fraud in other respects, a peremptory order will not be granted.

11. Performance of contracts.

Where a contract is awarded to the petitioner, the lowest bidder, by the sewer commission, for the building of an outlet, and they refuse to enter into the contract, pleading lack of available funds, a peremptory order of mandamus is proper, where there is money for construction purposes and no preference as to matter of payments.³¹ Where a contract for the construction of a subway provides that all claims of the contractor for extra work must be approved by the chief engineer of the subway commission, if the chief engineer refuses to pass upon a claim, an order of mandamus will issue directing him to act.³² It has been held that mandamus to the mayor of a city to compel the performance of a duty which rests in contract merely will not be granted, as it would be in the nature of an action in equity for the specific performance of a contract, and a municipality, no more

26. *People v. Thompson*, 99 N. Y. 641.

27. *People v. Green*, 50 How. 500; *aff'd*, 64 N. Y. 656.

28. *New York State Construction Co. v. City of New York*, 163 App. Div. 227, 148 N. Y. Supp. 129; *People ex rel. Carlin Const. Co. v. Prendergast*, 99 Misc. 8, 163 N. Y. Supp. 583.

29. *People v. Connolly*, 2 Abb. N. S. 315.

30. *People ex rel. Lighton v. Mc-*

Guire, 31 Misc. 324, 65 N. Y. Supp. 463.

31. *People ex rel. Phoenix Const. Co. v. Hoyle*, 75 Misc. 515, 133 N. Y. Supp. 669.

32. *People ex rel. R. T. S. Construction Co. v. Craven*, 210 N. Y. 443; *aff'g*, 160 App. Div. 925, 145 N. Y. Supp. 1140.

33. *People ex rel. Ryan v. Aldridge*, 83 Hun, 279, 64 St. Rep. 727, 31 N. Y. Supp. 920.

than a private person, can be compelled to prosecute an enterprise beyond the point at which it sees fit to discontinue the undertaking.³³ A mandamus will issue to compel a city to complete its purchase after the approval of the tax for such purpose by the electors.³⁴

Mandamus will lie to compel the commissioners of the East river bridge to entertain and investigate complaints of violations by contractors on the work of the provisions of the Labor Law in relation to hours of work and wages of employees.³⁵

12. Issuance of bonds.

It is the duty of the municipal common council of New York city to authorize the issue of bonds to pay for work in one of its component cities, and the performance thereof may be enforced by mandamus.³⁶ The order will run to the president of a village to compel him to sign bonds authorized to be issued.³⁷ Where a contract for municipal improvements provides for its payment by issue of bonds, and the city treasurer refuses to issue them, mandamus will lie to compel him to do so on the petition of the contractor.³⁸ Mandamus will lie to compel the comptroller of a city to issue and negotiate bonds in order to pay the State Treasurer taxes which are owing from said city.³⁹ But mandamus will not lie against a supervisor of a city to compel the issuance by a municipal corporation of bonds to pay for a public improvement, if it be apparent that a serious question will arise as to their validity.⁴⁰

13. Licenses and permits.

In a proper case, mandamus is an appropriate remedy to require municipal officials to grant a license or permit.⁴¹ The action of the board of health of the city of New York, in refusing a permit for a private hospital, being unauthorized,

34. *Weston v. City of Newburgh*, 67 Hun, 127, 51 St. Rep. 414, 22 N. Y. Supp. 22.

35. *People ex rel. O'Brien v. Van Wyck*, 27 Misc. 439, 59 N. Y. Supp. 134.

36. *People ex rel. Sherrill v. Guggenheimer*, 47 App. Div. 9, 62 N. Y. Supp. 11.

37. *People v. White*, 54 Barb. 622.

38. *Sheehan v. Treasurer of Long Island City*, 11 Misc. 487, 67 St. Rep.

277, 33 N. Y. Supp. 428.

39. *Matter of Attorney-General v. Myers*, 58 Hun, 218, 34 St. Rep. 284, 12 N. Y. Supp. 754.

40. *People ex rel. Dady v. Supervisors*, 89 Hun, 241, 69 St. Rep. 448, 35 N. Y. Supp. 91. See same case upon appeal, 6 App. Div. 225, 39 N. Y. Supp. 983; rev'd, 154 N. Y. 381.

41. *Ackley's Case*, 4 Abb. 35; *People v. Perry*, 13 Barb. 206.

the proper remedy is by mandamus.⁴² Where the permit for a market stand is assigned with the approval of the proper authorities, giving the assignee the same privileges as were possessed by the assignor, and the comptroller refuses to issue the assignee a permit without restricting the privileges, mandamus will lie to compel him so to do, the issuance of the new permit being purely a ministerial act.⁴³

Mandamus lies to the commissioner of public works of a city to compel him to grant a permit to repair a vault under a sidewalk where such permit has been granted with the illegal condition that the petitioner pay a certain sum, and the order will compel the issuing of the permit without the condition of payment.⁴⁴

The exercise of the discretionary power to grant a theatrical license cannot be compelled by mandamus.⁴⁵ Under the Code of Ordinances of the city of New York, motion picture theatres must have a license issued by the commissioner of licenses, and unless there is some error of law in his proceedings, or his refusal to grant a license is capricious, arbitrary and unreasonable, his judgment is final, and a mandamus will not lie to compel him to grant an application to operate such a theatre.⁴⁶ The granting of a concert hall license by the police commissioner of the city of New York is discretionary, and mandamus does not lie to compel him to issue a certificate if his refusal to do so be not arbitrary, unreasonable, or based upon false information.⁴⁷

The order is available to compel a commissioner of public works of a city to issue a permit to a railroad corporation to alter its system for moving cars where it is entitled to do so on complying with certain legislation.⁴⁸ Where a park commissioner refuses to grant a street railway company a permit to cross a parkway except on conditions which he has no jurisdiction to impose, he may be compelled by mandamus to issue a proper permit.⁴⁹ Mandamus will not lie to the commissioner of public works of a city to compel him to give a permit for excavation in the public streets in favor of a

42. *People ex rel. Sprenger v. Department of Health*, 226 N. Y. 209.

43. *People ex rel. Danziger v. Metz*, 123 App. Div. 269, 107 N. Y. Supp. 970.

44. *People ex rel. Ziegler v. Collis*, 17 App. Div. 448, 45 N. Y. Supp. 282; *dism'd*, 158 N. Y. 704.

45. *People ex rel. Park Circle Amusement Co. v. Bd. of Police of N.*

Y., 36 Misc. 89, 72 N. Y. Supp. 583.

46. *Matter of Ormsby v. Bell*, 218 N. Y. 212.

47. *People ex rel. Rota v. Baker*, 136 App. Div. 7, 120 N. Y. Supp. 161.

48. *Matter of Petition of T. A. R. R. Co.*, 121 N. Y. 536.

49. *People ex rel. Eastern Parkway Co. v. Kennedy*, 97 App. Div. 103, 89 N. Y. Supp. 603.

railway corporation, where its charter does not give a clear legal right thereto.⁵⁰ The order will not issue to a commissioner of public works of a city to compel the granting of a permit to the petitioner for the construction of an underground railroad, if the right thereto is not free from doubt and no reason is apparent why the rights of the petitioner should not be asserted by a regular action at law.⁵¹ A mandamus ought not to issue to compel the commissioner of public works to give a permit to erect columns in a street unless the petitioner has the absolute right so to do.⁵²

Mandamus will not lie to compel the city clerk to grant an auctioneer's license to a corporation, as the statute is not mandatory, but simply gives him authority, and he has a right to exercise his discretion in acting upon the application and to refuse it where the associates in the corporation are not known to him.⁵³

The court will not by mandamus control the particular exercise of the power vested by the Village Law in the village trustees to regulate the erection of poles and stringing of wires of a telephone company, through the streets, though it may compel the trustees to act if they seek to preclude entirely or embarrass the telephone company seeking to avail itself of the franchise conferred by the Transportation Corporations Act.⁵⁴

14. Building permits.

The refusal of the superintendent of buildings of a city to issue to a property owner, pursuant to the building code of the city, a permit to make the proper changes to a building is reviewable by mandamus.⁵⁵ The office of a mandamus is not to compel action by the building department in advance of the preparation and adoption of proper plans, but only to compel action when plans affording no legitimate ground of objection have been arbitrarily or unreasonably condemned.⁵⁶ The department of public buildings, having once acted, will not be compelled to submit the question passed

50. *People ex rel. Third Ave. R. R. Co. v. Newton*, 112 N. Y. 396.

51. *People ex rel. N. Y. U. R. Co. v. Newton*, 34 St. Rep. 584, 19 Civ. Pro. 416, 11 N. Y. Supp. 782.

52. *People v. Thompson*, 98 N. Y. 6.

53. *People ex rel. United Auctioneers v. Scully*, 23 Misc. 732, 53 N. Y. Supp. 125, 87 St. Rep. 125.

54. *People ex rel. Monticello Telephone Co. v. Trustees of Monticello*, 35 Misc. 675, 72 N. Y. Supp. 350.

55. *People ex rel. Lankton v. Roberts*, 90 Misc. 439, 153 N. Y. Supp. 143; *aff'd*, 171 App. Div. 890, 155 N. Y. Supp. 1133.

56. *Hartman v. Collins*, 106 App. Div. 11, 94 N. Y. Supp. 63.

on to examiners or to act favorably to petitioner.⁵⁷ Mandamus will not lie against the commissioner of buildings to compel him to permit the closing of windows in a party wall, where the resulting structure would be in violation of the Building Code of the city of New York.⁵⁸

A peremptory mandamus requiring the superintendent of the bureau of buildings of the city of New York to approve a proposed amendment to a plan for the construction of a building, with the qualification: "This application is granted without prejudice to the superintendent of public buildings, pointing out specifically any lawful requirements in respect to stairways, galleries, or otherwise, and requiring them to be complied with," is erroneously granted.⁵⁹ An alternative order of mandamus will not issue to compel the superintendent of buildings to enforce the provisions of Building Code, section 105, requiring the use by builders of fireproof materials in certain instances, where the buildings alleged to violate the section are substantially completed, and the owners are not made parties to the proceeding and given an opportunity to be heard.⁶⁰

15. Removal of obstructions in street.

Municipal authorities having jurisdiction over streets and under a duty to prevent and remove encroachments may be compelled to perform that duty by mandamus.⁶¹ When an officer of a municipality, who is charged by its charter with the duty of removing unlawful incumbrances from the public streets, fails to do so, property owners who are prejudiced thereby may compel action by mandamus.⁶² And city officials may be required to enforce the law so as to prohibit the unauthorized operation of jitneys on the city streets.⁶³ Mandamus requiring a public officer to abate a nuisance in a public street will not be denied, because there are thousands of similar nuisances which would require an army of

57. *People v. Esterbrook*, 26 Hun, 401.

58. *People ex rel. Auwell v. Calder*, 85 App. Div. 31, 82 N. Y. Supp. 822.

59. *Hartman v. Collins*, 106 App. Div. 11, 94 N. Y. Supp. 63.

60. *People ex rel. Cooke v. Stewart*, 77 App. Div. 181, 78 N. Y. Supp. 1054.

61. *People ex rel. Ackerman v. Stover*, 138 App. Div. 237, 122 N. Y. Supp. 1030; *People ex rel. Hofeller v. Buck*, 193 App. Div. 262, 184 N. Y.

Supp. 210; *People ex rel. Weatherwax v. Watt*, 115 Misc. 120, 188 N. Y. Supp. 559.

62. *People ex rel. Sibley v. Gresser*, 205 N. Y. 24; *People ex rel. Browning, King & Co. v. Stover*, 145 App. Div. 259, 130 N. Y. Supp. 92; *aff'd*, 203 N. Y. 613.

63. *People ex rel. Weatherwax v. Watt*, 115 Misc. 120, 188 N. Y. Supp. 559.

employees and put the city to a heavy expense to remove them; nor because the petitioner has a remedy against the individual maintaining the nuisance, unless it appears that the respondent, by reason of the multitude of such applications actually made, is without means or money to enforce the direction of the court.⁶⁴

Mandamus will not lie to compel the mayor and municipal boards of a city to revoke a resolution of the common council granting permission to occupy the sidewalk with booths, where the common council were legally competent to pass the resolution. If the stand is used for legal purposes, it cannot be regarded as a nuisance or an unlawful obstruction of the streets.⁶⁵ But mandamus will not lie to the mayor of a city to compel him to initiate proceedings to remove an obstruction to the streets where he has a discretion in regard thereto. Such discretion is not affected by a resolution of the common council requesting the mayor to take such proceedings.⁶⁶ The remedy will not lie to a commissioner of public works of a city directing him to remove obstructions from the street, where such obstructions are erected under color of legislative authority in a comparatively uninhabited part of the city and cause no apparent or substantial loss.⁶⁷ One is not entitled to mandamus against the public officers of a city to remove a telegraph pole, even if the ordinance authorizing the erection was void because no compensation was made to the petitioner for the taking of his private property, the remedy being by action.⁶⁸ A peremptory order of mandamus will not be granted to compel the president of a borough of New York city and other officials to remove an electric line from the city streets, on the ground that the company was never authorized to carry on its business therein, where the petitioner alleges no special damage and basis his claim merely on the fact that he is a resident and citizen of such borough. An action by the People of the State through the Attorney-General is the proper remedy in such a case.⁶⁹

16. Garbage removal.

The city of New York, having assumed the duty of removing all ashes, street sweepings, garbage, and other light

64. *People ex rel. Mullen v. Newton*, 20 Abb. N. C. 387.

65. *People ex rel. Meeks v. Mayor*, 1 N. Y. Supp. 95.

66. *People ex rel. Wooster v. Maher*, 141 N. Y. 330.

67. *People ex rel. Lynch v. Manhattan Ry. Co.*, 20 Abb. N. C. 393.

68. *People ex rel. McManus v. Thompson*, 32 Hun. 93.

69. *Matter of Clements*, 191 App. Div. 279, 181 N. Y. Supp. 230.

refuse and rubbish which accumulates in the city, a purely arbitrary distinction in favor of some inhabitants of the city and against other inhabitants will not be tolerated. Where, however, owing to the inadequacy of the appropriation for the street cleaning department and the insufficiency of its equipment, all the inhabitants cannot be served, the commissioner of street cleaning may, in his discretion, while removing ashes from private residences, refuse to remove them from department stores, and the exercise of such discretion is not reviewable by the courts.⁷⁰

17. Correction of records.

Mandamus lies to compel the assessors of a city to correct clerical errors when the charter directs them so to do.⁷¹ Where the mother, on the day of the birth of her child, without consulting her husband, stated to the attending physician that she intended to give the child a certain name, without understanding that he sought the information to report to the department of health of the city of New York, and the parents after mutual deliberation actually gave the child a different name, by which it was baptized, the department of health will be compelled by mandamus to correct its records so as to show the true name of the child.⁷² An order will not issue to compel the commissioner of police to destroy photographs, records, and impressions of the petitioner which were unlawfully taken.⁷³ Mandamus will not lie to compel police commissioners to remove a photograph from the rogues' gallery, as no such duty is imposed upon them by law.⁷⁴

18. Taxation.

Through the aid of an order of mandamus, the proper official may be compelled to accept taxes in arrear and cancel a tax lien against the property or a sale thereof.⁷⁵ Mandamus will issue in a proper case to compel a register to

70. *People ex rel. Adams Co. v. Woodbury*, 88 App. Div. 443, 85 N. Y. Supp. 174.

71. *People ex rel. Nostrand v. Wilson*, 119 N. Y. 515.

72. *People ex rel. Baker v. Dept. of Health*, 131 App. Div. 693, 116 N. Y. Supp. 66.

73. *People ex rel. Gow v. Bingham*, 57 Misc. 66, 107 N. Y. Supp. 1011.

74. *People ex rel. Joyce v. York*, 27 Misc. 658, 59 N. Y. Supp. 418.

75. *People ex rel. Cooper v. Registrar of Arrears*, 114 N. Y. 19; *People ex rel. National Park Bank v. Metz*, 141 App. Div. 600, 126 N. Y. Supp. 986; *Matter of Connell*, 77 Misc. 251, 137 N. Y. Supp. 667. See, also, *Matter of Hagemeyer*, 113 App. Div. 472, 99 N. Y. Supp. 369.

accept from owners arrears for taxes, even though an invalid sale has been made.⁷⁶ The cancellation of a sale and the payment of the surplus may be compelled by mandamus, and the certificate-holder is not required to recover a judgment as a condition precedent.⁷⁷

The granting of a common-law mandamus is in the discretion of the court, which will refuse it where there is another adequate remedy provided by statute. The remedy will, therefore, be refused to direct the striking of an assessment from the roll where the petitioner has a remedy by certiorari, in which all adequate relief may be obtained.⁷⁸ The remedy to review an assessment for the purposes of taxation which is illegal, erroneous, and unequal is by certiorari under the Tax Law or under the Civil Practice Act; after the expiration of the time within which the remedy by certiorari may be invoked, the aggrieved person will not be granted a peremptory order of mandamus directing the cancellation of the assessment, but will be left to whatever remedy he may have in equity or at law.⁷⁹ Mandamus will not be sustained to compel the commissioners of taxes and assessments to remit a personal tax unlawfully assessed upon a nonresident, the remedy being by certiorari.⁸⁰ The remedy lies to assessors to compel them to strike out the assessment and taxes, and to restrain the collection thereof, where the property was included in the assessment by mistake.⁸¹ But mandamus will not lie to compel a collector of taxes to correct his books so as to conform to the apportionment in a case where there is fraud on the part of the applicant.⁸² And the remedy will not lie to a board of assessors to require them to correct the assessment-rolls where they have no authority to do so.⁸³

Where a board of assessors has acted and rendered judgment in assessment proceedings, mandamus is not proper remedy to review the judgment; such review should be had by certiorari.⁸⁴

Where the petition for a writ of mandamus to compel the cancellation of a tax sale alleges that no lease of the premises

76. *Clementi v. Jackson*, 92 N. Y. 591.

77. *People ex rel. McClinchie v. Prendergast*, 140 App. Div. 235, 125 N. Y. Supp. 99.

78. *People ex rel. N. Y. & Harlem R. R. Co. v. Bd. of Taxes and Assessments*, 166 N. Y. 154.

79. *People ex rel. Cochrane v. Feitner*, 44 App. Div. 239, 60 N. Y. Supp. 614.

80. *People ex rel. Bliss v. Feitner*, 72 App. Div. 45, 76 N. Y. Supp. 219.

81. *People ex rel. Nostrand v. Wilson*, 119 N. Y. 515.

82. *People ex rel. Wood v. Assessors*, 137 N. Y. 201.

83. *Matter of Popoff*, 10 Misc. 272, 63 St. Rep. 438, 31 N. Y. Supp. 2.

84. *People ex rel. Osborne v. Gilonn*, 24 Abb. N. C. 125, 30 St. Rep. 515, 9 N. Y. Supp. 563, 18 Civ. Pro. 112.

was issued to the purchaser, an allegation in the answering affidavit that leases were issued to such purchasers as surrendered the certificates of sale is no proof that such certificate was surrendered.⁸⁵

19. Miscellaneous matters.

The commissioner of public charities of the city of New York has revisionary jurisdiction over asylums wholly or partly under private control to which payments are made by the city, and where he has not served notice that children voluntarily surrendered to them are not proper public charges, he may be required by mandamus to make the necessary certificate that the asylum has complied with the rules of the State Board of Charities in regard to such children.⁸⁶

Section 710 of the charter of the city of New York, requiring the commissioner of correction to examine the previous record of persons committed for vagrancy as submitted by superintendents of certain penal institutions, and to make an order fixing the date upon which the prisoner is entitled to a discharge, is mandatory, and he will be compelled to make such order by mandamus. But as such section further provides that no order of the commissioner for a discharge shall be made without the written indorsement of the court or magistrate by whom the vagrant was committed, an order of mandamus should not contain a provision requiring the commissioner of correction to order the superintendent of prisons to discharge the petitioner without the consent of the magistrate.⁸⁷

Where a water consumer's supply has been cut off for nonpayment of water rates, mandamus will not be granted to compel the water commissioner to continue the consumer's supply without payment of penalty demanded as the cost of cutting off the supply, except on the consumer's making a deposit covering the amount charged, as security to the commissioner, and also covering the probable cost of litigation to determine the validity of the charge.⁸⁸

The owner of an apartment-house in the city of New York over five stories in height is not entitled to a peremptory order of mandamus compelling the commissioner of water

85. *People ex rel. National Park Bank v. Metz*, 141 App. Div. 600, 126 N. Y. Supp. 986.

86. *Matter of N. Y. Juvenile Asylum*, 31 Misc. 445, 65 N. Y. Supp. 617; *aff'd*, 54 App. Div. 637, 67 N. Y. Supp. 1143.

87. *People ex rel. Horowitz v. Coggey*, 131 App. Div. 20, 115 N. Y. Supp. 836.

88. *People ex rel. Hammerstein v. Monroe*, 41 Misc. 198, 83 N. Y. Supp. 995.

supply to furnish water at frontage rates under section 473 of the charter, where the answering affidavits allege that a meter system was installed without objection, and for over five years the petitioner and his predecessors in title paid for water according to the meter readings without objection.⁸⁹

P. Judicial officers.

1. In general.

Mandamus may be addressed to judicial tribunals to compel them to exercise their functions, but never to require them to decide in a particular manner. It is not a remedy for erroneous decisions.⁹⁰ "The judgment of an officer, court, or body charged with judicial functions cannot be coerced by mandamus. The most that can be accomplished by that remedy is to compel such officer, court, or body to decide, leaving the decision to the free exercise of the judgment and conscience of the tribunal charged with the duty of deciding, and reserving to the party affected by such a decision the right to review the same by certiorari or appeal."⁹¹

Inferior tribunals or a ministerial officer cannot be compelled by mandamus to decide a question in a particular manner, when the duties which are required to be performed are in their nature judicial, and all acts which depend upon the decision of a question of law or the ascertainment and determination of a fact are considered judicial.⁹² If a judicial body errs in its decision, the remedy to review and to correct the same is by certiorari, not by mandamus.⁹³ And, when there is a remedy by appeal from the decision in question, mandamus is not an appropriate remedy to attack it.⁹⁴ The order will not issue to compel a judge to change his decision on settling a case;⁹⁵ to correct an error in dismissing an appeal,⁹⁶ or any decision involving discretion;⁹⁷ to

^{89.} *Matter of Herrmann*, 138 App. Div. 780, 123 N. Y. Supp. 752.

^{90.} *Howland v. Eldridge*, 43 N. Y. 457; *People ex rel. Graham v. Studwell*, 91 App. Div. 469, 86 N. Y. Supp. 967; *aff'd*, 179 N. Y. 520; *Judges of Oneida Common Pleas v. People*, 18 Wend. 92.

^{91.} *People ex rel. Woodward v. Rosendale*, 76 Hun, 103, 27 N. Y. Supp. 837.

^{92.} *People ex rel. Kings Co. Gas Co. v. Schieren*, 89 Hun, 223, 69 St. Rep. 243, 35 N. Y. Supp. 64.

^{93.} *People ex rel. Bevin's v. Supervisors*, 62 Hun, 298, 63 St. Rep. 577, 31 N. Y. Supp. 248.

^{94.} *Matter of Runk*, 200 N. Y. 447.

^{95.} *Tweed v. Davis*, 1 Hun, 252.

^{96.} *Ex parte Ostrander*, 1 Denio, 679.

^{97.} *People v. Judges*, 3 Cow. 39; *People v. N. Y. Super. Ct.*, 19 Wend. 701; *People v. Marine Court*, 36 Barb. 341; *People v. Judges*, 18 Wend. 79; *People v. Tracy*, 1 How. 186; *People v. Baker*, 35 Barb. 105; *People v. Callahan*, 7 Daly, 434.

open a surrogate's decree;⁹⁸ or to control the practice in inferior courts.⁹⁹ It will not be granted to compel a court to allow an action to be removed to the United States courts;¹ or to compel obedience to the order of another court;² or to compel a court to vacate an order in arrest of a judgment;³ or to compel a court to reverse a manifestly erroneous decision, as it is judicial and involves discretion;⁴ or to a justice of a court, where his time is occupied, to compel him to entertain a particular case.⁵ It will not lie to compel an inferior tribunal to decide an action or proceeding pending before it, where such tribunal has already decided that it has no jurisdiction to entertain the same.⁶

The refusal of a justice of the Municipal Court of the city of New York to order the removal of a cause to the City Court of New York may be reviewed on appeal, and such action cannot, therefore, be compelled by mandamus.⁷ Mandamus will not issue to compel a justice of the Municipal Court of the city of New York to order the removal of a cause to another district, since his refusal should be reviewed by appeal.⁸ Mandamus will not issue to a justice of the Municipal Court to hear a cause in a district to which he has not been assigned at the time of the hearing of the order to show cause.⁹

An order of peremptory mandamus to compel one of three commissioners in condemnation proceedings to sign a report already signed by his associate members will not be issued on the ground that they had agreed upon their report,

98. *People v. Lott*, 42 Hun, 408.

99. *Ex parte Brown*, 5 Cow. 31; *People v. Common Pleas*, 2 How. Pr. 189; *Ex parte Chamberlain*, 4 Cow. 49.

1. *People v. Judges*, 2 Denio, 197.

2. *Matter of Pond*, 11 How. Pr. 563.

3. *Ex parte Bostwick*, 1 Cow. 143.

4. *People v. Judges*, 21 Wend. 20; *Ex parte Koon*, 1 Denio, 644; *Elkins v. Ahearn*, 2 Denio, 291; *Ex parte Jacobs*, 1 Denio, 646; *Ex parte Baily*, 2 Cow. 479; *People v. Common Pleas*, 19 Wend. 113; *Ex parte Barrett*, 2 Cow. 458; *Ex parte Bacon*, 6 Cow. 392; *Ex parte Coster*, 7 Cow. 523; *People v. Judges*, 20 Wend. 658; *Gilbert v. Judges*, 3 Cow. 59.

5. *People v. McAdam*, 3 Civ. Pro. 396.

6. *Matter of McBride*, 72 Hun, 394, 55 St. Rep. 487, 25 N. Y. Supp. 431.

7. *People ex rel. Goldstein v. Bolte*, 71 N. Y. Supp. 73.

8. *People ex rel. Jaffe v. Bolte*, 35 Misc. 53, 71 N. Y. Supp. 74.

Transfer of cause.—A justice of the Municipal Court of the city of New York, after issue joined and several adjournments, transferred the action from the district over which he presided and in which neither of the parties resided to a district where defendant's office was situated. Held, that since his action could be reviewed on appeal, mandamus would not lie to compel him to retain jurisdiction and try the action. *People ex rel. McGowan v. Murray*, 53 Misc. 364, 104 N. Y. Supp. 740.

9. *Matter of Nitchie*, 125 App. Div. 378, 109 N. Y. Supp. 758.

in case his refusal is based upon a subsequent agreement for a rehearing and reargument before signing the report, which rehearing has not been had, since the effect of the order would be to compel the commissioner to decide a particular case in a particular way.¹⁰

Where a decree of the surrogate on final judicial settlement has not been appealed from, he cannot be compelled by mandamus proceedings to reverse his decree as to an issue formally raised on such judicial settlement.¹¹ An order of mandamus will not be granted to compel a surrogate to sign an order for the examination of a proponent before trial, as the effect of such an order would be to deprive the surrogate of the discretion vested in him.¹²

2. Compelling action.

If a judicial officer neglects to decide a matter or to perform some other act in connection with a matter before him, mandamus may issue to require him to take action.¹³ The order cannot require him to make a particular decision or to act in a particular way. It may be granted to compel a court to exercise statutory jurisdiction;¹⁴ to compel a subordinate court to give judgment, so that an appeal can be brought;¹⁵ to compel the entry of a judgment;¹⁶ to compel a judge to file decision when made;¹⁷ or the acceptance and filing of other proper papers;¹⁸ to compel the settlement

10. *People ex rel. Comstock v. Morrison*, 54 App. Div. 262, 66 N. Y. Supp. 519; *aff'd*, 165 N. Y. 644.

11. *Matter of DeNuber v. Millard*, 152 App. Div. 774, 137 N. Y. Supp. 731.

12. *People ex rel. Lewis v. Fowler*, 189 App. Div. 335, 178 N. Y. Supp. 500.

13. The writ has been issued to inferior courts to compel them to set aside their orders. *People v. Judges*, 1 How. 109; *People v. Judges*, 1 How. 111; *Matter of Application for Mandamus*, 1 How. 200; *People v. Common Pleas*, 18 Wend. 234.

Police justice.—The remedy will not lie to a police justice to require him to act where his jurisdiction is not exclusive. *People ex rel. Fellows v. Hogan*, 55 Hun, 391, 123 N. Y. 219.

Transfer tax.—Section 230 of the Laws of 1896, chapter 908, as amended

by the Laws of 1904, chapter 758, requiring the surrogate upon application of any interested party, including the Comptroller of the State, to order an appraisal of the property of persons whose property is subject to the transfer act, is mandatory and not discretionary, and if the surrogate, upon a proper application, refuses to act he may be compelled to do so by mandamus. *Kelsey v. Church*, 112 App. Div. 408, 98 N. Y. Supp. 535.

14. *Matter of Hook*, 55 Barb. 257.

15. *People v. Stone*, 9 Wend. 182; *Ex parte Bostwick*, 1 Cow. 143.

16. *Horne v. Barney*, 19 Johns. 247; *Haight v. Turner*, 2 Johns. 370; *People v. Justices of Chenango*, 1 Johns. Cas. 180.

17. *People v. Dodge*, 5 How. Pr. 47.

18. *People ex rel. Jaffe v. Bolte*, 35 Misc. 53, 71 N. Y. Supp. 74.

of a case by a referee,¹⁹ but not in a particular way; ^{19a} to place on the calendar an appeal prematurely dismissed;²⁰ to compel the issuance of a warrant in summary proceedings on proper proof;²¹ or to compel an inferior court to issue an execution.²² An alternative mandamus is a proper remedy to raise the question as to proper entry of order on decision of judge.²³

The Supreme Court will compel by mandamus a judge of the general sessions of the peace, before whom a capital case was tried, to act on an application of attorneys appointed by him in such case for compensation, where he refused to act solely on the ground of want of power.²⁴ Where a court without authority refuses to permit the trial of a case to proceed before the costs of a former action between the same parties are paid, the remedy of the plaintiff is mandamus.²⁵ Mandamus will lie to compel the Municipal Court of the city of New York to vacate an order staying proceedings in an action until plaintiff pays a judgment for costs entered against him in a prior action in favor of defendant, and to compel the court to set the case down for hearing.²⁶

Where a court at Special Term refuses to pass upon requests to find which have been seasonably made, the party aggrieved may apply to the Appellate Division for an order of peremptory mandamus to compel the court to perform its duty.²⁷

19. *People v. Justices*, 20 Wend. 663; *People v. Baker*, 14 Abb. 19; *Sikes v. Ransom*, 6 Johns. 279; *Delevan v. Boardman*, 5 Wend. 132; *People v. Judges of Westchester*, 2 Johns. Cas. 117.

19a. *People v. Baker*, 14 Abb. Pr. 19.

20. *People v. County Judge*, 13 How. Pr. 277; *People v. County Judge*, 13 How. Pr. 398; *People v. Cortelyou*, 36 Barb. 164.

21. *People v. Willis*, 5 Abb. Pr. 205.

Filing order.—Mandamus will lie to a justice of the District Court of New York to make and file order in summary proceedings, and to issue a warrant for the possession of premises, in a case where he adjourned the proceedings without authority. *People ex rel. Allen v. Murray*, 2 Misc. 152, 50 St. Rep. 535, 23 N. Y. Supp. 160, 23 Civ. Pro. 71; *aff'd*, 138 N. Y. 665.

22. *Cook v. Kirkland*, 2 How. Pr.

109; *People v. Gale*, 22 Barb. 502.

Where a surrogate did not unqualifiedly refuse to issue execution on a judgment of his court, but advised that the adverse party be given notice of the application, and the applicant apparently acquiesced in the suggestion, mandamus would not lie to compel the issuing of such execution as the writ implies an improper refusal. *People ex rel. Sackett v. Woodbury*, 70 App. Div. 416, 75 N. Y. Supp. 236.

23. *People v. Supervisors*, 9 Abb. Pr. 408.

24. *People ex rel. Acritelli v. Foster*, 40 Misc. 19, 81 N. Y. Supp. 212, 12 Anno. Cas. 375; *aff'd*, 87 App. Div. 193, 84 N. Y. Supp. 97.

25. *Hirschfield v. Hassett*, 59 Misc. 154, 110 N. Y. Supp. 264.

26. *McKown v. Oppenheimer*, 60 Misc. 98, 111 N. Y. Supp. 609.

27. *Norwegian Lutheran Trinity*

Where a court imposes a sentence in a criminal action less than that required by positive statute, the correction of the sentence may be required by* a peremptory order of mandamus.²⁸ And mandamus will lie to an inferior court to compel the judges to pass sentence upon a defendant who has pleaded guilty, where they have suspended sentence after such a plea.²⁹

3. Clerk.

Mandamus will not lie to the clerk of an inferior court to compel him to deliver to the petitioner papers filed with said clerk, where it has been decided by the judges of said court they should be filed with their clerk, and the decision has been acted upon for a number of years.³⁰ It does not lie to compel the clerk of a Municipal Court to pay to a tenant money deposited with him as rent accruing during summary proceedings, although the landlord has been awarded possession.³¹ Mandamus will not issue to a clerk of the New York Municipal Court directing that a provision be inserted in a judgment of that court that the defendant therein "is subject to arrest and imprisonment."³²

4. Rights of district attorney.

A peremptory mandamus to compel the admission of the district attorney of New York to a criminal court at any and all times will be refused where the allegations as to his exclusion are denied in the opposing affidavits; but an alternative order may be granted to determine the existence of an alleged custom to close the doors of court and allow no one to enter while the court is charging the jury, the reasonableness of such custom, and to establish the facts.³³ A district attorney has a right to an immediate inspection and examination of all depositions and informations in the custody or under the control of a city magistrate or his clerk, whether the same have been acted on or not, and this right may be enforced by mandamus.³⁴ The remedy will lie

Church v. Krelsovič, 147 App. Div. 108, 131 N. Y. Supp. 845.

28. Matter of Cropsey v. Tiernan, 172 App. Div. 435, 158 N. Y. Supp. 948.

29. People ex rel. Benton v. Ct. of Sessions of Monroe Co., 46 St. Rep. 255, 19 N. Y. Supp. 508, 8 Crim. Rep. 355.

30. People ex rel. Gottchius v. McGoldrich, 67 St. Rep. 289, 24 Civ. Pro.

293, 33 N. Y. Supp. 441.

31. People ex rel. Terwilliger v. Chamberlain, 140 App. Div. 503, 125 N. Y. Supp. 562.

32. Matter of Kling, 60 App. Div. 512, 69 N. Y. Supp. 962.

33. People ex rel. Gardiner v. Goff, 27 Misc. 331, 57 N. Y. Supp. 1106.

34. People ex rel. Gardiner v. Olmstead, 25 Misc. 346, 55 N. Y. Supp. 472.

to a police justice to require him to allow the complainant to be represented by counsel, and to allow said counsel to act as prosecuting attorney in the absence of the district attorney on the preliminary hearing.³⁵

5. Court attendants.

The court will not determine, on a petition for mandamus by one seeking to have court attendants appointed in the City Magistrates' Courts of New York city, what attendants are necessary, thereby usurping the functions of the board of magistrates, and the board of estimate and apportionment, nor will it direct the removal of police officers from such courts.³⁶ Nor will mandamus lie to the justice of an inferior court to compel him to reinstate the petitioner to the position of court attendant as against an incumbent occupying under cover of a legal title, for *quo warranto* is the appropriate proceeding for trying and judging the title to office.³⁷

Q. Civil Service Law.

1. Classification.

The determination of a civil service body in classifying positions in the public service may be corrected by mandamus, if the classification clearly violates the Constitution or a statute.³⁸ The official acts of civil service commissioners in executing the commands of the statute may be ministerial in their nature, and therefore may be reached, when they become the subject of judicial inquiry, by way of mandamus.³⁹ But, if the action of the civil service body is not palpably illegal, the court will not intervene.⁴⁰ While mandamus is

35. *People ex rel. Howes v. Grady*, 66 Hun, 465, 50 St. Rep. 128, 21 N. Y. Supp. 381; aff'd, 144 N. Y. 689.

36. *People ex rel. O'Donnell v. McClellan*, 52 Misc. 609, 102 N. Y. Supp. 946.

37. *Matter of Torney*, 7 Misc. 260, 57 St. Rep. 465, 27 N. Y. Supp. 913, 23 Civ. Pro. 333.

38. *People ex rel. Schau v. McWilliams*, 185 N. Y. 92; overruling *People ex rel. Sims v. Collier*, 175 N. Y. 196. See, also, *People ex rel. Finnegan v. McBride*, 226 N. Y. 252; *People ex rel. Coit v. Wheeler*, 56 Misc. 289, 106 N. Y. Supp. 450; *Matter of Peters v. Justice*, 75 Misc. 504, 133 N. Y. Supp. 847. Compare *People ex rel. O'Toole v.*

Hamilton, 44 Misc. 577, 90 N. Y. Supp. 97; aff'd, 98 App. Div. 59, 90 N. Y. Supp. 547.

A transfer tax appraiser who is still holding office and has not been removed has no standing to attack the action of the Civil Service Commission in classifying his position. *Matter of Weeks v. Kraft*, 147 App. Div. 403, 132 N. Y. Supp. 228; rev'g 72 Misc. 134, 129 N. Y. Supp. 690; appeal dismissed, 205 N. Y. 55, 585.

39. *Slavin v. McGuire*, 205 N. Y. 84.

40. *People ex rel. Schau v. McWilliams*, 185 N. Y. 92; *Matter of Darling v. Maguire*, 70 Misc. 597, 129 N. Y. Supp. 385.

the proper remedy to compel a municipal civil service commission to correct an illegal classification of position in the public service, it will not lie when the determination of the commission does not constitute an abuse of discretion, and it cannot be said, therefore, to be illegal.⁴¹ The determination of a civil service commission in classifying positions in the public service is subject to a judicial control that is limited to such questions as may properly be reviewed in mandamus proceedings.⁴²

Mandamus does not lie to compel a municipal civil service commission to reclassify positions so as to make them non-competitive unless the State commissioners are made parties, as any reclassification is subject to their approval.⁴³

Where a question arises as to the proper classification of a position held by an applicant for an order of mandamus to compel the civil service commission to certify his payrolls, whether the position is in the exempt class under the Civil Service Law and the rules, or is subject to competitive examination, in a case where the facts are undisputed and only one inference can reasonably be drawn as to the confidential character of the position, a question of law is presented for the determination of the courts, and mandamus is the proper remedy.⁴⁴ Where the mayor of a city refuses to make classifications of civil service positions as required by statute, or, if he does it improperly, he may be compelled by mandamus, or in some cases by certiorari, to do his duty in this respect; but a taxpayer's action to restrain the payment of salaries earned by appointee is not an appropriate remedy.⁴⁵ A taxpayer's action is inappropriate as a remedy for correcting illegal action on the part of civil service commissioners.⁴⁶

2. Eligible list.

The action of a civil service commission or body in establishing or abolishing eligible lists may be reviewed by mandamus.⁴⁷ The remedy will lie to the Civil Service Commission to compel it to place the name of the petitioner on the list of eligibles under the Civil Service Act, where his name

41. *Matter of Dill v. Wheeler*, 185 N. Y. 106.

42. *Matter of Simons v. McGuire*, 204 N. Y. 253.

43. *Matter of Hammond v. Ricker*, 140 App. Div. 19, 124 N. Y. Supp. 406; *aff'd*, 200 N. Y. 527.

44. *Matter of Peters v. Adams*, 56 Misc. 29, 106 N. Y. Supp. 158.

45. *Chittenden v. Wurster*, 152 N. Y. 345.

46. *Slavin v. McGuire*, 205 N. Y. 84.

47. *People ex rel. Finnegan v. McBride*, 226 N. Y. 252.

has been illegally stricken therefrom.⁴⁸ A civil service commission may be compelled to reinstate the petitioner's name on the list of eligibles when it has been removed therefrom solely on account of his advanced age and feeble physical condition.⁴⁹

Although the civil service commission of the city of New York, in determining the relative standing upon the list of eligibles of one who has passed a civil service examination for promotion in the fire department, may increase his rating by reason of meritorious acts for which he has been placed upon the roll of honor by the fire department, it can only consider such efficiency record as it exists at the time of his examination. The rating should not be increased by reason of the fact that, after the examination, the fire department makes an official recognition of former meritorious acts. Mandamus will not lie to compel an increase in the applicant's rating merely because the civil service commission has erroneously credited other applicants with a recognition of merit made after their examination.⁵⁰

48. *People ex rel. Van Petten v. Cobb*, 13 App. Div. 56, 43 N. Y. Supp. 120.

49. *People ex rel. Van Petten v. Cobb*, 13 App. Div. 56, 43 N. Y. Supp. 120.

Evidence.—On a proceeding for a mandamus to compel a civil service board to place relator's name on the eligible list by virtue of a rating obtained on an examination for merit under the act of 1897, he may show that he applied to the common council for an examination for fitness in order to sustain a claim that the board sought to defeat the provisions of the statute. *People ex rel. Drake v. Knauber*, 163 N. Y. 23.

Proper remedy.—Where appointments have been duly made from an eligible list furnished by the civil service commissioners, it was held that the remedy of a person whose name was omitted from the list by the mistake of the commissioners is not by mandamus to compel a cancellation of the appointments made and his own appointment to the place, but by a proceeding to test the title of the appointees. *People ex rel. Mullen v. Sheffield*, 24 App. Div. 214, 48 N. Y.

Supp. 796, 82 St. Rep. 796.

50. *Matter of Beck*, 135 App. Div. 156, 119 N. Y. Supp. 1028.

Efficiency record.—Rule 15 of the municipal civil service rules of the city of New York, providing for an efficiency record of employees, which may be considered on an examination for promotion, requires a carefully prepared record made from month to month of services which have been rendered. It contemplates a record made at a time when the person is not an active candidate for promotion, and should deal with "comparative conduct, seniority and efficiency in previous service." Hence, where no such record was kept, but prior to an examination for promotion in the department of docks and ferries a record was filed giving an employee credit for fidelity, excellency, etc., and stating that other employees were "good," "very good," etc., but without stating the period of service of the several applicants, the one rated as "excellent," etc., is not entitled to a higher credit than the others. As under the circumstances aforesaid, the civil service commission is under no absolute legal duty to give the applicant a higher

The court on mandamus will not set aside the ratings of the Civil Service Commission on the claim that certain of the applicants obtained undue advantage by being allowed to participate in the examination after the others had finished, so that they might have obtained advance information as to the questions, where it does not appear that the civil service commissioners were aware of the fact or that the petitioner was prejudiced thereby.⁵¹

Mandamus will not lie to compel a public officer to notify the civil service commission of certain vacancies in his department and to request a certification of names of those graded as available, in a case where the public officer has authority to determine the number of clerks and subordinates which he requires in his department.⁵² An order of mandamus to compel an appointment to a position under the Civil Service Law can be issued only when the right to it is clear and absolute, and it is doubtful if it can issue conditionally to become operative upon complying with the requirement of a qualifying examination.⁵³

3. Right to promotion.

A person who has been duly promoted as captain of police in the city of New York is entitled to an order of mandamus to compel the civil service commissioners to certify such promotion on the payroll, and to compel the city police commissioner to certify the same.⁵⁴ Where police sergeants were appointed from the eligible list in the manner prescribed by law to be police captains, and served as such, they are entitled to an order of mandamus to compel their certification on the monthly payrolls as such, and fraud on the part of former police commissioners, through which the appointments were made, cannot be set up in the mandamus proceeding.⁵⁵

Where neither the basis for an attempted increase in the salary of a clerk in the bureau of assessments and arrears in the city of New York, nor the fact that his proposed

rating than the others, he is not entitled to a mandamus compelling it to do so. *People ex rel. Steele v. McGuire*, 139 App. Div. 680, 124 N. Y. Supp. 552.

51. *People ex rel. Cardidi v. Creelman*, 150 App. Div. 746, 135 N. Y. Supp. 718.

52. *People ex rel. Tregaskis v. Palmer*, 9 App. Div. 252, 41 N. Y.

Supp. 494.

53. *People ex rel. Huber v. Adam*, 116 App. Div. 613, 101 N. Y. Supp. 925.

54. *People ex rel. Deevy v. Ogden*, 41 Misc. 246, 84 N. Y. Supp. 73; *aff'd*, 87 App. Div. 631, 84 N. Y. Supp. 1140.

55. *Toole v. Ogden*, 39 Misc. 581, 80 N. Y. Supp. 584.

promotion is based upon some qualification to be ascertained by civil service examination so as to bring the case outside the constitutional provision, is shown, and it appears that, when his promotion was attempted, an honorably discharged veteran blocked his advancement, though, under a classification subsequently made, the veteran would not be eligible for promotion, the clerk must abide by the situation as it existed on the date of his attempted promotion, and is not entitled to a peremptory order of mandamus.⁵⁶

A petition for an order of mandamus to compel a municipal civil service commission to give the petitioner a special examination for promotion upon the ground that he had been unlawfully removed from office when a prior examination was held will be denied for laches, where it appears that ten months elapsed between the time the petitioner was denied the special examination and his application for the order. Such delay is not excused by the fact that the petitioner's attorney advised him to await the determination of an appeal in another proceeding involving similar questions. Moreover, the moving papers are fatally defective where it appears that the petitioner made no application to enter the regular examination for promotion, and he does not show that he is eligible or would have taken the examination if he had not been dismissed before it was held.⁵⁷

Where one who has been appointed a bridge keeper has had his salary reduced by the bridge commissioner and civil service commissioners to that of a bridge tender, he has a remedy by action, if the reduction was unauthorized; and hence the denial of an application for an order of peremptory mandamus that his payrolls be prepared at the higher salary is within the discretion of the Special Term, and not subject to review.⁵⁸

4. Reinstatement of removed employee.

If an employee within the protection of the Civil Service Law is improperly removed from his position, he may have a remedy by mandamus for his reinstatement. If his removal is the result of a hearing upon charges preferred against him, the removal may be considered a judicial decision and reviewable by certiorari, not by mandamus.⁵⁹ But, if the

56. *Matter of Dryer*, 52 Misc. 612, 102 N. Y. Supp. 922.

57. *People ex rel. Reith v. Polk*, 138 App. Div. 477, 122 N. Y. Supp. 1048.

58. *People ex rel. Murray v. Lindenthal*, 77 App. Div. 515, 78 N. Y. Supp.

997.

59. *People ex rel. Holden v. Woodbury*, 88 App. Div. 593, 85 N. Y. Supp. 161; *People ex rel. Segee v. Hayes*, 106 App. Div. 563, 94 N. Y. Supp. 754; *People ex rel. Brown v. O'Brien*, 137

removal is without any investigation of charges against him, or without giving him an opportunity of explanation, the proper remedy is mandamus.⁶⁰

Mandamus will not lie to compel reinstatement to an office where the head of the department has power by statute to discharge employees without assigning reasons therefor thirty days after appointment.⁶¹ And mandamus will not lie against the board of managers of a State hospital to compel the reinstatement of an employee where the superintendent of the hospital is alone empowered to appoint and discharge employees.⁶²

The State Comptroller has power to remove an employee in his office for any cause other than political considerations; and where a civil service employee seeks reinstatement by mandamus on the ground that his removal was in violation of section 25 of the Civil Service Law, the only issue is whether he was removed for political reasons.⁶³ Mandamus is the only appropriate remedy to secure the reinstatement of one holding office in the competitive class who is removed solely for political reasons.⁶⁴ But the provision of the Civil Service Law that no recommendation or question under the authority of the statute shall relate to the political affiliations of any person and that no appointment to or removal from public office shall be in any manner affected or influenced by

App. Div. 311, 122 N. Y. Supp. 25.
See chapter on Certiorari.

Error in record.—A writ of mandamus to reinstate a tenement-house inspector on the ground that he was dismissed without an opportunity to explain was denied, where it appeared that he was really dismissed on sufficient reason, and after opportunity for explanation as required by the Laws of 1901, chapter 466, section 1543, though by mistake the commissioners entered on the record a charge subsequently made, which entry was corrected before the hearing of the motion. *People ex rel. April v. Butler*, 122 App. Div. 790, 107 N. Y. Supp. 833.

Filing reasons for removal.—Where a person has been removed after having been notified of the charges against him and been given an opportunity to appear and answer, the fact that the reasons for his removal are not immediately filed does not justify resort

to mandamus, if the omission is supplied promptly when attention is called to it. *People ex rel. Brown v. O'Brien*, 137 App. Div. 311, 122 N. Y. Supp. 25.

60. *People ex rel. Segee v. Hayes*, 106 App. Div. 563, 94 N. Y. Supp. 754.

Absence without leave.—A member of the uniformed force of the fire department of the city of New York, who had been absent without leave more than five days and was dropped from the rolls, is not entitled to mandamus for reinstatement. *People ex rel. Rice v. Sturgis*, 77 App. Div. 636, 78 N. Y. Supp. 1037.

61. *Sheridan v. Wills*, 6 App. Div. 132, 39 N. Y. Supp. 884.

62. *Porter v. Howland*, 24 Misc. 434, 53 N. Y. Supp. 683.

63. *People ex rel. Gallup v. Williams*, 139 App. Div. 355, 123 N. Y. Supp. 1098.

64. *People ex rel. Somerville v. Williams*, 217 N. Y. 40.

such affiliations, does not apply to one holding a position in the exempt class. Hence, where such person has been removed, he is not entitled to mandamus to compel reinstatement upon the ground that he has been removed for political reasons.⁶⁵ The mere unsupported allegation of bad faith on the part of the head of a department in discharging a civil service employee is not enough to justify the granting of either a peremptory or alternative order of mandamus to compel his reinstatement.⁶⁶

If the person removed is a public officer, and another is in possession of the office, the title thereto will generally be tried only in an action of *quo warranto*;⁶⁷ but, if he is merely a clerk or employee, he may have his remedy by mandamus and may not be required to resort to an action.⁶⁸

One who seeks reinstatement by mandamus to a public office on the ground that he holds a position in the classified civil service, subject to competitive examination and entitled to an opportunity to be heard before removal, must show by his petition that he holds his position lawfully and had passed the examination required to make his appointment legal, otherwise he is a *de facto* officer only and has no title to the office.⁶⁹

A mandamus will not lie to reinstate a fireman illegally retired and placed on the pension-roll, where he failed to complain of such retirement for two years, and his papers do not show whether he drew his pension during that time and whether the position had been filled.⁷⁰

If an order of mandamus requires the restoration of the petitioner to the position from which he has been wrongfully discharged, it requires the restoration to duties similar to those performed in so far as the affairs of the department will reasonably permit.⁷¹ A former volunteer fireman wrongfully discharged from a position in the civil service and reinstated in his position pursuant to a peremptory order of mandamus, under the statute (Civil Service Law, section

65. *People ex rel. Garvey v. Prendergast*, 148 App. Div. 129, 132 N. Y. Supp. 115.

66. *Matter of Colligan v. Williams*, 91 Misc. 128, 154 N. Y. Supp. 329.

67. *People ex rel. Brymer v. Scanlon*, 22 Misc. 298, 49 N. Y. Supp. 1096. And see *Domschke v. Cukor*, 194 App. Div. 755, 185 N. Y. Supp. 705. And see, *supra*, Art. II-I, Title to public office.

68. *People ex rel. Corkhill v. McAdoo*, 98 App. Div. 312, 90 N. Y. Supp. 68.

69. *Matter of Meehan v. Flaherty*, 119 App. Div. 128, 103 N. Y. Supp. 1058.

70. *People ex rel. Shea v. Bryant*, 28 App. Div. 480, 51 N. Y. Supp. 119.

71. *People ex rel. LaChicotte v. Stevenson*, 57 Misc. 64, 108 N. Y. Supp. 860.

22), may maintain an action against the officer who removed him for the amount of salary of which plaintiff has been deprived by defendant's wrongful act.⁷²

5. Rights of veterans.

The Civil Service Law gives veterans preferences in the public service; and the rights of veterans may be enforced by mandamus.⁷³ Mandamus will lie to an officer or appointing power to compel observance of statutory preference in appointment to public office, given to honorably discharged soldiers and sailors.⁷⁴ A veteran deprived of any right to preference in appointment or promotion has a remedy by mandamus, and it is not a sufficient answer to show that the position in question has been filled by the appointment of another.⁷⁵ The alternative order is a proper means of determining whether an honorably discharged soldier, was performing the same duties as one not a soldier, where he has been discharged in violation of the statutory preference.⁷⁶ But the remedy will not lie to compel the appointment of a veteran where the appointing board has a discretion in judging of the qualification for office.⁷⁷ Where the civil service commissioners certify an eligible list of persons for an appointment, certifying that one is a veteran, such certificate sufficiently advises the appointing power of his right to a preference in appointment.⁷⁸

An honorably discharged veteran employed as a clerk in the street cleaning department of the city of New York, whose rights have been prejudiced by the division of the eligible lists according to boroughs, and the subsequent promotion of clerks not veterans, may apply for an alternative order of mandamus.⁷⁹

A mandamus will not lie to compel the commissioner of water supply to reinstate a veteran wrongfully removed from a clerkship in a branch office of the department, as the com-

72. *McGraw v. Gresser*, 226 N. Y. 57.

73. *People ex rel. Tate v. Dalton*, 158 N. Y. 204; *Matter of Sullivan*, 55 Hun, 285, 8 N. Y. Supp. 401; *People ex rel. Merritt v. Civil Service Board*, 13 App. Div. 309, 43 N. Y. Supp. 101.

74. *Matter of Wortman*, 22 Abb. N. C. 137, 2 N. Y. Supp. 324.

75. *People ex rel. Mesick v. Scannell*, 63 App. Div. 243, 71 N. Y. Supp. 383. Compare *Matter of Hardy*, 17 Misc. 667, 41 N. Y. Supp. 469; *People ex rel. Ballou v. Wendell*, 57 Hun, 362,

10 N. Y. Supp. 587, 32 St. Rep. 129.

76. *Matter of McCloskey v. Willis*, 15 App. Div. 594, 44 N. Y. Supp. 1158.

77. *People ex rel. Lockwood v. Saratoga Spa*, 54 Hun, 16, 26 St. Rep. 54, 7 N. Y. Supp. 125.

78. *People ex rel. Hamilton v. Stratton*, 79 App. Div. 149, 80 N. Y. Supp. 269; *aff'd*, 174 N. Y. 531.

79. *People ex rel. Franklin v. Fetherston*, 168 App. Div. 416, 153 N. Y. Supp. 325.

missioner has no power to do so.⁸⁰ Mandamus to compel the reinstatement of a veteran to a public office will be refused where the return of the commissioner of public works shows that the petitioner was discharged solely for negligence, incompetence, and conduct not consistent with his position.⁸¹ Where the removal of a veteran from office is made in bad faith, no demand for reinstatement need be made before application for an order of mandamus.⁸²

The statute is sufficiently comprehensive to embrace ordinary laborers, and does not limit employment of veterans to business positions, and mandamus lies in favor of a laborer to the commissioner of public works.⁸³ The remedy will not lie to compel reinstatement to office on the ground that the petitioner is an honorably discharged soldier when he has waited eight months before making application for relief, being guilty of laches.⁸⁴ So also is a delay of four months after a discharge from the office.⁸⁵ Where an inspector of buildings was suspended in 1896 and finally removed without a hearing in December, 1897, and served notice demanding reinstatement in February, 1898, and again in April, claiming his privilege as a veteran, it was held that a motion for a mandamus made in May should not be denied on the ground of laches.⁸⁶

When veteran volunteer firemen hold positions by appointment in a city for an indefinite time, they may compel reinstatement by mandamus, if removed from their positions without cause. The rule that the courts will not, at the instance of a person out of possession of office, try the title to office by mandamus, but will leave the party to the proceeding of *quo warranto*, has reference to public offices created by law, and is not applicable to clerks or employees unlawfully removed from their position by superiors.⁸⁷ If,

80. *People ex rel. Tate v. Dalton*, 158 N. Y. 204.

81. *People ex rel. Connor v. Brookfield*, 2 App. Div. 299, 73 St. Rep. 392, 37 N. Y. Supp. 718.

82. *People ex rel. Bean v. Clausen*, 50 App. Div. 324, 63 N. Y. Supp. 1064.

83. *Sullivan v. Gilroy*, 55 Hun, 285, 28 St. Rep. 566, 8 N. Y. Supp. 401.

84. *People ex rel. Miller v. Justices of Sessions*, 78 Hun, 334, 60 St. Rep. 720, 29 N. Y. Supp. 157.

85. *People ex rel. Young v. Collis*, 6 App. Div. 467, 39 N. Y. Supp. 698; *Matter of Vanderhof*, 15 Misc. 434, 72

St. Rep. 354, 36 N. Y. Supp. 833; *aff'd*, 3 App. Div. 389, 38 N. Y. Supp.

651. A delay of two years and nine months (*Matter of Gaffney*, 84 Hun, 503, 32 N. Y. Supp. 873, 66 St. Rep. 153) or three years (*People ex rel. Throckmorton v. McCartney*, 28 App. Div. 138, 50 N. Y. Supp. 919), will constitute laches and defeat the relief.

86. *People ex rel. O'Connor v. Brady*, 49 App. Div. 238, 63 N. Y. Supp. 145.

87. *People ex rel. Drake v. Sutton*, 88 Hun, 173, 68 St. Rep. 494, 34 N. Y. Supp. 487.

however, he occupies the position of a public officer, the remedy may be by action.⁸⁸ A veteran volunteer fireman in the civil service whose removal is sought may waive his statutory right to a notice and hearing. Thus, he may waive it by a failure to assert his claim as such veteran where his status has not already been brought to the knowledge of the officer having the power of removal.⁸⁹

6. Abolition of office.

Mandamus will not lie to officers of a city to compel them to restore a person to an office which has been abolished in good faith.⁹⁰ A peremptory order of mandamus against a mayor and common council of a city to compel the reinstatement of the petitioner to a public office will not lie where the question as to the abolition of the office in good faith by the municipality is raised, though an alternative writ should issue for the trial of such questions.⁹¹ Where a question is raised as to whether a municipal office was abolished in good faith, only the alternative writ can issue.⁹²

Where it appears that the position from which a veteran was removed has been abolished for economical reasons and there is no other position which he is fitted to fill, a mandamus requiring his assignment to another position at the same salary should not be granted.⁹³ An honorably discharged war veteran appointed as laborer in a State department for no stated term, may be discharged when the funds available for the payment of his salary have been exhausted. Although such veteran is entitled to a preference in the civil service even to the extent of being transferred to another position for which he is fitted if his former position has been

88. *People ex rel. Cochrane v. Tracy*, 35 App. Div. 265, 54 N. Y. Supp. 1070.

89. *People ex rel. Ross v. Dooling*, 132 App. Div. 50, 116 N. Y. Supp. 371.

A veteran fireman who had been appointed inspector in the bureau of fire alarm, telegraph, and electric appliances of the former city of New York, was transferred to the position of inspector in the department of public buildings, lighting, and supplies of the present city of New York from which position he was wrongfully removed, without a hearing on charges preferred, in violation of chapter 577, Laws of 1892. Held, that he was entitled to a common-law writ of man-

damus to compel his reinstatement as inspector in the department of public buildings, lighting, and supplies. *People ex rel. Coveney v. Kearney*, 44 App. Div. 449, 61 N. Y. Supp. 41, 30 Civ. Pro. 12; aff'd, 161 N. Y. 648.

90. *People ex rel. Linnekin v. Ennis*, 18 App. Div. 412, 46 N. Y. Supp. 444.

91. *People ex rel. Corrigan v. Mayor*, 149 N. Y. 215.

92. *People ex rel. Vanderhoof v. Palmer*, 3 App. Div. 389, 38 N. Y. Supp. 651.

93. *People ex rel. Croft v. Keating*, 49 App. Div. 123, 63 N. Y. Supp. 71; aff'd, 164 N. Y. 64.

abolished, an order of mandamus directing his reinstatement will not issue in the absence of a showing that there is a vacancy in some position which he is fitted to fill, as the appointing officer is not required to discharge other competent employees to make room for him.⁹⁴

An application for a mandamus to reinstate a veteran whose office had been abolished for the sole purpose of removing him therefrom will not be denied on the ground of laches because not brought until about six months after the removal, where he had no reason to doubt for the first three months that the position had been abolished in good faith and after that date inquiry had to be made whether it had been revived or had never ceased to exist.⁹⁵

While there is nothing in the Civil Service Law which prevents the abolishment of a position in the civil service of the State held by a veteran fireman who has properly and satisfactorily discharged his duties, he must be provided with a similar position. If the position of paymaster in the State Department of Public Buildings, held by a veteran fireman, is abolished in bad faith and not in the interest of economy, the veteran fireman is entitled to be restored; if the position is abolished in good faith and the duties of a position created are similar to the position of those of the position abolished, the veteran is entitled to a transfer to such position.⁹⁶

Under section 1543 of the Greater New York charter where a position in the civil service of the city of New York has been abolished and a different position involving similar duties has been created and the appointing officer neither makes a valid appointment to the newly-created position nor makes any request of the civil service commission for the name of the person entitled to the position, the court is not justified in granting a peremptory order of mandamus requiring the appointing officer to forthwith appoint the removed officer to the newly-created position. It is only where there is need for his services that the removed official is entitled to be reinstated, and such need is to be determined by the appointing officer as evidenced by his request to the civil service commission for the name of the person entitled to the position.⁹⁷ In such a case, a determination by the municipal civil service commission that the duties of the newly-created position are not similar to those performed by him in his former position

94. *People ex rel. Forest v. Williams*, 140 App. Div. 723, 125 N. Y. Supp. 583; *aff'd*, 203 N. Y. 550.

95. *Matter of McDonald*, 34 App. Div. 512, 54 N. Y. Supp. 525.

96. *Matter of Hay*, 72 Misc. 434, 130 N. Y. Supp. 337.

97. *Matter of Morrison v. Cantor*, 76 App. Div. 480, 78 N. Y. Supp. 385; *aff'd*, 173 N. Y. 646.

is quasi-judicial in its character and cannot be reviewed by mandamus.⁹⁸

R. Private corporations and associations.

1. In general.

In some cases, an order of mandamus may be granted to compel a private or a quasi-public corporation to perform a duty. The relief is proper to compel a corporation to act in the line of its duty, in cases where it has no discretion as to the particular manner in which it shall act.⁹⁹ Where it has a discretion, the order will simply put it in motion in the line of its duty.¹ The remedy lies to private corporations only where the duty concerned and attempted to be coerced is specific and plainly imposed upon the corporation.² It does not lie to review the validity of corporate action.³ The remedy is not available to compel an officer to carry out the will of the corporation.⁴ It will not lie against a voluntary unincorporated association in the absence of some statutory duty imposed on it.⁵

When a foreign corporation accepts a license to do business in this State or does some act which subjects itself to the jurisdiction of this State, it may be treated as a domestic corporation to the extent of rendering it subject to mandamus. Where, however, it has not been authorized to do business in this State and has done no act to subject it to the jurisdiction of this State, its actions in reference to its internal affairs may not be controlled by mandamus.⁶

2. Possession of records.

Mandamus is the proper remedy to compel an outgoing officer of a corporation to deliver over books and papers belonging to the corporation.⁷ It is no defense to such a proceeding that they are not in his actual custody, and that he has turned them over to a stranger.⁸ Where it has been

98. *Donovan v. Cantor*, 89 App. Div. 50, 85 N. Y. Supp. 406.

99. *People v. Judges Dutchess Common Pleas*, 20 Wend. 658; *People v. Steele*, 1 Edm. 505.

1. *People v. Collins*, 19 Wend. 56; *Fish v. Weatherwax*, 2 Johns. Cas. 215; *People v. Brennan*, 1 Abb. N. S. 184.

2. *People v. N. Y., L. E. & W. R. R. Co.*, 104 N. Y. 58.

3. *People ex rel. Wilson v. African W. M. E. Church*, 156 App. Div. 386,

141 N. Y. Supp. 294.

4. *People v. Brennan*, 39 Barb. 522.

5. *People ex rel. Solomon v. Brotherhood of Painters*, 218 N. Y. 115.

6. *People ex rel. Solomon v. Brotherhood of Painters*, 218 N. Y. 115.

7. *People ex rel. Keeseville, etc., R. R. Co. v. Powers*, 145 App. Div. 693, 130 N. Y. Supp. 529.

8. *People ex rel. Keeseville, etc., R. R. Co. v. Powers*, 145 App. Div. 693, 130 N. Y. Supp. 529.

judicially decided that certain persons are the lawful directors of a corporation, they are entitled to the possession of its books and papers, and a peremptory order of mandamus to compel their delivery will be granted, although no demand has been made, where the defendant claims a right to retain them.⁹

3. Election of officers.

A corporation may be compelled by mandamus to hold an election.¹⁰ And mandamus lies to compel the rector of a church to give notice of the election of churchwardens and vestrymen.¹¹ And it lies to the rector to compel him to join with the trustees in calling an election to fill vacancies, and in such case a referee may be appointed as inspector and judge of the qualification of electors and to see that the order is fully obeyed.¹² But, when a person is occupying an office of a corporation, mandamus is not generally a proper remedy to determine his right thereto.¹³ Thus, the remedy will not lie to restore the petitioner to the office of manager of a corporation where his right thereto is doubtful.¹⁴ *Quo warranto* and not mandamus is the remedy of a director who claims to have been illegally removed and whose place has been filled by the election of another.¹⁵

Where, on application by petitioners to have themselves declared the lawfully elected trustees of an incorporated society, it appeared on undisputed testimony, as to one, that he had resigned, and that the society had accepted his resignation, it was error to declare him a trustee.¹⁶

4. Inspection of books by stockholder.

Under section 32 of the Stock Corporation Law a corporation is required to keep a stock book containing the names of the stockholders of the corporations, and must permit its inspection by certain persons interested in the corporation. And section 33 of the Stock Corporation Law imposes similar duties on a foreign corporation which has an office in this

9. Matter of Journal Publishing Club, 30 Misc. 326, 63 N. Y. Supp. 465.

10. People v. Albany Hospital, 11 Abb. N. S. 4; People v. Cummings, 72 N. Y. 443.

11. St. Stephen Church Cases, 25 Abb. N. C. 250.

12. St. Stephen Church Cases, 25 Abb. N. C. 250.

13. People ex rel. Berkeley v. N. Y.

Casualty Co., 34 Misc. 326, 69 N. Y. Supp. 755; Matter of Emet, 7 Hun, 333.

14. People ex rel. Nicholl v. N. Y. Infant Asylum, 122 N. Y. 190.

15. People ex rel. McLaughlin v. Police Com'rs, 174 N. Y. 450; People ex rel. Manice v. Powell, 201 N. Y. 194.

16. Sorentino v. Ciletti, 75 App. Div. 508, 78 N. Y. Supp. 322.

State for the transaction of business.¹⁷ If this right of inspection is improperly denied by the corporation, it may be enforced by mandamus.¹⁸ But a peremptory order will not issue to the agent of a foreign corporation where the affidavits show that the books are at the home office and not under his control.¹⁹ The right of the president of a company to an inspection of the stock book is absolute, and his motives are immaterial.²⁰

Besides the statutory right to inspect the stock book, there is a general right of a stockholder in a proper case to inspect the books and records of the corporation, which may be enforced by mandamus.²¹ The Supreme Court has power, by mandamus, on petition of a stockholder, to compel the corporation to exhibit its books for his inspection.²² This common-law right, however, is enforced by the courts of this State against domestic corporations, not those created under the laws of another jurisdiction.²³ The State in which a corporation is organized has alone authority to allow inspection of books by a stockholder, and to compel the books to be brought into the State if necessary for that purpose.²⁴

To entitle a person to a mandamus compelling a corporation to permit him to examine its books, the stock book of the company must show that he is a stockholder.²⁵ But it is

17. *People ex rel. Daniels v. Crawford*, 68 Hun, 547, 52 St. Rep. 476, 22 N. Y. Supp. 1025.

18. *People ex rel. Hunter v. National Park Bank*, 122 App. Div. 635, 107 N. Y. Supp. 369; *People ex rel. Harri-man v. Paton*, 20 Abb. N. C. 172; *People ex rel. Daniels v. Crawford*, 68 Hun, 547, 52 St. Rep. 476, 22 N. Y. Supp. 1025.

19. *People ex rel. Hoffman v. Ted-castle*, 12 Misc. 468, 68 St. Rep. 135, 34 N. Y. Supp. 257.

20. *People ex rel. Gunst v. Gold-stein*, 37 App. Div. 550, 56 N. Y. Supp. 306.

21. *Matter of Colwell*, 76 App. Div. 615, 78 N. Y. Supp. 607; *People ex rel. Hunter v. National Park Bank*, 122 App. Div. 635, 107 N. Y. Supp. 369; *Matter of Wygant*, 101 Misc. 509, 167 N. Y. Supp. 369; *People v. Throop*, 12 Wend. 183; *People v. Pacific Mail*, 3 Abb. N. S. 364; *People v. Mott*, 1 How. 247; *Sage v. Lake Shore R. R.*, 16 Alb. L. J. 102, Ct. of App.; *People v. Lake Shore, etc.*, 11 Hun, 1, 70 N. Y. 220.

Officer with lien on books.—Man-damus may be issued to compel an officer of corporation who has lien on the books to allow an inspection. *People v. German Hospital*, 8 Abb. N. C. 332.

By-laws.—An order permitting a stockholder to inspect the by-laws and resolutions of the corporation having the effects of by-laws will not be disturbed, it not appearing that the privilege will be abused, or that any ulterior purpose prejudicial to the corporation will be served thereby, and the rights of the corporation being preserved by the order. *Matter of Coats*, 75 App. Div. 567, 78 N. Y. Supp. 429.

22. *Matter of Steinway*, 159 N. Y. 250.

23. *Matter of Rappleye*, 43 App. Div. 84, 59 N. Y. Supp. 338; *dism'd*, 161 N. Y. 615.

24. *Mitchell v. Northern Security Oil & Transportation Co.*, 44 Misc. 514, 90 N. Y. Supp. 60.

25. *Matter of Reiss*, 30 Misc. 234, 62 N. Y. Supp. 145.

immaterial whether the transfer of stock to the petitioner was merely colorable or whether there were any consideration therefor, or what was the occasion for the transfer.²⁶

The right of the stockholder to examine the books of the corporation is not absolute;²⁷ and in some cases the right may be denied or limited.²⁸ Thus, a mandamus to allow him to examine and copy the by-laws, minutes, and all the books of the company, will not be granted where it does not appear that he will be appreciably benefited thereby.²⁹ The granting of a mandamus is always in the judicial discretion of the court, and a strict legal right will not be enforced when it appears that the application is not made in good faith for a legitimate and proper object.³⁰ Where, on an application to inspect the stock book, it appears that the petitioner's purpose is "sinister and inimical" to the corporation, his

26. *People ex rel. Harriman v. Paton*, 20 Abb. N. C. 172.

Sufficiency of affidavit.—On an application for a peremptory order to allow the relator access to the defendant's books, it was held that when the affidavit of the defendant's officer merely averred that he had been advised that the relator was not the owner of the stock mentioned in the latter's affidavit, but nowhere denied in terms that such shares were in fact the property of the relator, that the averments were evasive, and not sufficient to put the applicant's right of inspection in issue. *Martin v. Johnston Co.*, 17 N. Y. Supp. 133.

27. *People ex rel. Mackey v. American Union L. Ins. Co.*, 31 Misc. 617, 64 N. Y. Supp. 916.

28. *Matter of Colwell*, 76 App. Div. 615, 78 N. Y. Supp. 607; *People ex rel. Althouse v. Giroux Consol., etc., Co.*, 122 App. Div. 617, 107 N. Y. Supp. 188.

29. *People ex rel. Mackey v. American Union Life Ins. Co.*, 31 Misc. 617, 64 N. Y. Supp. 916.

30. *People ex rel. Althouse v. Giroux Consol., etc., Co.*, 122 App. Div. 617, 107 N. Y. Supp. 188; *People ex rel. Hunter v. National Park Bank*, 122 App. Div. 635, 107 N. Y. Supp. 369.

Court of Appeals.—The discretion will not be reviewed by the Court of Appeals. *Tuttle v. Iron National*

Bank, 170 N. Y. 9.

Suit against directors.—Since mandamus to require a corporation to exhibit its books and papers to a stockholder will only lie to protect his stock interest, it would not lie to aid him in suit against directors of the corporation, caused by their publication of a false report, whereby he was induced to become a stockholder and incurred loss. *Matter of Taylor*, 117 App. Div. 348, 101 N. Y. Supp. 1039.

Hostility to president.—Mandamus would be granted to compel a corporation to submit its books to the inspection of a stockholder, where he claimed that he was induced to buy his stock by the president; that he had been unable to ascertain the condition of the corporation; that no dividends had been paid; that the corporation did not seem to be doing any business; and that no report has been made during the three years of the corporation's existence, although the president stated that he had told the petitioner that the corporation had lost money, and that he had answered all reasonable inquiries, and that the petitioner was hostile to him, in the absence of evidence that injury would result to the corporation from such inspection, or that the stockholder had any illegal end in view. *Matter of O'Neill*, 47 Misc. 495, 95 N. Y. Supp. 964.

application, in the exercise of judicial discretion, should be denied.³¹ An inspection will not be granted where it appears that the petitioner desires it in order to furnish information to a competing company.³²

A peremptory order of mandamus will not be issued to compel a corporation to exhibit to a stockholder its books of account and records for the purpose of enabling the stockholder to discover whether the corporation, which has reduced the price of its product, is selling the same at a loss, and whether it is paying its fixed charges out of capital, with a view, if such be found to be the case, of preventing such action on the part of the company, where it appears that the reduction in price of the product was made to meet a reduction by a rival company, and that the stockholder's contemplated action would be injurious to the corporation.³³

Where, on an application for mandamus requiring the exhibition of the books of a corporation to executors, it appears that testator, a stockholder, sold to the corporation which bore his name the formulas for certain medicines and good-will of the business of manufacturing the same, and that after being deposed as an officer he organized a new establishment in the same city for carrying on practically the same business in his own name, and had manifested ill-will toward the corporation in many ways, and after his death his executors pursued the same course with the manifest purpose of injuring its business, and reasonable statements of the affairs of the corporation have been furnished them, the object of the application is evidently in furtherance of such purpose, and mandamus should be denied.³⁴

A stockholder in a corporation is not entitled to mandamus requiring it to produce its books and papers for his inspection on his mere allegation that he has no knowledge of the condition of its affairs or the names of its stockholders, and that it is necessary to examine the books, etc., in order to ascertain their names and residences, so that he may confer with them respecting the management of the company, etc., especially in the absence of any showing that such information has been refused.³⁵

31. *People ex rel. Britton v. Am. Press Assoc.*, 148 App. Div. 651, 133 N. Y. Supp. 216; *People ex rel. Lehman v. Consolidated Fire Alarm Co.*, 145 App. Div. 427, 127 N. Y. Supp. 348.

32. *People ex rel. Lehman v. Consolidated Fire Alarm Co.*, 142 App. Div. 753, 127 N. Y. Supp. 348.

33. *Matter of Pierson*, 44 App. Div. 215, 60 N. Y. Supp. 671; *aff'g* 28 Misc. 726, 59 N. Y. Supp. 1003.

34. *Matter of Kennedy*, 75 App. Div. 188, 77 N. Y. Supp. 714, *rev'g* 37 Misc. 317, 75 N. Y. Supp. 457.

35. *Latimer v. Herzog Teleseme Co.*, 75 App. Div. 22, 78 N. Y. Supp. 314.

The demand for the inspection of the books should be by the stockholder in person; a demand by his attorney may be insufficient.³⁶ A stockholder is not entitled to a peremptory order of mandamus compelling his corporation to allow him to examine its books for the purpose of discovering the prices at which the corporation retired outstanding bonds which it purchased in the open market, if no preliminary demand for such information was made upon the corporation, but merely a demand for a written statement of its affairs.³⁷ But where such a demand has been made and the stockholder alleges that bonds of the corporation were redeemed before maturity at a greater cost than the market value, and such allegations are denied by the corporation, the stockholder is entitled to an alternative order of mandamus by which his right to an inspection of the books may be determined as an issue of fact.³⁸

Mandamus will not issue on the petition of the director of a corporation to compel it to exhibit for examination the books of the corporation to an audit company as the petitioner's agent for an unlimited examination by such audit company's employees.³⁹ But the court should permit the petitioner to have the aid of expert accountants.⁴⁰

A peremptory order of mandamus requiring the president and treasurer of a corporation to exhibit to a director, his attorney, accountant, and assistants, without limitation in number, the books and records of the corporation, and permit an examination thereof for a period of three months, should be modified so as to authorize such examination to be made by the director and one accountant during four weeks, with a provision for an extension of time, if necessary, on application to the court.⁴¹

36. *People ex rel. McDonald v. U. S. Mercantile Rep. Co.*, 20 Abb. N. C. 192.

Joint stock company.—Assuming that mandamus will lie to compel the officers of a joint stock company to submit the books and records for an inspection by shareholders, a prerequisite to the issuance of the order is the refusal of the officers to permit the examination. Mandamus will not issue to compel the officers of a joint stock company to permit an examination of the books and records by shareholders where the application for the order was made without allowing the officers a reasonable time under the circumstances to act on the shareholders'

prior demand for such inspection. *Matter of Hatt*, 57 Misc. 320, 108 N. Y. Supp. 468.

37. *Matter of Hitchcock*, 149 App. Div. 324, 134 N. Y. Supp. 174.

38. *Matter of Hitchcock*, 157 App. Div. 328, 142 N. Y. Supp. 247.

39. *People ex rel. Bartels v. Borgstede*, 169 App. Div. 421, 155 N. Y. Supp. 322.

40. *People ex rel. Poleti v. Poleti, etc., Inc.*, 193 App. Div. 738, 184 N. Y. Supp. 368.

41. *People ex rel. McInnes v. Columbia Paper Bag Co.*, 103 App. Div. 208, 92 N. Y. Supp. 1084.

5. Membership.

When a member has been improperly expelled from a corporation, or organization, mandamus is the proper remedy by which to obtain reinstatement.⁴² The court will not consider the sufficiency of the charges upon which a member of a benevolent association was expelled, if he was denied the right to be heard in his own defense.⁴³ The remedy lies to a mutual protective union to compel the restoration of a member expelled in violation of the by-laws.⁴⁴ An order of mandamus may be issued against a benevolent society compelling it to reinstate a member illegally expelled.⁴⁵ An order of peremptory mandamus will issue to a live stock association commanding it to restore the petitioner to all rights and privileges as a member on the ground he had not had a fair opportunity to be heard in defense of the charges preferred against him, before he was suspended from membership.⁴⁶

Mandamus will lie to restore one who has been unlawfully expelled to membership in a society whose object is not solely to enable its members to meet for Divine worship or other religious observances, but is to provide a fund for the payment of weekly benefits and gratuitous services of a physician, a burial ground for its members, and generally to help such members as are in distress.⁴⁷

Mandamus is a proper remedy to compel the admittance to a medical society,⁴⁸ or to compel a church to admit a member to the pulpit.⁴⁹ But it has been held that it will not lie to compel a religious corporation to restore a relator to membership.⁵⁰ And it has been held that the remedy is not

42. *Stein v. Marks*, 44 Misc. 140, 89 N. Y. Supp. 921; *People v. American Institute*, 44 How. Pr. 468; *People v. Benev. Soc.*, 24 How. Pr. 216; *People v. Commercial Assoc.*, 18 Abb. Pr. 271.

Subsequent application.—Although a member of a mutual benefit society incorporated under the Membership Corporation Law has been suspended for three years for misconduct, and although a writ of mandamus to compel his reinstatement on account of such suspension has been refused by the court, that is no bar to a subsequent application for a reinstatement by mandamus where he was subsequently expelled for an alleged failure to pay dues. *People v. Philip Bernstein Sick, etc., Soc.*, 161 App. Div. 823, 146 N. Y. Supp. 886.

43. *People ex rel. Wang v. Lubliner*

United Brothers Assoc., 137 App. Div. 173, 122 N. Y. Supp. 11.

44. *People ex rel. Deverell v. M. M. P. Union*, 118 N. Y. 101.

45. *Doyle v. Benev. Soc.*, 3 Hun, 361; *People ex rel. Grunwald v. I. O. Ahavas Israel*, 13 Misc. 426, 68 St. Rep. 404, 34 N. Y. Supp. 675.

46. *People ex rel. Milson v. East Buffalo Live Stock Assoc.*, 88 App. Div. 619, 84 N. Y. Supp. 795.

47. *People ex rel. Katz v. Erste Ulaszkowcer Kranken Unterstutzungs Verein*, 56 Misc. 304, 57 Misc. 62, 106 N. Y. Supp. 922.

48. *People v. Medical Society of Erie*, 32 N. Y. 187.

49. *People v. Steele*, 1 Edm. 505.

50. *People v. German Church*, 53 N. Y. 103.

available against the New York Stock Exchange to compel the reinstatement of an expelled member.⁵¹

The mere fact that a member of a fraternal society was removed in the method provided for by its constitution and by-laws is not sufficient to authorize the refusal of an alternative order of mandamus to secure his reinstatement, where a controversy remains as to the facts which involve the right to make such removal.⁵²

Although the constitution of a society provides that a member may file a written appeal from a decision of the society, which the president shall read at the next meeting, and if the majority are of the opinion that an injustice has been done, or that the decision is contrary to the constitution, the matter may be taken up *de novo*, a member who has been expelled is not limited to such remedy within the society itself, but may invoke the remedy of mandamus to compel his restoration to membership.⁵³

A foreign fraternal society having obtained a license to do business within the State becomes subject to the jurisdiction of the domestic courts the same as if incorporated within the State, and hence mandamus will lie to compel it to reinstate a member wrongfully expelled.⁵⁴ But the courts of this State have no jurisdiction to issue an order of mandamus to compel a fraternal beneficial corporation organized under the laws of another State and having no subordinate lodges in this State to reinstate a member.⁵⁵

Where a member in good standing of a membership corporation tenders his resignation by a letter in which is shown his intention to resign immediately he at once ceases to be a member and is not entitled to be restored to membership by mandamus, though he attempted to withdraw his resignation before it had been accepted.⁵⁶

The remedy is not available to prevent an anticipated wrong or to enjoin a threatened expulsion from the society.⁵⁷

51. *Matter of Weidenfeld*, 84 App. Div. 235, 82 N. Y. Supp. 634; *aff'd* on opinion below, 176 N. Y. 562.

New York Produce Exchange. See *Matter of Haebler v. N. Y. Produce Exchange*, 149 N. Y. 414.

52. *People ex rel. Miodownick v. Order of Brith Abraham*, 116 App. Div. 364, 101 N. Y. Supp. 866.

53. *People v. Bernstein Sick, etc., Benefit Soc.*, 161 App. Div. 823, 146 N. Y. Supp. 886; *Matter of Hillery*,

189 App. Div. 766, 179 N. Y. Supp. 62.

54. *Matter of Wilcox*, 123 App. Div. 86, 108 N. Y. Supp. 483.

55. *People ex rel. Ruman v. National Slavonic Soc.*, 144 App. Div. 574, 129 N. Y. Supp. 603.

56. *People ex rel. Haas v. N. Y. M. B. Club*, 70 Misc. 603, 129 N. Y. Supp. 365.

57. *Brown v. Duane*, 60 Hun, 98, 14 N. Y. Supp. 450.

6. Public Utilities.

Before the creation of the Public Service Commission, mandamus was frequently used as a remedy to compel a public utility corporation to furnish service to one entitled thereto. Thus, mandamus would lie to compel a gas company to furnish gas,⁵⁸ a telephone company to install an instrument,⁵⁹ a water company to furnish water.⁶⁰ It will not lie to compel cemetery association to allow burial.⁶¹

But mandamus would not lie to compel one telephone company to furnish telephone services to a rival company.⁶² A telephone company could not be compelled by mandamus to place an instrument in the office of another telephone company and establish connections therewith, or to receive and transmit messages, but the remedy was by action.⁶³ Where a telephone company refused to furnish telephone service to the occupant of premises from which a telephone previously installed had been removed by the police because the premises were used as a poolroom, unless such occupant would give written assurance that the telephone was not to be used for illegal purposes, and would give reference as to his character, it was held that the court would not issue an order requiring it to furnish telephone service, the demand of the company not having been complied with.⁶⁴

A telegraph company receiving from the New York Stock Exchange information for transmission cannot be compelled to furnish it to a person in violation of its agreement with the Stock Exchange not to furnish it to persons other than such as were approved by the exchange.⁶⁵

The writ will not issue to compel a corporation to remove a telegraph pole erected by a corporation; the remedy is an action for damages.⁶⁶

Under the Public Service Commissions Law, the usual practice is for the Commission to make an order requiring the utility to perform its duty. If the company fails to comply

58. *People v. Manh. Gas Co.*, 1 Abb. N. S. 404.

59. *People ex rel. Postal Telegraph Co. v. Hudson River Telegraph Co.*, 19 Abb. N. C. 466.

60. *People ex rel. Brush v. N. Y. Suburban Water Co.*, 38 App. Div. 413, 56 N. Y. Supp. 364.

61. *People v. Trustees of Cathedral*, 21 Hun, 184, rev'g *Copper's Case*, 7 Abb. N. C. 121.

62. *People ex rel. Oneida Telephone*

Co. v. Central N. Y. Tel. & Tel. Co., 41 App. Div. 17, 58 N. Y. Supp. 221.

63. *Matter of Baldwinsville Telephone Co.*, 24 Misc. 221, 53 N. Y. Supp. 574, 87 St. Rep. 574.

64. *Cullen v. N. Y. Telephone Co.*, 106 App. Div. 250, 94 N. Y. Supp. 290.

65. *Matter of Renville*, 46 App. Div. 37, 61 N. Y. Supp. 549.

66. *People ex rel. McManus v. Thompson*, 32 Hun, 93.

with the order, its obedience may be compelled by mandamus.⁶⁷

7. Railroads.

Before the creation of the Public Service Commission, mandamus was frequently granted to compel railroad corporations to perform statutory duties.⁶⁸ The proceeding may be brought by the attorney-general in name of the people, to compel railroad corporation to exercise its duty as a carrier of freight and passengers.⁶⁹ It will lie to compel a railroad company to build fences,⁷⁰ but not to compel it to operate two lines of road if one will accommodate the public.⁷¹

67. *Public Service Com. v. Iroquois Nat. Gas Co.*, 108 Misc. 696, 178 N. Y. Supp. 24.

68. **Raising track.**—Where plans for the repaving a street raise the grade line, or crown, of the street higher in some places than the rails on the northerly side of the track of a street surface railway running through the street, so that the railway company must elevate its rails to conform to the new level, or crown, of the street, such change does not constitute a relocation of the track which must be ordered by the public service commission under the statute (*Public Service Commissions Law* [Cons. Laws, ch. 48], § 50), and the city authorities having the power under the Greater New York charter to make such change, if necessary for the repaving, the railway company is required by the statute (*Railroad Law*, § 178) to raise its northerly track to conform to the new surface grade or level, and if the company fails or refuses to do this a writ of mandamus to compel it so to do should be granted. *People ex rel. City of New York v. Belt Line Ry. Corp.*, 230 N. Y. 86.

Street paving.—Where the charter of a city provided that if a street, upon which there was a street railroad, shall be paved, the board of public works shall have power to require the company operating the railroad to change its grade to conform to such improvements, and the company refused to change the grade of its tracks after being ordered to do so by the board, it was held that mandamus was

the proper remedy to enforce the performance of such duty by the railroad company. *People ex rel. City of Geneva v. Geneva, Waterloo, etc., Traction Co.*, 112 App. Div. 581, 98 N. Y. Supp. 719; *aff'd*, 186 N. Y. 516.

Street crossing.—A mandamus will not be granted to compel a railroad company to take a street across its tracks until the provisions of chapter 754 of the Laws of 1897, including the determination of the Railroad Commissioners as to the manner of crossing, have been complied with, unless the right to institute the proceeding was acquired by the municipality prior to July 1, 1897. A mandamus will not be granted where the time given by the notice to the company to do the work had not expired when the act of 1897 took effect. *People ex rel. City of Niagara Falls v. N. Y. C. & H. R. R. Co.*, 158 N. Y. 410; *aff'd*, 31 App. Div. 334, 52 N. Y. Supp. 234.

Transfers.—The public right to have street railway companies comply with the law by giving transfers cannot be enforced by mandamus on the relation of a private individual. *People ex rel. Lehmaier v. Interurban St. Ry. Co.*, 85 App. Div. 407, 83 N. Y. Supp. 622.

69. *People v. N. Y. C. R. R.*, 28 Hun, 543.

70. *People v. Rochester, etc., R. R.*, 14 Hun, 371; *aff'd*, 76 N. Y. 294; *People v. Albany & Boston R. R.*, 7 Hun, 569.

71. *People v. Rome, etc., R. R. Co.*, 103 N. Y. 95.

The public is interested in the enforcement of the statute preventing unnecessary impairment of the usefulness of a highway, and a proceeding may be maintained to compel a railroad company to remedy the unnecessary encroachment of a bridge constructed upon a highway. Such a proceeding may be maintained against the company which is in full possession and operation of the railroad although it be not the owner thereof.⁷²

Mandamus will not lie to review the discretion of a railroad company in failing to furnish suitable passenger and freight houses at a station, even where facts appear which show the duty to be imperative.⁷³ If the responsibility of determining how many trains shall be run, and at what intervals of time, is placed on the board of directors of a railroad company, mandamus will not lie in the first instance on the application of persons claiming to be aggrieved by failure of a railroad company to properly operate its trains to compel it to restore a continuous train service to a named station, which had been in part abandoned.⁷⁴

8. Educational corporations.

Mandamus will lie to a medical college to compel the giving of a degree to a student, who has complied with its terms, when it is unjustly refused.⁷⁵ But mandamus will not lie to a medical college to compel the issue of a diploma to a student where the faculty have a discretion in passing upon his qualifications and have passed upon them.⁷⁶ Nor will it lie to a law school to compel the giving of a degree where the faculty has refused, in its discretion, so to do, though mandamus may compel the giving of a certificate of attendance.⁷⁷ Mandamus is not the proper remedy in the case of the removal of a college professor; the remedy, if any, is by action for salary, or other emolument.⁷⁸

72. *People ex rel. Bacon v. Northern Central Ry. Co.*, 164 N. Y. 289.

73. *People v. N. Y. & L. E. R. R. Co.*, 5 St. Rep. 551.

74. *People ex rel. Linton v. Brooklyn Heights R. Co.*, 172 N. Y. 90.

75. *People ex rel. Cecil v. Bellevue Hospital*, 60 Hun, 107, 38 St. Rep. 418, 14 N. Y. Supp. 490; *aff'd*, 128 N. Y. 621.

76. *People ex rel. Jones v. N. Y. H. M. C. & H.*, 47 St. Rep. 395, 20 N. Y. Supp. 379.

77. *People ex rel. O'Sullivan v. N. Y. Law School*, 68 Hun, 118, 52 St. Rep. 14, 22 N. Y. Supp. 663.

78. *People ex rel. Kelsey v. N. Y. Post Graduate Medical School & Hospital*, 29 App. Div. 244, 51 N. Y. Supp. 420.

ARTICLE III.**APPLICATION FOR ORDER.****A. Civil Practice Act, § 1315. Granting of alternative mandamus order.**

An alternative mandamus order may be granted upon a verified petition, which may be accompanied by other written proof, showing a proper case therefor. Previous notice of the application must be given to a judge of the court, or to the corporation, board, or other body, officer, or other person against which or whom the order is sought.

B. Civil Practice Act, § 1316. Contents of petition for alternative order.

The statement, contained in a petition for an alternative mandamus order, of the facts constituting the grievance to redress which the order is issued, the joinder in the petition of two or more such grievances, and the command of the order, are subject to the provisions of statute and rule respecting the statement, in a complaint, of the facts constituting a cause of action, the joinder therein of two or more causes of action, and the demand of judgment thereupon.

C. Civil Practice Act, § 1329. Application of certain provisions.

No pleadings are allowed in a mandamus proceeding, except as prescribed in the foregoing sections of this article. The provisions of statute or rule relating to the form and contents of complaint and answer, and to objections to either, apply to the petition for a mandamus order and the return, respectively; except that it is not necessary to serve a copy of either upon the attorney for the adverse party, or to verify a return, and that neither can be amended without special application to the court, or stricken out as sham.

D. Petition.**1. In general.**

The petition should state the facts upon which the petitioner's right to relief is based.⁷⁹ The general rules as to pleadings in an action are applicable to a petition in a mandamus proceeding.⁸⁰ The petition may be said to be in the

79. Appointment of veteran.—A petition for mandamus to a city council to appoint to office an honorably discharged soldier of the Civil War under the Civil Service Law has been held to be fatally defective in not averring that the council knew that he was an honorably discharged soldier. *In re Wortman*, 2 N. Y. Supp. 326, 22 Abb. N. C. 143. Where one sought to enforce a preference for an office under the Veteran Law (L. 1894, chap. 916), and it does not appear

from his affidavit that he was a discharged soldier and as such entitled to preference, and the opposing affidavit stated that his application for the office contained no such averment, it was held that the petitioner did not make out a case either for a peremptory or for an alternative order. *People ex rel. Wagner v. Trustees of Cohocton*, 17 Misc. 652, 41 N. Y. Supp. 449.

80. Civil Practice Act, § 1316.

nature of a complaint.⁸¹ The rule requiring liberality in the construction of pleadings may be applied to a petition in mandamus.⁸² A defect in the petition may be cured by an allegation of the necessary fact in the return.⁸³

The petitioner must show that he is legally and equitably entitled to some right properly the subject of the order, and that it is legally demandable from the person to whom the order is to be directed, and also that such person still has it in his power to perform the duty required.⁸⁴ He is bound to show, as the foundation for the proceeding, that the specific act sought to be coerced is the duty of the person against whom the order is directed, and that such person has no discretion as to its exercise.⁸⁵ He must show some present disregard of duty on the part of the respondent; mandamus will not be granted where it is shown that the respondent "is about" to disregard his duty.⁸⁶

It is improper to consolidate two mandamus proceedings based on different facts and against different respondents in part at least.⁸⁷ But it is thought that two or more grievances against the same board or officer may be joined in the same proceeding, as different causes of action.⁸⁸

81. *People ex rel. Del Mar v. St. L. & S. F. R. R. Co.*, 47 Hun, 544, 14 St. Rep. 885.

82. *People ex rel. Wang v. Lubliner United Bros. Assoc.*, 137 App. Div. 173, 122 N. Y. Supp. 11.

Benevolent association.—It seems that allegations of a petition for mandamus to compel the relator's reinstatement as a member of a benevolent association stating that contrary to the by-laws he was denied the right to select counsel and the privilege of challenging members of the trial committee which expelled him, are in a sense legal conclusions, and it would be better to allege that he requested those privileges and that the request was denied. But the rule that pleadings shall be liberally construed applies in mandamus, and the petition is not defective if it appear that the affirmative action of the committee at the trial was such as to render the requests futile. Moreover, an allega-

tion that he was denied an opportunity to speak upon the charges, and was directed to leave the room sufficiently states that he was not afforded an opportunity to defend. *People ex rel. Wang v. Lubliner United Brothers Assn.*, 137 App. Div. 173, 122 N. Y. Supp. 11.

83. *People ex rel. Banta v. Scannell*, 50 App. Div. 625, 63 N. Y. Supp. 985.

84. *People ex rel. Stevens v. Hayt*, 66 N. Y. 607.

85. *People ex rel. Allen v. Murray*, 2 Misc. 152, 23 N. Y. Supp. 160, 23 Civ. Pro. 71; *aff'd* without opinion, 138 N. Y. 635.

86. *People ex rel. Sayles v. Fitzgerald*, 37 St. Rep. 540, 13 N. Y. Supp. 663; *aff'd*, 128 N. Y. 620.

87. *People ex rel. Collins v. Ahern*, 146 App. Div. 135, 130 N. Y. Supp. 497.

88. *People ex rel. Neftaniel v. Order American Star*, 53 Super. Ct. 69.

2. Alleging conditions precedent to relief.

Whatever is required to be done by the petitioner as a condition precedent to the right demanded must be shown affirmatively to have been done.⁸⁹ Where tender must be shown on the part of a petitioner, it must be shown to be a full tender of present performance; if the tender was conditional, the order may be denied.⁹⁰ It should appear from the petition that a demand has been made on the defendant to do the thing which he is sought to be compelled to do, and that he has refused or neglected to do it.⁹¹

3. Allegations on information and belief.

A peremptory order of mandamus will not be issued upon a petition based on information and belief, as such a petition does not show conclusively that the petitioner has a clear legal right to the relief demanded.⁹² Unspecific and indefinite statements and denials or statements and denials upon information and belief are worthless upon such an application.⁹³ If the facts are alleged to be upon information and belief, the sources of information and belief must be set forth or the papers will be held not to prove the facts alleged.⁹⁴ A petition based only on allegations on information and belief, without stating the sources of information, should be denied; though met only by an affidavit which is insufficient to raise an issue.⁹⁵

4. Demand of greater relief than proper.

Decisions can be found where the relief was apparently denied because the applicant asked for more than he was entitled to.⁹⁶ This rule is inconsistent with the general rules of pleading; and, if enforced at all, should be limited in its application to cases when a peremptory order is sought in the first instance. The court may issue a peremptory order

89. *People ex rel. Stevens v. Hayt*, 66 N. Y. 606.

90. *Matter of McGrath*, 56 Hun, 76, 9 N. Y. Supp. 168, 29 St. Rep. 704.

91. *In re Whitney*, 3 N. Y. Supp. 839, 24 St. Rep. 968.

92. *People ex rel. Keating v. Prendergast*, 151 App. Div. 541, 136 N. Y. Supp. 184; *Matter of Sheehan v. Treasurer Long Island City*, 11 Misc. 488, 67 St. Rep. 277, 33 N. Y. Supp. 428.

93. *Matter of Guess*, 16 Misc. 307,

74 St. Rep. 387, 38 N. Y. Supp. 91; *Matter of Freel*, 73 St. Rep. 331, 38 N. Y. Supp. 143.

94. *People ex rel. O'Brien v. Cruger*, 12 App. Div. 536, 42 N. Y. Supp. 398.

95. *People ex rel. Bourke v. Grout*, 107 App. Div. 228, 94 N. Y. Supp. 1101.

96. *People ex rel. Ketteltas v. Cady*, 2 Hun, 225; *People ex rel. Byrnes v. Greene*, 64 Barb. 162; *People ex rel. Adams Co. v. Woodbury*, 88 App. Div. 443, 85 N. Y. Supp. 174.

on the final determination of the alternative order, even though the petitioner asks too much, or mistakes to some extent the relief to which he is entitled; in awarding the peremptory order the court may mould it according to the just rights of all the parties.⁹⁷ It is no reason for refusing a proper peremptory order of mandamus that the alternative order asks too much, or includes an unnecessary party.⁹⁸ Where the order to show cause upon which the peremptory order is issued contains the usual request "or for other relief," the Supreme Court has power to grant the order for any relief to which the petitioner is entitled, although it is not specified in the order to show cause.⁹⁹ Even on an application for a peremptory mandamus in the first instance, it has been said that the court will mould it according to the just rights of the parties, and where the petition sets forth a substantial right the proceeding will not fail because the petitioner asks too much or mistakes to some extent the relief to which he is entitled.¹

E. Affidavits.

Under the former practice, the alternative writ of mandamus could be granted upon an affidavit or other written proof showing a proper case therefor. The Civil Practice Act requires a verified petition, and permits the petition to be accompanied by other written proof showing a proper case for the granting of the order. On applying for an order of mandamus, the petitioner should present all his affidavits at the time of his application, and he cannot complain because the court refuses to consider affidavits subsequently offered.² But, where a person dismissed from a civil service position, on the ground that no appropriation had been made for his position, petitioned for a peremptory mandamus to compel his reinstatement, he is entitled, on subsequently discovering that the head of his department had appointed a person in the exempt class to perform the same duties at a larger salary, to have his affidavits setting forth said facts made part of his moving papers.³ An affidavit

97. *People ex rel. Keene v. Supervisors*, 142 N. Y. 277.

98. *People ex rel. Fellows v. Early*, 106 App. Div. 269, 94 N. Y. Supp. 641.

99. *People ex rel. Henry v. Nostrand*, 46 N. Y. 377.

1. *Matter of Albany Syndicate v.*

Runkle, 101 Misc. 41, 166 N. Y. Supp. 488.

2. *People ex rel. Melledy v. Shea*, 73 App. Div. 237, 76 N. Y. Supp. 682.

3. *People ex rel. Schott v. Prendergast*, 148 App. Div. 135, 132 N. Y. Supp. 113.

must not contain scandalous matter, or it may be stricken out by the court on its own motion.⁴

F. Title of papers.

Under the former practice, when mandamus was a State writ, the proceeding was prosecuted in the name of the People on the relation of the petitioner, though it was the proper practice to entitle the papers on the original application: "In the Matter of the Application of, for, etc." The cause took its title on granting of the order for the writ;⁵ and the affidavit upon which the relief was granted could not be entitled in a cause.⁶ This would seem to be the proper practice under the Civil Practice Act. The Practice Act does not prescribe the manner of entitling the papers after the order is issued; but, with the abolition of the writ, it is improper to prosecute the proceeding in the name of the People.

G. Notice of application.

The Civil Practice Act provides for notice of the application for the order, whether an alternative or a peremptory order is sought. A peremptory order must be vacated where no notice of application therefor has been given.⁷ But where no such notice has been given, and the respondents appear, make their return, and submit themselves to the jurisdiction of the court without objection, it is then too late for them to object that they have not received such notice.⁸ Upon an application for a peremptory mandamus, the court will not consider in support thereof affidavits, copies of which have not been served with the notice.⁹

4. *People ex rel. Allen v. Murray*, 22 N. Y. Supp. 1051, 23 Civ. Pro. 53.

5. *People v. Sage*, 2 How. Pr. 60.

6. *Haight v. Turner*, 2 Johns. 371; *People v. Common Pleas*, 1 Wend. 291; *People v. Sage*, 2 How. 59; *People v. Dikeman*, 7 How. 124. See *Ex parte La Farge*, 6 Cow. 61. See, also, *People ex rel. Brennan v. Haffen*, 124 App. Div. 230, 108 N. Y. Supp. 654.

7. *People v. Bd. of Canvassers Dutchess Co.*, 48 St. Rep. 533, 64 Hun, 634, 18 N. Y. Supp. 302.

8. *People ex rel. Hasbrouck v. Bd. of Supervisors*, 135 N. Y. 522.

9. *People ex rel. Lind v. City of N. Y.*, 63 Misc. 511, 117 N. Y. Supp. 1068; *People ex rel. Del Mar v. St. L. & S. F. R. R. Co.*, 47 Hun, 544, 14 St. Rep. 885.

ARTICLE IV.

PARTIES.

A. The petitioner.

1. Private citizen to enforce public duty.

As a general rule, any citizen is entitled to maintain a proceeding by mandamus to compel a public officer to perform duties of a public character.¹⁰ It is only where private redress is sought that the petitioner must show a special interest in the controversy.¹¹ In matters of private or corporate right, the title of the petitioner to the right must appear; in matters of public right, any citizen may be the petitioner.¹² In cases where the interest is common to the whole community, it is not necessary that the petitioner show an individual right; any person interested in the enforcement of a statutory right may be the petitioner.¹³

Every citizen has the right to compel the performance by a public officer of his duty of executing the law enacted for the benefit of the citizens generally, and is not required to show a particular individual right.¹⁴

Any citizen of a village may have mandamus to compel the trustees to appoint and organize a board of health when they are required so to do by statute.¹⁵ A citizen and taxpayer can compel a common council to follow a statute.¹⁶ A citizen is a proper petitioner to compel a board of supervisors of counties to meet, as required by statute, and divide their respective counties into as many Assembly districts as they were entitled to.¹⁷ No personal interest in the petitioner is essential in order to enable him to have mandamus compelling a board of supervisors to vacate their order directing the payment of a claim not authorized by law.¹⁸

10. *People ex rel. Hotchkiss v. Smith*, 152 App. Div. 514, 137 N. Y. Supp. 387; *aff'd*, 206 N. Y. 231.

11. *People v. Common Council of Buffalo*, 16 Abb. N. C. 96.

12. *People v. Collins*, 19 Wend. 46.

13. *People v. Supervisors*, 17 Hun, 501; *s. c.*, 85 N. Y. 324; *People v. Halsey*, 37 N. Y. 344; *People v. Supervisors*, 56 N. Y. 249; *People v. Asten*, 62 N. Y. 623; *People v. Common Council*, 20 How. 401. See *People v. Common Council*, 78 N. Y. 33; *People v. Tracy*, 1 How. 186.

14. *People ex rel. Kay v. Swan-*

strom, 79 App. Div. 94, 79 N. Y. Supp. 934; *disr'd*, 175 N. Y. 513.

15. *People ex rel. Boltzer v. Daly*, 37 Hun, 466.

16. *People v. Common Council of Buffalo*, 16 Abb. N. C. 96.

17. *People ex rel. Baird v. Supervisors of Kings Co., etc.*, 138 N. Y. 115; *People ex rel. Pond v. Supervisors of Monroe Co.*, 47 St. Rep. 457, 20 N. Y. Supp. 97; *rev'd on other grounds*, 47 St. Rep. 702.

18. *People ex rel. Lawrence v. Supervisors of Westchester*, 11 Hun, 308.

An elector has sufficient interest in election matters to require public officers to do their duty in relation thereto.¹⁹ Any elector may present a petition to compel the State Board of Canvassers to disregard a paper purporting to be a return of a board of canvassers, and which does not give the results of a proper legal canvass, and to consider only a proper return, at least in a case where the interested candidate is dead.²⁰ An elector of the city is entitled to maintain a proceeding in mandamus to require the mayor to perform the official duty of appointing city magistrates to fill vacant offices.²¹

Upon the refusal of a county treasurer to issue his warrant for the collection of a tax, etc., any citizen having a common interest in the collection of the tax may have mandamus to compel him to do so.²² A charitable institution which is, by statute, exempted from assessments for local improvements may obtain relief from an illegal assessment by mandamus.²³

Mandamus may be had by any citizen or class of citizens to enforce a law requiring police officers to enforce the law relating to intoxicating liquors.²⁴ Any citizen may petition in mandamus proceedings issued against a board of excise, compelling them to proceed against a saloon-keeper charged with the violation of the statute forbidding the keeping open of saloons on election day.²⁵

It is not necessary that the petitioner should show a special injury to entitle him to proceed by mandamus to compel public officials to remove unlawful incumbrances, obstructions, and nuisances from the public streets.²⁶ Mandamus pro-

19. *People ex rel. Conklin v. Boyle*, 98 Misc. 364, 163 N. Y. Supp. 72; *aff'd*, 178 App. Div. 908, 164 N. Y. Supp. 1107.

The secretary of a county committee of a political party is not legally interested in the appointment of an election commissioner so as to be entitled to compel the board of supervisors to appoint one of the persons certified by the county committee under section 194 of the Election Law. *People ex rel. Mullarkey v. Supervisors of Montgomery*, 180 App. Div. 125, 167 N. Y. Supp. 323.

20. *People ex rel. Daley v. Rice*, 129 N. Y. 453.

21. *Kelly v. Van Wyck*, 35 Misc. 210, 71 N. Y. Supp. 814.

22. *People ex rel. Stephens v. Hal-*

sey, 37 N. Y. 346.

23. *Matter of Brooklyn Children's Aid Society*, 166 App. Div. 852, 151 N. Y. Supp. 720.

24. *Matter of Whitney*, 3 N. Y. Supp. 838.

25. *People ex rel. Welling v. Meakin*, 56 Hun. 626, 10 N. Y. Supp. 161.

26. *People ex rel. Mark Cross Co. v. Ahearn*, 124 App. Div. 840, 109 N. Y. Supp. 249.

A foreign corporation 'doing business in this State may proceed by mandamus to compel city officials to perform their duty to remove obstructions from the streets. *People ex rel. Brown- ing, King & Co. v. Stover*, 145 App. Div. 259, 130 N. Y. Supp. 92; *aff'd*, 203 N. Y. 613.

ceedings may be maintained by a citizen and taxpayer to compel a company having no franchise in the streets to remove electric light poles therefrom.²⁷ A resident and citizen of the city of New York, not claiming special interest or damage, may maintain a proceeding for mandamus against the commissioner of highways to compel the removal of a booth or stand for the sale of newspapers on a sidewalk of the city.²⁸ The fact that a landowner has a private interest in securing the removal of an encroachment upon a public street does not deprive him of the right to compel the municipal authorities to abate the nuisance.²⁹

A taxpayer in the city of New York is entitled to a peremptory mandamus requiring the commissioners of the water supply to allow an inspection of the reports of the engineers of the board relating to the award of a contract where they have let the contract, involving a large amount of money, to a contractor who was not the lowest bidder.³⁰

A private citizen may move for a mandamus to compel public officers to perform a public duty imposed upon them by the Labor Law, although he shows no personal interest in the matter.³¹

Any citizen of a county has a sufficient interest in the publication of the laws to enable him to compel a board of supervisors to designate two newspapers for such publication as required by statute.³²

Any citizen of the State may apply for an order of mandamus to compel a railroad company to construct fences and cattle-guards, as required by statute, when it has failed to do so.³³ An application for mandamus to compel a street-car company to run its cars may be made by any citizen of a city in which the road is located.³⁴ But a private person, who complains of no injury which is not common to the whole community, will not be granted a mandamus compelling a street railway company to exercise its franchise and rebuild a part of its line which it has abandoned.³⁵

27. *People ex rel. Clements v. Williams*, 100 Misc. 569, 166 N. Y. Supp. 560.

28. *People ex rel. Pumpysky v. Keating*, 168 N. Y. 390. See, also, *Hofeler v. Buck*, 110 Misc. 403, 180 N. Y. Supp. 563.

29. *Matter of People ex rel. Foot v. Gross*, 137 App. Div. 77, 122 N. Y. Supp. 135.

30. *Matter of Egan v. Board of Water Supply*, 148 App. Div. 177, 133

N. Y. Supp. 129; *aff'd*, 205 N. Y. 147.

31. *People ex rel. O'Brien v. Van Wyck*, 27 Misc. 439, 59 N. Y. Supp. 134.

32. *People ex rel. Waller v. Supervisors*, 56 N. Y. 252.

33. *People ex rel. Garbutt v. R. & S. L. R. Co.*, 14 Hun, 374.

34. *Loader v. Brooklyn Heights R. R. Co.*, 14 Misc. 208, 35 N. Y. Supp. 996.

35. *People ex rel. Karl v. United*

A citizen of a county, who is put to inconvenience by reason of the nonrepair of a bridge, may petition for a mandamus to compel the board of supervisors to repair the bridge, when they are required to keep the same in repair.³⁶

2. Private citizen to enforce private wrong.

When an application for an order of mandamus is made to secure some personal or private redress, the applicant must be shown to have a personal right in obtaining it before the order can be granted.³⁷ Where the matter does not concern the general public, but is to promote certain private rights, the personal interest of the petitioner in the matter in controversy must be clearly shown to entitle him to maintain the proceeding. Thus, the rector of a church is held to have no such interest in its consolidation with another corporation as to enable him to prosecute, when he has never been authorized by a board of vestrymen so to do.³⁸ But the rector of a church is a proper petitioner to compel the vestrymen to attend a duly called meeting from which they intentionally absent themselves and which cannot be held in their absence.³⁹ The county clerk of the county of New York is not entitled to a peremptory order of mandamus to compel the city comptroller to certify and audit salaries of certain employees in his office, where the county clerk's duty ends with his own certification and transmission of the payroll to the comptroller.⁴⁰ A person acting solely for the benefit of others, and with no personal interest, is not a proper petitioner in mandamus.⁴¹

3. Attorney-General.

Where the people have an interest, the Attorney-General is the proper officer to set the proceedings in effective operation on their behalf.⁴² The Attorney-General may apply for mandamus only to protect some public right or to secure some public interest, and where private interests only are involved the application by the Attorney-General is not proper; in such a case the relief must be applied for by the

Traction Co., 145 App. Div. 645, 130 N. Y. Supp. 477.

36. *People ex rel. Keene v. Supervisors*, 142 N. Y. 277.

37. *People ex rel. Wright v. Common Council of Buffalo*, 16 Abb. N. C. 116.

38. *St. Stephen's Church Cases*, 25 Abb. N. C. 247.

39. *People ex rel. Kenny v. Winans*, 29 St. Rep. 651, 9 N. Y. Supp. 249.

40. *People ex rel. Schneider v. Prendergast*, 172 App. Div. 215, 158 N. Y. Supp. 615.

41. *People ex rel. Simon v. Mayor*, 20 Misc. 189, 45 N. Y. Supp. 900.

42. *People v. N. Y. C. & H. R. R. R. Co.*, 28 Hun, 543.

private parties interested.⁴³ Where a town was bonded for a railroad on condition that a depot should be maintained, at a certain place, it was held that the agreement must be enforced by the town and could not be enforced by a proceeding instituted by the Attorney-General on behalf of the State.⁴⁴

4. Joinder of petitioners.

The relief may be applied for jointly by parties having a common interest, and the chief officers of a city or town may be joined as petitioners.⁴⁵ Where a number of persons are similarly situated, the court will not require separate mandamus proceedings to be instituted. So held, where the relief asked by the petitioner was that an eligible civil service list containing his name be in effect re-established by the vacation of an order revoking the same.⁴⁶ But where awards of damages in taking lands for a road are several and independent, one of the persons to whom damages have been awarded cannot bring mandamus on behalf of himself and the others against the town auditors to compel the auditing of the claims, where there is nothing to show that any of the claimants except the applicant have asked for the payment of the awards, or that they desire the same audited and paid by the town.⁴⁷ The death of one of several copartners prosecuting a mandamus proceeding does not abate the proceeding after the joinder of issue.⁴⁸

B. To whom order is directed.

In general, the order is directed to the person or body whose legal duty it is to perform the required act, as where a corporation is required by law to do a particular act, the mandamus is addressed to that organ of the corporation which is to perform it. It lies to the body upon whom the duty of "putting the necessary machinery in motion" is imposed.⁴⁹ It must be addressed to the person, body, or board who is obliged by law to execute it, or whose duty it is

43. *People v. Rome, etc.*, R. R. Co., 3 St. Rep. 39, 103 N. Y. 95. See, also, *People ex rel. Sherwood v. Bd. of Canvassers*, 129 N. Y. 360.

44. *People v. Rome, etc.*, R. R. Co., 103 N. Y. 95.

45. *People v. Supervisors of Ontario*, 85 N. Y. 324; *People v. Supervisors of Ulster*, 17 Wkly. Dig. 138.

46. *People ex rel. Finnegan v. Mc-*

Bride, 185 App. Div. 482, 173 N. Y. Supp. 43.

47. *People ex rel. Baker v. Morgan*, 97 App. Div. 267, 89 N. Y. Supp. 832.

48. *People v. Supervisors*, 76 N. Y. 228.

49. *People ex rel. Market Com'rs v. Common Council*, 3 Abb. Ct. App. Dec. 506; s. c., 3 Keyes, 86; *People ex rel. v. Throop*, 12 Wend. 183.

to do the thing required.⁵⁰ It is not proper to direct it to an official who has no voice in the performance of the duty.⁵¹ If it is desired to convene a board of supervisors, it may be directed to the chairman and clerk.⁵² In a proceeding against a board of officers not incorporated, the individuals who compose the board should be made respondents.⁵³

Not only may a municipal board, such as the board of police, be made respondents in proceedings by mandamus, but also each individual member of such board may be made respondents as well as the board itself, and in such case each member should make a return thereto.⁵⁴ On an application for a mandamus against a board of aldermen, the individual members are not entitled to be heard separately; it is sufficient that they are represented by the corporation counsel.⁵⁵

When it is uncertain which of two officials is the proper respondent in mandamus, and both of them appear to be authorized to do the acts required to be done, the order may be directed to both of them as respondents.⁵⁶

An order of mandamus may properly be directed to the cashier of a bank to compel him to permit a director to inspect the discount-book, and it need not be directed to the board of directors; the rule being that the order should issue to him who has to do the thing required to be done,

50. *People v. Common Council*, 3 Keyes, 81; *People v. Police Com'rs*, 8 Abb. 41; *People v. Throop*, 12 Wend. 183.

Board of education.—Mandamus to compel payment by the board of education of the city of New York must be directed (before chap. 210, Laws of 1882) to the president and clerk. *People v. Neilson*, 5 T. & C. 64; *aff'd*, 41 Hun, 287.

51. The mayor of a city is not a proper party respondent in proceedings by mandamus against the auditor and the comptroller of said city requiring the latter to audit and certify a claim, even though the mayor would be required to sign the warrants upon the treasury after such audit, where the determination of the amounts due upon said claims by the auditor and comptroller precedes any duties imposed upon the mayor. *People ex rel. Kings Co. Gas Co. v. Schieren*, 89 Hun, 220.

Tax.—As the mayor, aldermen, and

commonalty of the city of New York owe to the State no duty in respect to the payment of a tax, it would be error for the attorney-general to make them parties to a proceeding by mandamus against the comptroller of said city, nor are they entitled to be made parties on their own request. *People v. Myers*, 20 St. Rep. 272, 50 Hun, 470, 3 N. Y. Supp. 365; *aff'd*, 112 N. Y. 676.

52. *People v. Brinkerhoff*, 68 N. Y. 259.

53. *People v. Civil Service Board*, 17 Abb. N. C. 64; *aff'd*, 41 Hun, 287.

54. *People ex rel. McMackin v. Bd. of Police*, 46 Hun, 301; *aff'd*, 107 N. Y. 235.

55. *People ex rel. Pierce v. Cassidy*, 28 Misc. 589, 59 N. Y. Supp. 1112; *aff'd*, 44 App. Div. 399, 60 N. Y. Supp. 703.

56. *People ex rel. Harriman v. Paton*, 20 Abb. N. C. 199.

but it seems that there would be no impropriety in issuing the order to the board of directors as well.⁵⁷

C. Failure of remedy when interested person not a party.

In some cases a petitioner will fail to procure the relief, because a person affected by the decision is not a party to the proceeding. Thus, if the purpose of the proceeding is to determine the title to a public office, and one other than the petitioner is performing the functions of the office and is not a party to the proceeding, the remedy will be denied, and the petitioner will be compelled to assert his rights by action.⁵⁸ A court crier, being in possession of his office, cannot be ousted by mandamus against the judge appointing him without being made a party to the proceeding.⁵⁹

The incumbent in the office of street commissioner of a village, appointed for the term prescribed, is a necessary party to a proceeding for peremptory mandamus to appoint the petitioner.⁶⁰ And, in a proceeding by mandamus under the Civil Service Law to compel the reinstatement of an officer or employee protected by law and illegally removed, the person appointed in the place of the petitioner is a necessary party to the proceeding.⁶¹ But if the appointment in question is merely a temporary one, the appointee need not be made a party to the proceeding.⁶² In mandamus to compel the reinstatement of petitioner to an office abolished in bad faith, the appointee of the new office created in the place of the one abolished is not a necessary party, but, in mandamus to compel the transfer of petitioner to the newly-created position, the appointee is a necessary party.⁶³

The constitutionality of a change in classification cannot be attacked in a proceeding by mandamus brought against the mayor of the city to which the civil service commissioners of the city and State are not parties.⁶⁴

The county treasurer is not a necessary party to mandamus issued on behalf of a village to compel a board of

57. *People v. Throop*, 12 Wend. 187.

58. *People ex rel. Ballou v. Wendell*, 57 Hun, 362, 32 St. Rep. 129, 10 N. Y. Supp. 587.

59. *People v. Wendell*, 57 Hun, 362, 10 N. Y. Supp. 587.

60. *People ex rel. Conlin v. Village of Dobbs Ferry*, 63 App. Div. 276, 71 N. Y. Supp. 578.

61. *People ex rel. Michales v. Ahearn*, 111 App. Div. 741, 98 N. Y.

Supp. 492; *Matter of Cooper v. Paris*, 73 Misc. 244, 130 N. Y. Supp. 1043.

62. *People ex rel. Mesick v. Scanell*, 63 App. Div. 243, 71 N. Y. Supp. 383.

63. *Matter of Jones*, 80 App. Div. 167, 80 N. Y. Supp. 420.

64. *People ex rel. Huber v. Adam*, 116 App. Div. 613, 101 N. Y. Supp. 925.

supervisors to correct their apportionment of an assessment upon bank stock.⁶⁵

An order of mandamus to the superintendent of public works to award a contract to the petitioner, who has bid thereon, will not be issued in a case where the successful bidder, to whom the contract has already been awarded, is not made a party to the proceeding.⁶⁶

In a proceeding against the supervisor of a town to compel the issuing of bonds in payment for work, where payment has been refused because the bonds had not been issued, the town treasurer and clerk, although required by law to sign the bonds, are not necessary parties.⁶⁷

In proceedings against a board of assessors, requiring them to rectify errors, the collector of taxes is properly joined in the proceeding in order to restrain him from collecting the illegal tax.⁶⁸ A purchaser at a tax sale is not a necessary party to a proceeding by mandamus to compel a county clerk to record a deed or satisfaction piece affecting the title.⁶⁹ And such a purchaser, who has not received a conveyance, is not a necessary party to proceedings against the registrar to compel him to receive taxes and cancel the sale.⁷⁰ Where lands sold at a tax sale were conveyed previous to the enactment of the General Tax Law, which authorized an application for cancellation to be made by the owner of such lands at the time of sale, mandamus to compel cancellation will not lie on behalf of the owner when the purchaser is not made a party to the proceeding.⁷¹

D. Substitution of officials.

Where, during the pendency of the proceeding, the term of office of the officer to whom the order is directed expires, or the officer otherwise vacates the office, the successor may generally be substituted and the proceedings continued.⁷² Where the proceeding is against an officer of a municipality for the enforcement of a right of the petitioner against the

65. *People ex rel. Village of Cobleskill v. Supervisors*, 140 App. Div. 769, 126 N. Y. Supp. 259.

66. *Matter of Hilton Bridge Constr. Co.*, 13 App. Div. 29, 43 N. Y. Supp. 99.

67. *People ex rel. Dady v. Supervisors*, 154 N. Y. 381.

68. *People ex rel. Nostrand v. Wilson*, 119 N. Y. 518.

69. *Matter of Application of Clementi v. Jackson*, 92 N. Y. 591.

70. *People ex rel. Cooper v. Registrar of Arrears*, 114 N. Y. 22.

71. *People ex rel. Staples v. Sohmer*, 206 N. Y. 39; *aff'd*, 150 App. Div. 8, 134 N. Y. Supp. 543. Compare *People ex rel. National Park Bank v. Metz*, 141 App. Div. 600, 126 N. Y. Supp. 986.

72. *People ex rel. Collins v. Ahearn*, 146 App. Div. 135, 130 N. Y. Supp. 497.

municipality, the proceeding does not abate by the resignation, removal, or expiration of term of the officer, but it may be enforced against his successor or successors.⁷³ Where the proceeding is brought to enforce the performance of an official corporate duty resting upon the officer as such, and not involving the exercise of discretion, it will not abate by the expiration of the term of office of the incumbent, and the performance of the duty will devolve upon his successor.⁷⁴ A proceeding by mandamus by one in the civil service of a city to compel his reinstatement does not abate upon the resignation from office of the officer proceeded against, but the proceeding may be continued and enforced against his successor.⁷⁵ A change in the personnel of a board, since its refusal to act, is no reason for denying a mandamus where the purpose of the proceeding is to require the board as such to act.⁷⁶ A final order of mandamus may issue, although the term of office of the supervisors, who made an erroneous apportionment, has expired, if in fact the alternative order was issued while they were in office, for the petitioner, having a clear right against the county, may enforce that right either against the members of the original board or their successors. But, before the final order issues, it may be necessary to substitute the members of the new board as parties.⁷⁷

But mandamus does not reach the office and cannot be directed to it, and, where the officer who removed the petitioner thereafter died, a demand for reinstatement must be made upon his successor before the writ will issue.⁷⁸ If notice of an intention to continue the proceeding against the successors in office of the original respondents is requisite, a notice to the corporation counsel, who has always had charge of the matter, may be sufficient.⁷⁹

73. *People ex rel. LaChicotte v. Best*, 187 N. Y. 1. Compare *People ex rel. Hatch v. Lantry*, 88 App. Div. 583, 85 N. Y. Supp. 193.

74. *People ex rel. Dannatt v. Comptroller*, 77 N. Y. 50; *People ex rel. Cunliffe v. Cram*, 30 Misc. 561, 63 N. Y. Supp. 1027.

75. *People ex rel. La Chicotte v. Best*, 187 N. Y. 1.

76. *People ex rel. Slater v. Smith*, 83 Hun, 437, 64 St. Rep. 419, 31 N. Y. Supp. 749. In *People ex rel. Lazarus v. Coleman*, 99 App. Div. 88, 91 N. Y. Supp. 432, it is held that where there has been a change in the board consisting of three members and a ma-

jority of the members composing the board when action was taken sought to be reviewed still remain members of it, the proceeding should not be said to have abated but opportunity should be afforded to the relator, if so advised, to move to bring in as a party the successor to the defendant whose term of office has expired.

77. *People ex rel. Village of Cobleskill v. Supervisors*, 140 App. Div. 769, 126 N. Y. Supp. 259.

78. *People ex rel. Taylor v. Welde*, 61 App. Div. 580, 70 N. Y. Supp. 869.

79. *People ex rel. Cunliffe v. Cram*, 30 Misc. 561, 63 N. Y. Supp. 1027.

As the power to appoint and remove superintendents of highways in the city of New York is vested solely in the borough presidents, neither the city nor the commissioner of public works can be substituted as a party defendant in mandamus to compel the reinstatement of such superintendent where the borough president who removed him has been ousted from office.⁸⁰

Where proceedings by mandamus are commenced against a mayor in his official capacity and not against him individually, the proceeding continues against his successor in office. In determining whether the order is to operate upon the office through the incumbent, or only upon the incumbent, the test seems to be whether the duty enjoined would be obligatory on the successor in office. In such a case, the order may issue against the office by name, without the name of the incumbent appearing therein.⁸¹

E. Intervention of other parties.

Under section 1332, after the joinder of issue by a return, statutory provisions relating to actions are generally applicable to mandamus proceedings. It is thought that then a third party may be allowed to intervene under section 193 of the Civil Practice Act.⁸² But the court may deny such an application as a matter of discretion,⁸³ and this discretion will not be reviewed in the Court of Appeals.⁸⁴

The holder of a liquor tax certificate will not be allowed to intervene in mandamus proceedings, wherein inspectors of election of a town district have been ordered to file a tally sheet of the votes cast on the submission of the question of the right to sell liquors. The reason for this holding is that the return filed by the inspectors cannot prejudice the holder of such certificate, and the result of the vote must be determined in other proceedings.⁸⁵ But it has been held that, where a candidate for election was proceeding by mandamus under the Reform Ballot Law, section 31 (L. 1890, chap. 262), that the opposing candidate should be permitted to intervene so as to protect his rights.⁸⁶

80. *People ex rel. Collins v. Ahearn*, No. 2, 137 App. Div. 265, 121 N. Y. Supp. 970.

81. *People ex rel. Wooster v. Maher*, 64 Hun, 413, 19 N. Y. Supp. 758; *rev'd on other grounds*, 141 N. Y. 330.

82. *In re Bohnet v. The Mayor, etc.*, of New York, 150 N. Y. 279. Compare *Steingoetter v. Bd. Canvassers Erie Co.*, 18 St. Rep. 799, 2 N. Y. Supp. 561.

83. *Matter of Bohnet*, 8 App. Div. 293, 40 N. Y. Supp. 1140; *appeal dismissed*, 150 N. Y. 279.

84. *In re Bohnet v. Mayor of New York*, 150 N. Y. 279.

85. *People ex rel. Henness v. Douglass*, 143 App. Div. 750, 128 N. Y. Supp. 547.

86. *People ex rel. Hasbrouck v. Supervisors*, 135 N. Y. 528.

The fact that in mandamus by a police captain to secure reinstatement to office, where the title was in question, the present incumbent intervened does not deprive him of the right to assert that the remedy selected by the petitioner was an improper one.⁸⁷

ARTICLE V.

THE ORDER.

A. By what court granted.

1. Civil Practice Act, § 1317. Mandamus orders granted at Special Term.

Except where special provision therefor is otherwise made in this article, a mandamus order can be granted only at a special term of the supreme court held within the judicial district embracing the county wherein an issue of fact joined upon an alternative mandamus order is triable, as prescribed in this article.

2. Civil Practice Act, § 1318. Mandamus order when granted by Appellate Division.

A mandamus order may be granted at a term of the appellate division of the supreme court only, directed generally against any judge holding, or to hold, a special term of the same court, or directed against one or more judges of the same court named therein, in any case where such order may be issued out of the supreme court against any other court, or a judge thereof. Such order can be granted only at a term of the appellate division of the judicial department embracing the county wherein the action is triable or the special proceeding is brought, in the course of which the matter sought to be enforced by the mandamus order originated, unless that term is not in session; in which case, it may be granted at a term of the appellate division of an adjoining judicial department.

3. Common law.

The power to issue the order of mandamus was at common law lodged exclusively in the Court of King's Bench, because of the general superintendence it exercised over all inferior jurisdictions, and, unless conferred by statute, could be exercised by no other court in the realm. It was one of the prerogative orders, and, if any trace is to be found of an attempt by any other court to exercise the jurisdiction in the absence of a special statute conferring the authority, it was in the nature of a usurpation.⁸⁸ The power to issue it in England resided exclusively in the Court of King's Bench until 1854, when it was vested in all the superior

87. *People ex rel. McLaughlin v. Bd. of Police Com'rs of City of Yonkers*, 174 N. Y. 450, rev'g 79 App. Div. 32, 79 N. Y. Supp. 710.

88. *Audley v. May*, Poph. 176, 2 Bl. Com. 110; *Moses on Mandamus*, 16; *People ex rel. Ryan v. Greene*, 58 N. Y. 296.

courts of the kingdom.⁸⁹ The jurisdiction resided in the court and not in the individual judges, and the order was issued in term and not in vacation.⁹⁰

4. Special Term.

Section 1318 contains the only provision which permits any tribunal, other than the Special Term of the Supreme Court, to grant the order of mandamus. This section, together with section 1317, are the only statutes conferring jurisdiction to issue the order, and the jurisdiction thus conferred is exclusive.⁹¹ The order cannot be granted at chambers.⁹² And this seems to be true even in the first judicial district, despite the provisions of section 116 of the Civil Practice Act, permitting motions in such district to be made to a judge out of court.⁹³ When, before amendments to the Code of Civil Procedure, an alternative order could be granted without notice, it was thought proper to grant the order without notice at an adjourned term.⁹⁴ But, as the order cannot now be granted without notice, it is doubtful if it can be granted at such a term. When an issue of fact upon an alternative order of mandamus has been referred as provided in section 1333, such referee is empowered to hear and determine the entire controversy between the parties, including the right to the peremptory order of mandamus, notwithstanding the provisions of the Practice Act directing that the order should be issued either by a Special or a General Term of the Supreme Court.⁹⁵

The Special Term is not authorized to review the power of the Appellate Division to direct the issuance of an alternative order of mandamus, upon the final hearing in the proceeding.⁹⁶

The provisions of section 1317, that an order of mandamus can be granted only at a Special Term, apply only to the original application for the order, and the section does not

⁸⁹. *People ex rel. McMahon v. The Bd. of Excise*, 3 St. Rep. 253.

⁹⁰. *People ex rel. Lower v. Donovan*, 29 Abb. N. C. 175.

⁹¹. Jurisdiction of county court to issue peremptory writ of mandamus under the Drainage Law, see *People ex rel. Dunphy v. Chaney*, 171 App. Div. 303, 156 N. Y. Supp. 1035.

⁹². *Matter of Manning*, 71 Hun, 236, 24 N. Y. Supp. 1039, 54 St. Rep. 562; *People ex rel. Gaylord v. Suprs. Schoharie County*, 40 St. Rep. 66, 15 N. Y.

Supp. 795.

⁹³. *People ex rel. Lower v. Donovan*, 135 N. Y. 80-82, 29 Abb. N. C. 176, 47 St. Rep. 836, rev'g 63 Hun, 512, 45 St. Rep. 141, 18 N. Y. Supp. 501.

⁹⁴. *People ex rel. Fulton v. Suprs. Oswego*, 50 Hun, 107, 19 St. Rep. 26, 15 Civ. Pro. 383, 3 N. Y. Supp. 752.

⁹⁵. *People ex rel. Krohn v. Miller*, 39 Hun, 559, 9 Civ. Pro. 149.

⁹⁶. *People ex rel. Lazatus v. Coleman*, 57 Misc. 57, 107 N. Y. Supp. 957.

limit the effect of section 584 of the Civil Practice Act, and on appeal the Appellate Division may reverse, affirm, or modify the order.⁹⁷

5. Proper county.

Section 1317 provides that, except where special provision is otherwise made, an order of mandamus can be granted only at a Special Term of the Supreme Court held within the judicial district embracing the county wherein the issue of fact joined upon the alternative order is triable; but section 1334 provides that such issue is triable in the county wherein it is alleged in the petition that the material facts took place, unless the court directs it to be tried elsewhere.⁹⁸ It would, therefore, seem to follow that, unless the court especially directs the issue to be tried elsewhere, the application for the order must be made in the district embracing the county where the material facts took place. Consequently, the district in which the application for mandamus should be made is dependent, not upon the location of the office of the public official against whom the order is granted, but rather upon the place where the material facts occurred. In other words, the proper place in which to make application is to be resolved by determining in what county or place the issue of facts joined upon an alternative order of mandamus, if granted, would be triable, and the place where such issue would be triable is dependent upon the place where the material facts occurred.⁹⁹

There is, however, authority for the proposition that an order to show cause why a peremptory order will not issue may be granted outside of the district, if it is returnable within the proper district.¹

It has been held that an application for mandamus, requiring the State Comptroller to correct or reduce any assessment-roll containing assessments of forest lands against the State should be made within the third judicial district,² and that an application for a mandamus to compel the Superintendent of Banking to certify to a reward for information as to violations of chapter 326 of the Laws of 1895, in rela-

97. *People ex rel. Kavanaugh v. Grady*, 20 App. Div. 27, 46 N. Y. Supp. 645.

98. *People v. Myers*, 50 Hun, 479; 20 St. Rep. 270, 3 N. Y. Supp. 366; aff'd without opinion, 112 N. Y. 676.

99. *People ex rel. Davenport v. Rice*, 68 Hun, 24, 52 St. Rep. 51, 22 N. Y.

Supp. 631.

1. *People ex rel. Crouse v. Supervisors of Fulton Co.*, 70 Hun, 562, 53 St. Rep. 798, 24 N. Y. Supp. 399.

2. *People ex rel. Town of Brighton v. Williams*, 145 App. Div. 8, 129 N. Y. Supp. 457.

tion to associations for loaning money on personal property, must be made in the county of Albany.³

B. Application for peremptory order in first instance.

1. Civil Practice Act, § 1319. Peremptory mandamus order in first instance.

A peremptory mandamus order may be granted in the first instance where the applicant's right to the mandamus order depends only upon questions of law, and notice of the application has been given to a judge of the court or to the corporation, board, or other body, officer, or other person, against which or whom the order is directed. The notice must be served at least eight days before the application is heard; unless a shorter time is prescribed by an order to show cause made, where the application is to the special term, by the court or a judge thereof; or where the application is to the appellate division, by the appellate division or a justice of the appellate division of that judicial department. In such a case the application must be founded upon a verified petition, which may be accompanied by other written proofs, a copy of which must be served with the notice or order to show cause. Where the court, board or other body to be served consists of three or more members, the notice or order to show cause, and the papers upon which the application is to be made, may be served as prescribed for service of an alternative mandamus order. Except as prescribed in this section, or by special provision of law, a peremptory mandamus order cannot be granted until an alternative mandamus order has been granted and duly served, and the return day thereof has elapsed.

2. When entitled to peremptory order in first instance.

As stated in section 1319, a peremptory order of mandamus is granted in the first instance when the petitioner's right depends only upon questions of law.⁴ After the proof

3. *People ex rel. Shook v. Kilburn*, 28 Misc. 679, 59 N. Y. Supp. 1052.

4. *People ex rel. Hasbrouck v. Supervisors*, 135 N. Y. 522; *In re Haebler v. N. Y. Produce Exchange*, 149 N. Y. 414; *People ex rel. Croft v. Manhattan Hospital*, 5 App. Div. 249, 39 N. Y. Supp. 158; *People ex rel. O'Brien v. Cruger*, 12 App. Div. 536, 42 N. Y. Supp. 398; *People ex rel. Canavan v. Collins*, 20 App. Div. 342, 46 N. Y. Supp. 727; *People ex rel. Crouse v. Supervisors*, 70 Hun, 562, 53 St. Rep. 798, 24 N. Y. Supp. 399.

The object of the peremptory order is not to determine controversies, but simply to enforce a clear specific legal right, when such right depends only upon questions of law. *People ex rel. Hoyt v. Bd. of Trustees*, 19 Misc. 673, 44 N. Y. Supp. 471.

Transfer of public funds.—Where a

statute provides that a public fund shall be transferred from one public official to another and no substantial dispute on any question of fact is involved, the transfer may be compelled by a peremptory mandamus. *Matter of Bristol*, 93 Misc. 626, 158 N. Y. Supp. 503; *aff'd*, 173 App. Div. 545, 160 N. Y. Supp. 410.

Liquor Tax Law.—A peremptory writ of mandamus was granted in the first instance to compel the commissioner of public safety, chief of police and his subordinates to enforce the observance of the provisions of the Liquor Tax Law with respect to obstructions in windows of saloons. *People ex rel. Brown v. Kennedy*, 102 Misc. 450, 169 N. Y. Supp. 1022.

Grant of franchise.—Section 74 of the Greater New York charter not prescribing the manner in which an ordi-

is all in, and it appears that no material fact is in dispute, and the right of the applicant to the relief depends upon the decision of questions of law, the peremptory order may issue, and there is no need of the alternative order.⁵ In other cases it is not granted until after an alternative order has been issued.⁶ It is issued only when the facts upon which the petitioner relies are undisputed.⁷ A peremptory order can

nance granting a franchise or right to use any of the city streets in the borough of Manhattan shall be brought to a first reading; the situation depends upon whether there was a first reading or not, in accordance with the usual and orderly procedure of the board of aldermen and with their understanding of the fact, agreeably to the rules of procedure adopted by them, and where an issue of fact as to the procedure which is to lead to the orderly bringing of such an ordinance to a first reading, upon which the right to a peremptory mandamus directing the board of aldermen to refer to the board of estimate and apportionment an ordinance purporting to grant consent, permission, or authority to lay, erect, and construct suitable wires or other conductors on, over, or under the streets of the city of New York in the borough of Manhattan for conducting and distributing electricity, materially depends, it cannot be held as matter of law that there was a first reading and only an alternative writ may issue. *Matter of Manhattan & Bronx El. Co.*, 47 Misc. 209, 95 N. Y. Supp. 851.

5. *People ex rel. Bantel v. Morgan*, 20 App. Div. 48, 46 N. Y. Supp. 898.

6. *People ex rel. Corrigan v. Mayor*, 149 N. Y. 223; *People ex rel. Giles v. Klauder-Weldon D. M. Co.*, 180 App. Div. 149, 167 N. Y. Supp. 429; *People v. Becker*, 3 St. Rep. 202.

Board of plumbers.—When the papers used upon a motion for a writ of mandamus requiring the mayor of a city to appoint an examining board of plumbers, pursuant to the provision of the City Law, disclose the existence of a serious question of fact as to whether there reside in the city any

persons eligible for appointment to two of the places on the board, the court should not criticise the opposing affidavits too closely and grant a peremptory mandamus on the ground that they did not entitle the defendant to litigate that question, but should, in its discretion, order an alternative mandamus in order that the question of fact may be determined. *People ex rel. Van Deren v. Moore*, 78 App. Div. 28, 79 N. Y. Supp. 7.

7. *People ex rel. Canavan v. Collins*, 20 App. Div. 342, 46 N. Y. Supp. 727; *People ex rel. Doran v. Harwick*, 48 App. Div. 559, 62 N. Y. Supp. 897; *People ex rel. McAniney v. Vandervoort*, 52 App. Div. 283, 65 N. Y. Supp. 100; *Matter of Kenny*, 52 App. Div. 385, 65 N. Y. Supp. 204; *People ex rel. McElwee v. Produce Exchange Trust Co.*, 53 App. Div. 93, 65 N. Y. Supp. 926; *People ex rel. Hupfel's Sons v. Cushman*, 95 App. Div. 598, 88 N. Y. Supp. 1022; *People ex rel. Dunn v. Metz*, 115 App. Div. 269, 100 N. Y. Supp. 913; *Matter of Hitchcock*, 157 App. Div. 328, 142 N. Y. Supp. 247; *Matter of Rexford Flats Bridge Co.*, 168 App. Div. 558, 153 N. Y. Supp. 154; *People ex rel. Hatheway v. Fromme*, 30 Misc. 323, 63 N. Y. Supp. 583; *aff'd*, 67 App. Div. 618, 73 N. Y. Supp. 1144, 170 N. Y. 62; *People ex rel. Katz v. Erste Ulaskowcer Kranken Unterstützungs Verein*, 56 Misc. 304, 57 Misc. 62, 106 N. Y. Supp. 922; *St. Stephen Church Cases*, 25 Abb. N. C. 241; *Blumenthal v. Washington Heights Hospital*, 153 N. Y. Supp. 940.

Payment for State highway contract.

—Where the allegations of a petition by a contractor that it has duly performed its contract for the construction of a State highway; that said

only be granted in the first instance to obtain decision of questions of law, and never where there is a dispute as to material facts, or where two opposite inferences may be

highway has been accepted by the State, and that there is a certain balance due, are controverted by an affidavit of the State Commissioner of Highways, to the effect that said contract has not been duly performed; that the acceptance of the highway was void; for the reason that it was based upon insufficient and incorrect information and was subsequently rescinded; and that alleged defects in the highway, made it practically valueless within one year of its alleged completion, a peremptory order of mandamus should not be issued compelling the payment of the amount due under the contract. *People ex rel. B. D. Pierce, Jr., Co. v. Sohmer*, 167 App. Div. 437, 153 N. Y. Supp. 195.

Drainage commissioners.—Where, on an application for a peremptory mandamus an allegation by the petitioners that they have been duly appointed drainage commissioners is put in issue by a positive denial, there is no authority to issue a peremptory writ. *People ex rel. Dunphy v. Chaney*, 171 App. Div. 303, 156 N. Y. Supp. 1035.

Discharged veteran.—Where the answer to a petition for mandamus to compel the petitioner's reinstatement in office puts in issue the allegation that the petitioner is an honorably discharged veteran and denies his discharge from employment, and certain allegations of bad faith in relator's removal, the applicant is entitled to the alternative and not the peremptory order. *Pratt v. Phelan*, 67 App. Div. 349, 73 N. Y. Supp. 823.

County committee.—On application for mandamus to restore to membership in the county committee of a political party relators, claiming to have been duly elected thereto and thereafter expelled therefrom, the validity of their election being absolutely denied, even if the county committee, or the court upon such application, have power to pass upon the

validity of the election, a peremptory mandamus should not be granted, but at most an alternative order may be issued. *People ex rel. Hahn v. Republican Co. Committee of N. Y. Co.*, 124 App. Div. 427, 108 N. Y. Supp. 1051; *aff'd*, 192 N. Y. 568.

Regulation of lunacy commission.—The peremptory mandamus can only be had upon motion where the applicant's right depends upon questions of law, and if the decision of any disputed question of fact should be necessary, the proper course is for the court to direct an alternative writ to issue, so that the defendant may make a return thereto, and so that the issue of fact raised upon that return can be tried by a jury. However, if the facts raised by the opposing affidavits involve only a question of law, such as the reasonableness of a regulation adopted by the State Commission of Lunacy, the matter will be determined as a question of law upon the motion, and evidence will not usually be received upon the question. But if the necessity and reasonableness of such a regulation should depend upon the existence of particular facts of which the court cannot take judicial notice, then the matter will be left to be decided as a question of fact upon proper evidence. *People ex rel. Croft v. Manhattan Hospital*, 5 App. Div. 249, 39 N. Y. Supp. 158.

Civil Service Law.—Where one seeks by mandamus to be reinstated to a position which has been abolished, the question whether such position was in good faith abolished, or whether its abolishment was colorable only, is a question of fact, and a peremptory order will be denied; in such case the alternative order should issue. *People ex rel. Vanderhoff v. Palmer*, 3 App. Div. 389, 38 N. Y. Supp. 651.

Transfer book.—A question of fact is raised on an application for a peremptory order to compel the transfer

drawn from evidence offered.⁸ Where important allegations of fact in the moving papers are denied, a peremptory order cannot be granted in the first instance.⁹ Even where, under the circumstances, the denial of the peremptory order will make the remedy unavailing, it will not issue where a question of fact is raised, but the petitioner can only have the alternative order.¹⁰ It is granted when the facts of the moving affidavit are admitted by defendant, and no other facts are set forth which would be a good defense by way of answer, if the petition was considered as a complaint in an action at law.¹¹ Where, according to well-settled rules of law, the petitioner is entitled on all the papers to all the relief asked for, the peremptory order must issue in the first instance. It is sufficient that no defense appears on the papers.¹² In a case where an alternative order would ordinarily be required, the parties, by agreeing to a statement of facts, may proceed thereon by motion for a peremptory order.¹³

agent of a foreign corporation to exhibit the transfer-book to a stockholder, when the transfer agent denies that he was such; in such case the alternative order must issue. *People ex rel. Daniels v. Crawford*, 68 Hun, 547, 22 N. Y. Supp. 1025.

License to sell milk.—Where the applicant was charged with selling or offering for sale adulterated milk, and his permit to sell revoked by the board of health of New York city, if he wished to compel the board to rescind their action and to show that he was not guilty of the acts charged and a proper person to sell milk, his remedy was by an alternative and not a peremptory mandamus. *People ex rel. Lodes v. Dept. of Health of City of New York*, 189 N. Y. 187, rev'g 117 App. Div. 856, 103 N. Y. Supp. 275, aff'g 51 Misc. 190, 100 N. Y. Supp. 788.

Extra work to contract.—Where a contractor, who had been fully paid for work done under a contract with the city, assigned his claim for extra work to relator, who applied for a peremptory mandamus to enforce it, and many of the material allegations of the moving papers were denied by affidavits asserting that all the work for which

payment was claimed had been fully paid for under the terms of the contract, and the claim had never been adjudged valid or audited, it was held error to grant a peremptory writ, and that the question whether relator should be allowed an alternative writ must be left to the sound discretion of the trial court. *People ex rel. Dady v. Coler*, 171 N. Y. 373, dism'g 69 App. Div. 409, 75 N. Y. Supp. 37.

8. *People ex rel. Kelsey v. N. Y. Medical School*, 29 App. Div. 245, 51 N. Y. Supp. 420.

9. *People ex rel. Breckenridge v. Scannell*, 25 Misc. 619, 56 N. Y. Supp. 117.

10. *People ex rel. Hoffman v. Tedcastle*, 12 Misc. 470, 68 St. Rep. 135, 34 N. Y. Supp. 257; *Matter of Loader*, 14 Misc. 213, 35 N. Y. Supp. 996.

11. *People ex rel. Hasbrouck v. Supervisors*, 135 N. Y. 522; *In re Haebler v. N. Y. Produce Exchange*, 149 N. Y. 418.

12. *People ex rel. v. Supervisors of Otsego*, 51 N. Y. 401.

13. *People ex rel. v. N. Y., L. E. & W. R. R. Co.*, 47 Hun, 43; *disapproved*, 24 Abb. N. C. 161.

The peremptory order will not issue in the first instance, unless it appears that the applicant has a clear and unquestioned legal right to the relief;¹⁴ and, when it rests in any substantial doubt, or the facts upon which it depends are in any essential respect controverted by affidavit, it will not be granted.¹⁵ The order should not issue if the answer alleges impossibility of performance.¹⁶

3. Practice on application.

The practice in reference to the issuance of a peremptory order is strictly defined by section 1319 of the Civil Practice Act, and must be pursued before the court can acquire jurisdiction to exercise this extraordinary power.¹⁷ In case of no necessity for early action, the usual eight-day notice of motion is given for any Special Term in the district. In case time is essential, an order to show cause is obtained upon showing in the moving papers that it is necessary that the motion should be heard at an earlier date. The matter then comes up on the petition and affidavits made and served with the order to show cause, and, in case no issue of fact is made, it becomes a question of law whether, upon the plaintiff's own showing, he is entitled to the order, and, in case he is so entitled, a peremptory order issues directing

14. *Herrmann v. O'Brien*, 138 App. Div. 780, 123 N. Y. Supp. 752; *People ex rel. Schwager v. MacLean*, 25 Abb. N. C. 470, 11 N. Y. Supp. 851.

15. *People ex rel. v. Supervisors*, 64 N. Y. 600; *People ex rel. v. Wendell*, 71 N. Y. 171; *People ex rel. N. Y. Exchange Bank v. Stupp*, 49 Hun, 544, 2 N. Y. Supp. 537, 18 St. Rep. 500.

Members of the board of health of the city of New York are administrative not judicial officers. It was not intended by section 1173 of the charter (L. 1901, chap. 466), providing that their acts shall be "regarded as in their nature judicial," to make them judicial officers, but simply to create a presumption that their acts were legal. Permits to sell milk granted by them are not property in any legal or constitutional sense, but are mere revocable licenses; their revocation is an administrative not a judicial act and may be effected without notice and an opportunity to be heard and is not reviewable by appeal or certiorari; if

the revocation is arbitrary or unreasonable, the remedy of the licensee is not by a peremptory but by an alternative mandamus. *People ex rel. Lodes v. Dept. of Health*, 189 N. Y. 187, rev'g 117 App. Div. 856, 103 N. Y. Supp. 275.

Payment for city contract.—In opposition to a motion for a peremptory mandamus, the comptroller submitted an affidavit that the applicant was not entitled to the sum claimed, and among other things that he had not complied with the requirements of the Labor Law, and had compelled or permitted his employees to work more than eight hours a day; held, that the motion was properly denied, under the rule that the applicant must establish a clear legal right. *People ex rel. Lentilhon v. Coler*, 61 App. Div. 223, 70 N. Y. Supp. 482; *dism'd*, 168 N. Y. 6.

16. *Public Service Com. v. International Ry. Co.*, 224 N. Y. 631.

17. *People ex rel. Del Mar v. St. Louis & S. F. R. R. Co.*, 47 Hun, 544.

the act to be performed. The only alternative to the defendant then is to perform the act and so return to the court. In that case very frequently no return is ever made, as the result sought to be attained is accomplished and the proceeding is abandoned, the petitioner having no further interest in pressing the matter. On the other hand, in case the defendant wishes to appeal, he applies for a stay of proceedings, and no return is necessary, as the matter goes up for argument on the papers before the Special Term. A return is proper where the order is obeyed, setting out that fact, as also a return may be filed showing the pendency of an appeal and stay thereon. So, in case the order is denied, the petitioner may appeal, and the matter comes up before the Appellate Division as to whether or not the Special Term should have issued the order. But in case the facts are disputed by defendant, upon the coming on of the motion, a resort must be had to the alternative order.¹⁸

The requirements of the Civil Practice Act, that a copy of the papers upon which the application is founded must be served with the order to show cause, is a substantial one, as these papers are in the nature of a complaint, to which the respondent is required to answer or demur upon the return day of the order, and hence must be served in order that the respondent may be apprised of their contents. Upon the hearing, the consideration of affidavits not served is error,

18. See *People ex rel. Crouse v. Supervisors*, 70 Hun, 562, 53 St. Rep. 798, 24 N. Y. Supp. 399, wherein Herrick, J., summarized the practice under mandamus: "A practice has grown up based upon the common-law practice of applying to the court or a judge in chambers upon petition or affidavit, for an order requiring the person, officer, or board to whom it is directed to do the thing asked for by the relator or to show cause at a Special Term why a mandamus should not issue compelling the person, officer, or board to do the thing specified in the order; then, upon the return day, if the thing has not been done and there is no dispute as to the facts, a peremptory mandamus is issued in the form required by the Code; if the facts are disputed, an alternative writ of mandamus is granted in the form and manner and returnable as prescribed by chapter 16, title 2, article 4, of the Code of Civil

Procedure. This practice is convenient. The order to show cause takes the place of and is in fact a notice, and in many instances results in bringing the controversy to a termination much more quickly than if an alternative mandamus was issued in the first instance returnable in twenty days after the service thereof, as required by section 2072 of the Code. This practice enables parties to move promptly to obtain the relief they seek, it affords the party proceeded against an opportunity to comply with the demands of the relator if he has no defense in fact or law. . . . If, upon the hearing of such order to show cause, there is no dispute as to the facts, but simply a question of law, and a peremptory mandamus is issued, I think it comes within section 2070 of the Code, the order to show cause having fulfilled all the offices of, and being, in fact, a notice of, the application."

if properly objected to, but if no objection be made the error will be deemed to have been waived.¹⁹ A peremptory order issued without notice to the board of canvassers of election must be vacated under section 1319, where no notice of the application for the order has been given as required by such section.²⁰

All that section 1319 is intended to accomplish is to authorize the court, where a proceeding has been properly commenced, to grant the order in the first instance where there is no dispute of material facts, and the right to the relief depends purely upon a question of law. It does not do away with the necessity of conforming to the regular rules of practice outlined by the Civil Practice Act in the commencement of the action or special proceeding.²¹

4. Answering papers taken as true.

Upon a motion for a peremptory mandamus, if opposing affidavits are read which conflict with the petition, the right to the relief must be determined upon the assumption that the averments of the opposing affidavits are true, and, if the petitioner desires to controvert or avoid the statements made in the opposing affidavits, he should take an alternative order, so that the questions of fact can be tried. Under this rule the statements of the answering affidavits, in so far as they conflict with those served in behalf of the petitioner, must be regarded as true.²² If the petitioner, notwithstanding the

19. *People ex rel. Del Mar v. St. Louis & S. F. R. R. Co.*, 47 Hun, 544.

20. *People v. Board of Supervisors Dutchess Co.*, 18 N. Y. Supp. 302.

21. *People ex rel. Doran v. Harwick*, 48 App. Div. 559, 62 N. Y. Supp. 897.

22. *People ex rel. v. Richards*, 99 N. Y. 620; *People ex rel. O'Sullivan v. N. Y. Law School*, 68 Hun, 120, 22 N. Y. Supp. 663, 52 St. Rep. 16; *People ex rel. O'Brien v. Cruger*, 12 App. Div. 537, 42 N. Y. Supp. 398; *People ex rel. Del Mar v. St. Louis & S. F. Ry. Co.*, 47 Hun, 544; *People ex rel. Sickels v. Becker*, 3 St. Rep. 206; *People ex rel. Hasbrouck v. Supervisors*, 135 N. Y. 528, 48 St. Rep. 536; *People v. Suprs. of Monroe*, 65 Hun, 296, 47 St. Rep. 480, 20 N. Y. Supp. 97; *Matter of Kline*, 17 Misc. 675, 39 N. Y. Supp. 873; *Matter of McDonald & Co.*, 16 Misc. 304, 39 N. Y. Supp. 367; *People*

ex rel. Weed, Parsons & Co. v. Palmer, 14 Misc. 41, 35 N. Y. Supp. 222; *Matter of Loader*, 14 Misc. 208, 35 N. Y. Supp. 996; *Matter of Loftus*, 41 St. Rep. 357, 16 N. Y. Supp. 327; *People ex rel. Leerburger v. M. R. F. L. Assoc.*, 15 Misc. 333, 73 St. Rep. 315, 37 N. Y. Supp. 617; *Matter of Grady*, 15 App. Div. 504, 44 N. Y. Supp. 578; *People ex rel. McGovern v. Trustees of Penn Yan*, 2 App. Div. 32, 37 N. Y. Supp. 535, 73 St. Rep. 151; *aff'd*, 153 N. Y. 643; *People ex rel. O'Brien v. Cruger*, 12 App. Div. 536, 42 N. Y. Supp. 398; *People ex rel. Gibbons v. Coler*, 41 App. Div. 463, 58 N. Y. Supp. 988; *People ex rel. Crott v. Keating*, 49 App. Div. 123, 63 N. Y. Supp. 71; *People ex rel. Lodholz v. Knox*, 58 App. Div. 541, 69 N. Y. Supp. 602; *aff'd without opinion*, 167 N. Y. 620; *Matter of Coats*, 73 App. Div.

statements in the affidavit, still demands a peremptory order, it is equivalent to a demurrer.²³ The contents of opposing affidavits, which are objected to as not giving legal reasons for a denial of the relief, must be accepted as true.²⁴ In determining whether there is a proper case for granting a peremptory mandamus, only those facts contained in the petition which are undisputed may be considered.²⁵ A demand for a peremptory mandamus admits the truth of answering affidavits,²⁶ for the application is determined upon the assumption that the allegations of the answering affidavits are true in so far as they conflict with those of the petition.²⁷ If the petitioner refuses to avail himself of an alternative order, the answering affidavit is conclusive as to all disputed questions of fact.²⁸ The petitioner is not entitled to present a replying affidavit.²⁹ The court can con-

178, 76 N. Y. Supp. 730; *People ex rel. Adams Co. v. Woodbury*, 88 App. Div. 443, 85 N. Y. Supp. 174; *People ex rel. Murphy v. Bingham*, 130 App. Div. 112, 114 N. Y. Supp. 702; *People ex rel. Van Voast v. Townley*, 184 App. Div. 568, 172 N. Y. Supp. 1; *Matter of Nash*, 36 Misc. 113, 72 N. Y. Supp. 1057; *People ex rel. Albertson v. McAdoo*, 46 Misc. 517, 92 N. Y. Supp. 1004; *Hammond v. General Committee of Republican Party of Erie Co.*, 56 Misc. 302, 106 N. Y. Supp. 589.

23. *People ex rel. Corrigan v. Mayor*, 149 N. Y. 223; *People ex rel. City of Buffalo v. N. Y. C. & H. R. R. Co.*, 156 N. Y. 570; *People ex rel. Pumpyansky v. Keating*, 168 N. Y. 390; *People ex rel. Ajas v. Bd. of Education*, 104 App. Div. 162, 93 N. Y. Supp. 300; *People ex rel. Lehman v. Consol. Fire Alarm Co.*, 142 App. Div. 753, 127 N. Y. Supp. 348; *Matter of Rexford Flats Bridge Co.*, 168 App. Div. 558, 153 N. Y. Supp. 154; *Matter of Sullivan v. McAneny*, 145 App. Div. 413, 130 N. Y. Supp. 24; *People ex rel. Lehman v. Consol. Fire Alarm Co.*, 145 App. Div. 427, 127 N. Y. Supp. 348; *Matter of Hitchcock*, 149 App. Div. 824, 134 N. Y. Supp. 174; *People ex rel. Lindgren v. McGuire*, 151 App. Div. 413, 136 N. Y. Supp. 88; *People ex rel. B. D. Pierce, Jr., Co. v. Sohmer*, 167 App. Div. 437, 153 N. Y. Supp. 195; *People*

ex rel. Franklin v. Fetherston, 168 App. Div. 416, 153 N. Y. Supp. 325; *People ex rel. Giles v. Klauder-Weldon D. M. Co.*, 180 App. Div. 149, 167 N. Y. Supp. 429; *In re Goldman*, 132 N. Y. Supp. 607; *People v. Supervisors*, 73 N. Y. 173; *People v. Becker*, 3 St. Rep. 202; *People v. Bd. of Apportionment*, 64 N. Y. 627; *People v. Cromwell*, 102 N. Y. 477.

24. *People ex rel. Buffalo Paving Co. v. Mooney*, 4 App. Div. 557, 73 St. Rep. 652, 38 N. Y. Supp. 495; *People ex rel. Langdon v. Dalton*, 46 App. Div. 264, 61 N. Y. Supp. 263.

25. *People ex rel. Guernsey v. Pier-son*, 35 Misc. 406, 71 N. Y. Supp. 993; *aff'd*, 64 App. Div. 624, 72 N. Y. Supp. 1123.

26. *People ex rel. Peck v. Town Bd. of Salina*, 27 App. Div. 476, 50 N. Y. Supp. 533.

27. *People ex rel. Pumpyansky v. Keating*, 168 N. Y. 390; *People ex rel. Myers v. Moynahan*, 130 App. Div. 46, 114 N. Y. Supp. 417; *Herrmann v. O'Brien*, 138 App. Div. 780, 123 N. Y. Supp. 752; *People ex rel. v. Becker*, 3 St. Rep. 202; *People v. Cromwell*, 102 N. Y. 477, *rev'g* 38 Hun, 384.

28. *Matter of Breckenridge*, 160 N. Y. 103.

29. *People ex rel. Brennan v. Haffen*, 124 App. Div. 230, 108 N. Y. Supp. 654; *People ex rel. O'Donnell v.*

sider nothing except the statements in the moving affidavits which are not denied, and the facts set up in the answering affidavit.³⁰ Allegations in the petition which are denied by the opposing affidavits are to be considered as not proved.³¹

The truth or falsity of the denials in the opposing affidavits cannot be inquired into so as to enable the court to issue a peremptory order, although they may be inquired into so as to satisfy the court as to the propriety of granting an alternative order; and, for the purpose of issuing the peremptory order in the first instance, the denials of a respondent cannot be regarded a sham, nor can they be disregarded because the preponderance of evidence seems to be with the petitioner.³² But while uncontroverted statements of fact contained in the opposing affidavits must be taken as true for the purposes of the motion, yet this is not so in respect to mere conclusions or inferences therein averred.³³ The rule that, in an application for a peremptory mandamus, the allegations of fact in the return are to be taken as true has no application where the court ordered an alternative order for the very purpose of having a question of fact raised by the return decided in the trial of which the defendants participated.³⁴ Although on a petition for a peremptory order of mandamus the answering affidavits must be taken as true, it is not so where the petitioner also asks for an alternative order which is granted.³⁵

Bermel, 51 Misc. 75, 100 N. Y. Supp. 728.

Leave to file replying affidavits.—Where, on the hearing of an application for a mandamus, leave was given the applicant to file replying affidavits, and to the defendant to object to the same, but the order denying the motion did not refer to them, it must be presumed that they were objected to, or at least not considered. *People ex rel. Melledy v. Shea*, 73 App. Div. 237, 76 N. Y. Supp. 682.

30. *People ex rel. v. Rome, etc., R. R. Co.*, 103 N. Y. 95; *In re Haebler v. N. Y. Produce Exchange*, 149 N. Y. 418; *People ex rel. P. C. Savings Bank v. Cromwell*, 102 N. Y. 477; *Matter of Kennedy*, 75 App. Div. 188, 77 N. Y. Supp. 714.

31. *People ex rel. Lee v. Gleeson*; 32 App. Div. 358, 53 N. Y. Supp. 7; *People ex rel. Blatchford v. McAdoo*, 101 App. Div. 183, 91 N. Y. Supp. 553; *aff'd*, 181 N. Y. 547.

32. *People ex rel. Del Mar v. St. Louis, etc., Co.*, 47 Hun, 543.

33. *Matter of Ramsdale v. Supervisors*, 8 App. Div. 553, 40 N. Y. Supp. 840; *People ex rel. Coffey v. Democratic General Committee*, 31 Misc. 350, 65 N. Y. Supp. 418; *rev'd*, 52 App. Div. 170, 164 N. Y. 335.

34. *People ex rel. McLaughlin v. Bd. of Police Com'rs of City of Yonkers*, 79 App. Div. 82, 79 N. Y. Supp. 710; *rev'd*, 174 N. Y. 450.

35. *People ex rel. Wang v. Lubliner United Brothers Assoc.*, 137 App. Div. 173, 122 N. Y. Supp. 11.

5. When statements in petition are taken as true.

Although denials in the answering papers or allegations of fact therein are taken as true for the purposes of the application, the matters of fact in the petition which are not denied or controverted are deemed admitted.³⁶ Where no papers are filed in reply to a petition for a peremptory mandamus, the facts as stated in the petition are taken as true.³⁷ If the defendant proceeds to a hearing without traversing the averments of the moving affidavits, this is equivalent to a demurrer on his part, and the truth of the petitioner's averments is to be considered as admitted.³⁸ But the only allegations of the petition which are taken as true are the allegations of fact that are undisputed, and any allegation which is a mere conclusion of law is not considered.³⁹

A peremptory order will usually be granted on the return of the order to show cause, if the petitioner's allegations are not met or avoided.⁴⁰

Averments of lack of knowledge or information sufficient to form a belief as to the allegations contained in the petition are not sufficient to raise an issue as to the matters to which such allegations relate.⁴¹ Denials and affirmative allegations made expressly and solely upon information and belief, where there is no disclosure by affiant of the sources of his information, or the grounds of his belief, do not put in issue positive allegations in the affidavit of the moving party, excepting in cases where a public officer or other party proceeded against cannot positively have any knowledge of the subject-matter as based upon the communication from others.⁴² A court may grant the order, when the allegations

36. *People ex rel. Bowers v. Dalton*, 23 Misc. 294, 50 N. Y. Supp. 1028, 84 St. Rep. 1028; *aff'd*, 31 App. Div. 630, 54 N. Y. Supp. 1112.

37. *People ex rel. Brownell v. Higgins*, 96 Misc. 485, 160 N. Y. Supp. 721.

38. *People ex rel. Supts. of Poor of Oswegatchie v. Bd. Supervisors St. Lawrence Co.*, 103 N. Y. 541.

39. *People ex rel. Corrigan v. Mayor*, 149 N. Y. 223.

40. *Matter of Ramsdale v. Supervisors*, 8 App. Div. 553, 40 N. Y. Supp. 840; *People v. Assessors*, 52 How. Pr. 140; *Achley's Case*, 4 Abb. Pr. 35; *Ex parte Rogers*, 7 Cow. 526; *People ex rel. v. Throop*, 12 Wend. 183; *People ex rel. v. Supervisors*, 11 Abb. Pr.

114; *aff'd*, 3 Abb. Dec. 566; *People v. Supervisors*, 2 Keyes, 288; *People ex rel. v. Supervisors*, 64 N. Y. 600. See *People ex rel. v. Contracting Board*, 27 N. Y. 378; *People v. Com'rs of Highway*, 6 Wend. 559; *People v. Com'rs of Highway*, 7 Wend. 475; *People v. Cayuga Common Pleas*, 10 Wend. 632; *People v. Beebe*, 1 Barb. 379; *People v. Brennan*, 39 Barb. 522.

41. *Matter of People ex rel. Foot v. Gross*, 137 App. Div. 77, 122 N. Y. Supp. 135; *People ex rel. Wanzor v. Sturgis*, 38 Misc. 433, 77 N. Y. Supp. 1008; *Matter of Cooper v. Paris*, 73 Misc. 244, 130 N. Y. Supp. 1043.

42. *People ex rel. Kelly v. Common Council of Brooklyn*, 77 N. Y. 503; *People ex rel. Rau v. York*, 31 App.

of the petition, which are positive and explicit in detail, are met only by denials of knowledge or information, or by denials not putting in issue facts, but stating conclusions of law.⁴³

The affidavit of the respondent, in answer to the petition, must state facts and not conclusions of law, otherwise no

Div. 527, 52 N. Y. Supp. 401; *Blust v. Collier*, 62 App. Div. 478, 70 N. Y. Supp. 774; *Matter of Long Acre, etc., Co.*, 117 App. Div. 80, 102 N. Y. Supp. 242; *aff'd*, 188 N. Y. 361; *Taylor v. Bankers' Loan & Investment Co.*, 118 App. Div. 27, 102 N. Y. Supp. 1029; *Matter of Reise*, 30 Misc. 234, 62 N. Y. Supp. 145; *Matter of Journal Publishing Club*, 30 Misc. 326, 63 N. Y. Supp. 465; *Matter of Long Acre Electric Light & Power Co.*, 51 Misc. 407, 101 N. Y. Supp. 460; *aff'd*, 117 App. Div. 80, 102 N. Y. Supp. 242; *aff'd*, 188 N. Y. 361; *Matter of Freel*, 89 Hun, 80, 35 N. Y. Supp. 59; *People v. Sutton*, 88 Hun, 175, 34 N. Y. Supp. 487; *People ex rel. Anibal v. Bd. of Supervisors*, 53 Hun, 255, 6 N. Y. Supp. 591; *People ex rel. Harriman v. Paton*, 20 Abb. N. C. 195, 5 N. Y. Supp. 314. In *People ex rel. Harriman v. Paton*, 5 N. Y. Supp. 314, 20 Abb. N. C. 195, referring to denials on information or want of information, the court said: "That form of denial for the purpose of meeting the averments of a positive affidavit upon a special motion, really amounts to nothing. The Code has allowed it in the answer or reply in forming issues of a fact by way of pleading, but it has not been sanctioned or allowed for any other purpose. The applicant's affidavit may very well be literally true, and at the same time the person verifying the answer may have had no knowledge or information whatever upon the subject. For that reason the answer does not tend to discredit the statements made in the affidavit, and it must, therefore, be taken to be presumptively correct as to the applicant's title."

Discharge of veteran.—On an application to compel the reinstatement of a veteran, the affidavit of the respondent

that he was informed that the petitioner was not a veteran raises no issue of fact where the relator's certificate of discharge was set forth in the moving affidavits, and there was no denial of its validity. *People ex rel. Drake v. Sutton*, 88 Hun, 175, 34 N. Y. Supp. 487. When one applied for mandamus to reinstate him to a public position, on the ground that he was a veteran, it was held that respondent's affidavit stating that relator was discharged for failure properly to attend to his duties raised an issue of fact, and the alternative order only could issue. *People ex rel. Curtin v. Bd. of Education of Brooklyn*, 41 St. Rep. 791, 16 N. Y. Supp. 676.

An affidavit of an examiner stating that from information obtained he found some of the items of the bill false and fraudulent but which contains no specific reference to evidence sustaining such finding, is not sufficiently definite to be considered in opposition to an application for a mandamus. *People ex rel. Goodwin v. Coler*, 48 App. Div. 492, 62 N. Y. Supp. 964.

43. *People ex rel. Paul Weidmann Brewing Co. v. Lyman*, 69 App. Div. 399, 74 N. Y. Supp. 1106; *Matter of Long Acre, etc., Co.*, 117 App. Div. 80, 102 N. Y. Supp. 242; *aff'd*, 188 N. Y. 361.

Gas company.—In order to defeat an application for peremptory mandamus to compel a gas company to supply to a customer at the statutory rate, the respondent should be required to set out specific facts showing that the statute invaded its constitutional rights by depriving it of its property without compensation, and a mere statement of that conclusion is insufficient. *Matter of Rebbecki*, 51 Misc. 403, 100 N. Y. Supp. 513.

issue of facts is raised.⁴⁴ Affirmations in an opposing affidavit which are only conclusions of law or fact, or are indefinite or general statements, are of no avail and worthless; and a denial in gross, without stating facts, is a mere conclusion.⁴⁵ In order that a denial shall raise an issue, it must present an honest dispute as to a material fact requiring determination.⁴⁶ The opposing affidavits must raise issues of fact fairly within the rules of procedure and pleading, in order to compel the issuance of an alternative order and a denial of a peremptory order in the first instance; and so where the denials of the respondent's affidavits are open to objection because of their general and indefinite character, they will be disregarded and the peremptory order will issue.⁴⁷ If the defendant's affidavits merely states the affiant's ignorance of certain facts, which are positively alleged in the petition, the allegations of such petition are not put in issue, and a peremptory order can issue.⁴⁸ Where the opposing affidavit is based upon an inspection of records which conflict with its statements, the records must be accepted as true and the affidavit considered insufficient to raise an issue.⁴⁹

6. Reference on motion.

Upon the hearing of a motion for a peremptory mandamus, the court, when desiring fuller information before proceeding, may order a reference to take proof of the facts alleged in the affidavits presented by the respondent, and direct that the persons making the same appear before the referee for examination. The object of this reference is to make more certain and reliable the unsatisfactory denials contained in answering affidavits, and thus to secure such information as will enable the court better to understand and dispose of the

44. *People ex rel. Joseph Fallert - too indefinite to raise an issue to defeat a peremptory order, when the facts should have been explicitly alleged.* *People ex rel. Empire City Trotting Club v. State Racing Commission*, 190 N. Y. 31.
Brewing Co. v. Lyman, 53 App. Div. 470, 65 N. Y. Supp. 1062; *aff'd*, 168 N. Y. 669; *Matter of Pierce Butler & Pierce Mfg. Co.*, 62 Hun, 266, 42 St. Rep. 568, 16 N. Y. Supp. 786; *aff'd* without opinion, 131 N. Y. 570.

45. *People ex rel. Beck v. Coler*, 34 App. Div. 167, 54 N. Y. Supp. 639.

General denials in affidavits in support of the refusal of a commission to issue a license, that the petitioner has complied with the requirements of the statute and that he is entitled to a license, held merely conclusions, and

46. *Matter of Stutzbach*, 62 App. Div. 219, 70 N. Y. Supp. 901; *aff'd*, 163 N. Y. 416.

47. *Matter of Freel*, 89 Hun, 81, 35 N. Y. Supp. 59, 69 St. Rep. 271.

48. *People ex rel. Anibal v. Bd. of Supervisors*, 6 N. Y. Supp. 591.

49. *People ex rel. Beck v. Coler*, 34 App. Div. 167, 54 N. Y. Supp. 639.

motion.⁵⁰ But this rule does not authorize a reference as to a disputed fact; it is only for the further information of the court.⁵¹

7. Allowance of peremptory order on application for alternative order.

Under the early practice, it was held that, on an application for an alternative writ, if the defendant did not show cause sufficient to prevent the issue of a peremptory order, that order could issue.⁵² Where affidavits presented in opposition to a motion for an alternative order are received without objection, and the questions involved are argued upon the merits before the Special Term and upon appeal to the Appellate Division, the proceeding may be treated as an application for a peremptory order.⁵³

8. Granting of alternative order on application for peremptory order.

On the return day of an order to show cause why a peremptory mandamus should not issue, if a material dispute of fact arises from the answering affidavits so that the peremptory order cannot be granted, the petitioner is generally allowed to take an alternative order in order that the questions of fact may be determined.⁵⁴

50. *People ex rel. Sand v. Ester Zloczower Kranken Unterstutzung Verein*, 37 Misc. 420, 75 N. Y. Supp. 784; *People ex rel. Del Mar v. St. Louis & S. F. Ry. Co.*, 44 Hun, 552, 19 Abb. N. C. 3.

51. *People ex rel. Hoffman v. Tedcastle*, 12 Misc. 469, 68 St. Rep. 136, 34 N. Y. Supp. 257.

52. *People v. Throop*, 12 Wend. 183; *Ex parte Jennings*, 6 Cow. 518.

53. *People ex rel. Wilson v. African W. M. E. Church*, 156 App. Div. 386, 141 N. Y. Supp. 394.

54. *People v. Rome, Watertown & Ogdensburg R. R. Co.*, 103 N. Y. 95; *People ex rel. Goldschmidt v. Travis*, 167 App. Div. 475, 152 N. Y. Supp. 1058; *People ex rel. Urban Water Supply Co. v. Connolly*, 164 App. Div. 163, 149 N. Y. Supp. 693; *aff'd*, 213 N. Y. 706; *Matter of Dooley*, 81 Misc. 340, 142 N. Y. Supp. 366; *People ex rel. Clements v. Williams*, 100 Misc. 569, 166 N. Y. Supp. 560; *People ex rel. Horvay v. Board of Education*, 156 N. Y. Supp. 65; *Matter of Rexford*

Flats Bridge Co., 168 App. Div. 558, 153 N. Y. Supp. 154; *People ex rel. City of Tonawanda v. Fitzhenry*, 170 App. Div. 227, 156 N. Y. Supp. 70.

Civil Service Law.—Where upon the petition and opposing papers an issue is raised as to whether the petitioner's dismissal from the civil service was in good faith in a legal sense, an alternative order of mandamus may be granted to try out such question. *People ex rel. Skilton v. Smith*, 91 Misc. 130, 154 N. Y. Supp. 288. Where the petitioner asks a peremptory mandamus to compel his reinstatement to the position from which he claims to have been illegally removed, or for an alternative order, and upon the entire record doubt arises as to whether he was legally appointed to the position from which he claims to have been ousted, the court, upon denying the peremptory order, should grant an alternative order upon the return to which the question of fact may be determined. *Shepard v. Oakley*, 181 N. Y. 339. Where a civil serv-

A petition for a peremptory mandamus should not be dismissed because the petitioner asks for more than he is entitled. He should be granted an alternative order in case he is entitled thereto.⁵⁵ But, if the petitioner desires an alternative order, he must ask for it; otherwise it will be assumed that he is willing to take the chance of maintaining his right to a peremptory order upon appeal, and does not desire an alternative order.⁵⁶ Where argument has been had on application for a peremptory order and decision made denying it, no request having been made to issue the alternative order before the determination, a motion by the petitioner to modify the order, so as to permit an alternative order, is directed to the discretion of the court, and its decision is not reviewable by the Court of Appeals.⁵⁷

The customary practice is specifically to ask for an alternative order in the event that the court refuses the peremptory order. But the alternative order is sometimes granted although it is not specially prayed for.⁵⁸ If the petition prays for "such other and further relief," the court, in its discretion, if the facts justify, may grant an alternative order.⁵⁹ An alternative order will be awarded, even when not demanded, in case a new proceeding would be barred by lapse of time.⁶⁰

Upon the denial of a peremptory mandamus, asking for the reinstatement of the petitioner in office, and the granting of an alternative order, the court has no power to attach the condition that he waive all claims for back salary.⁶¹

ice employee who was an exempt fireman was notified by the head of his department that because of insufficient appropriation he would be given an indefinite leave of absence without pay, but he insists that in an oral statement by the head of the department he was told that the reason he was laid off was on account of stories regarding his improper conduct while attending a term of court, it was held that in a proceeding to compel the reinstatement of the relator a proper case was presented for an alternative mandamus, in order that the real facts might be ascertained before the court was called upon to apply any measure of relief. *People ex rel. Cahill v. Green*, 103 Misc. 717, 168 N. Y. Supp. 895.

55. *Matter of Shepard v. Oakley*, 181 N. Y. 339.

56. *People ex rel. Slavin v. Wendell*, 71 N. Y. 172; *People ex rel. Bush v. County Canvassers*, 66 Hun, 265, 21 N. Y. Supp. 279.

57. *People ex rel. v. Wendell*, 71 N. Y. 171; *People ex rel. v. Fairman*, 91 N. Y. 385; *People v. Bd. of Apportionment*, 64 N. Y. 627.

58. *Matter of Dooley*, 81 Misc. 340, 142 N. Y. Supp. 366.

59. *People ex rel. Segal v. Englander*, 109 Misc. 490, 180 N. Y. Supp. 193.

60. *Matter of Jones*, 80 App. Div. 167, 80 N. Y. Supp. 420.

61. *People ex rel. Collins v. Ahearn*, 115 App. Div. 171, 100 N. Y. Supp. 716.

Where an application for a peremptory order is withdrawn because of a dispute as to the material facts, and an alternative order is sought, the application is, in effect, one on notice, and the court may determine whether the papers show a proper case.⁶²

9. Contents of peremptory order.

The contents of a peremptory order issued in the first instance are substantially the same, excepting the recitals, as the final peremptory order which is granted after a trial of the issues raised under an alternative order.⁶³

C. Contents of alternative order.

Under the former practice pursuant to the Code of Civil Procedure, an alternative writ of mandamus was composed of two divisions: a declaratory part, containing a statement of facts, and a mandatory part, directing the performance of certain acts. It was required that the writ contain a statement of facts constituting the grievance to redress which it is issued.⁶⁴ The writ was in the nature of a pleading,⁶⁵ and it set forth the facts upon which the relator based his claim in the same manner and with the same particularity as one is required to set them forth in a complaint.⁶⁶ The court would not look to the petition on which the alternative writ was granted to obtain the facts, which should

62. *People ex rel. Gargan v. York*, 31 Misc. 549, 65 N. Y. Supp. 559.

63. See *infra*, Art. VIII, Final peremptory order.

64. *People ex rel. Ajas v. Dept. of Health*, 138 App. Div. 559, 123 N. Y. Supp. 294; *People ex rel. Larkin v. Palmer*, 27 Misc. 569, 59 N. Y. Supp. 62; *rev'd*, 46 App. Div. 366, 61 N. Y. Supp. 597; *rev'd*, 163 N. Y. 201; *Reynolds v. Williams*, 154 N. Y. Supp. 407; *People ex rel. Egan v. Columbia Club*, 20 Civ. Pro. 319, 15 N. Y. Supp. 821.

Amendment.—The writ could be amended as to irregularities at any time before it is returnable. *People v. Baker*, 35 Barb. 104; *People v. Metropolitan Police Com'rs*, 5 Abb. 241. A variance between the declaratory and mandatory parts of the alternative writ was amendable. *People*

v. Earle, 47 How. 370. As to such variance, see *Green v. Dutchess & Col. R. R. Co.*, 58 N. Y. 152. Under section 2080 of the Code of Civil Procedure, an amendment to an alternative writ of mandamus could be allowed only by a special term of the court which had authority to issue the writ in the first instance. *People ex rel. McDonald v. Clausen*, 50 App. Div. 286, 63 N. Y. Supp. 993.

65. *People v. Ransom*, 2 N. Y. 490; *People ex rel. Keene v. Supervisors*, 142 N. Y. 271.

66. *People v. Supervisors of Westchester*, 15 Barb. 607; *People v. Ransom*, 2 N. Y. 490; *People v. Ovenshire*, 41 How. 164; *People v. Green*, 58 N. Y. 295; *People ex rel. Egan v. Columbia Club*, 20 Civ. Pro. 323, 15 St. Rep. 821.

be stated in the writ itself.⁶⁷ But where the allegations of the petition upon which the alternative writ was granted were incorporated into and made part of the writ, it was held that they were to be regarded as part of the writ itself in a case where the respondents have not been misled or harmed, and took issues upon those allegations.⁶⁸ It was necessary that the writ should demand the exact relief which was required, for the final peremptory writ followed the alternative writ as to the relief granted.⁶⁹ The mandatory part of an writ of mandamus had to be sufficiently definite and capable of being obeyed.⁷⁰ But it was only required to describe the thing to be done with reasonable certainty, so that the defendant would know what was required of him.⁷¹

The Civil Practice Act is not definite as to the contents of the alternative order. The section of the Code of Civil Procedure (2076) prescribing the contents of the alternative writ has been modified so as to make its provisions applicable to the petition. Under the new practice the petition should state the facts; and issue is taken by the return with the allegations in the petition, not with the allegations in the order. There is, therefore, not the same necessity for a statement of facts in the alternative order as existed under the former practice. It is thought that the present practice will be satisfied, if the order contains sufficient recitals to make its intention clear, and then adds directions to the board or officer proceeded against in same manner as heretofore when the writ was in vogue.

Formerly the order was entitled in the name of the people on the relation of the applicant.⁷² Under the present practice, there seems to be no objection to continuing the title used in the petition and original papers.

D. Civil Practice Act, § 1320. Entry of mandamus orders.

An alternative mandamus order must be entered in the office of the clerk at whose office the return must be made. A peremptory mandamus order must be entered in the office of the clerk of the county wherein the term is held at which the order is returnable.⁷³

67. *People ex rel. Egan v. Columbia Club*, 20 Civ. Pro. 323, 15 St. Rep. 821.

68. *People ex rel. Witherbee v. Supervisors of Essex*, 70 N. Y. 236.

69. *People ex rel. Uhrie v. Gilroy*, 60 Hun, 509, 15 N. Y. Supp. 242.

70. *People ex rel. Garbutt v. R. & S. L. R. R. Co.*, 76 N. Y. 298.

71. *People ex rel. Henry v. Nostrand*,

46 N. Y. 378.

72. *People v. Parmenter*, 158 N. Y. 385; *People ex rel. Doran v. Harwick*, 48 App. Div. 559, 62 N. Y. Supp. 897.

73. A writ of mandamus was not set aside for failure of the clerk to enter the order upon which it was granted. *People ex rel. Gaylord v. Supervisors of Schoharie Co.*, 15 N. Y. Supp. 795.

E. Civil Practice Act, § 1321. Service of alternative mandamus order.

An alternative mandamus order must be served by delivering a certified copy thereof together with a copy of the petition, and other papers, if any, to the person to be served. Where the order is directed against a court or the judge or judges of a court, it must be served, either in term time or in vacation, upon the judge or judges of the court; except that, where the court consists of three or more judges, service upon a majority of them is sufficient. Where it is to be served upon a board or body, other than a corporation, service must be made upon a majority of the members thereof, unless the board or body was created by law and has a chairman or other presiding officer appointed pursuant to law; in which case, service upon him is sufficient. Where the order is to be served upon a corporation, service may be made upon any officer upon whom a summons issued out of the supreme court may be served.⁷⁴

ARTICLE VI.**RETURN OR OBJECTIONS TO PAPERS.****A. Objections to petition or order in points of law.****1. Civil Practice Act, § 1322. Objections to petition and order in points of law.**

The person, upon whom an alternative mandamus order is served, instead of making a return to the petition and order, may file in the office where the order is returnable written objections to the papers in point of law; or he may object to a state of facts constituting a separate grievance and make return to the petition and order as to matters not affected by the objections.

2. Sufficiency of petition.

The practice under the Code of Civil Procedure authorized the person or body to whom a writ of mandamus was directed to interpose a demurrer thereto. The new practice has abolished both the demurrer and the writ; but has authorized an equivalent procedure by way of interposing objections in points of law to the petition.

Formerly, the writ contained a statement of the facts claimed by the applicant and operated as his pleading. After the issuance of the writ, the original moving papers had little, if any, importance. If the writ was insufficient on its face, it could not be supported by the petition or moving papers.⁷⁵

⁷⁴ **Board of education.**—Where a resolution before a board of education was illegally declared lost and the board adjourned, it was held that mandamus directing the board to reassemble was sufficiently served on chairman and clerk. *People v. Neilson*, 5 T. & C. 367.

Half holiday.—An alternative mandamus may be served after twelve

o'clock noon, on a legal half holiday. *People ex rel. Fulton v. Sup. Oswego*, 50 Hun, 106, 3 N. Y. Supp. 752, 19 St. Rep. 24, 15 Civ. Pro. 379.

⁷⁵ *People ex rel. Decker v. Parmelee*, 22 Misc. 380, 50 N. Y. Supp. 451; *People ex rel. v. The Columbia Club*, 20 Civ. Pro. 323, 15 N. Y. Supp. 821, citing *People v. Baker*, 35 Barb. 109. See, also, *People v. Board of Super-*

This situation is, of course, completely changed, as the objections are now taken to the petition, not to the order of mandamus.

3. When objections to be raised.

Under the former practice substantive defects in the writ were not waived by making a return thereto, and objection could be taken at any time before the issuance of the final peremptory writ.⁷⁶ The objection could be urged though the objection was not taken in the return.⁷⁷

Under the present practice, no doubt, the objection that the petition is insufficient in its statement of facts is not waived by failure to raise the question before trial.⁷⁸

But where technical objections are desired to be raised to the papers on an application for a peremptory mandamus, their sufficiency should be challenged at the first opportunity, and the point should be stated in the order to have been preliminarily raised and passed upon by the court, otherwise the objection will be deemed to have been waived and cannot be urged upon appeal.⁷⁹ The objection that the writ was not made returnable at special term could not be taken after a return had been made.⁸⁰

4. Separate grievances in petition.

Section 1322 recognizes that two or more grievances may be combined in the same petition, though it is probably necessary that the same person or board must be required to perform all of the acts whose performance is sought.⁸¹ Where the respondent objects to one or more, but not to all, of the complete statements of facts in the petition, a return may be made to those not objected to; and if the petitioner objects to one or more but not to all of the complete statements of

visors of Westchester, 15 Barb. 614; *People ex rel. Whiterbee v. Supervisors*, 70 N. Y. 236.

Jurisdiction.—An alternative mandamus to compel the clerk of the Municipal Court of New York to issue an execution and deliver a transcript of a judgment is insufficient where it does not recite jurisdictional facts. *People ex rel. Batchelor v. Bacon*, 37 App. Div. 414, 55 N. Y. Supp. 1045, 29 Civ. Pro. 111.

^{76.} *People ex rel. Ajas v. Dept. of Health*, 138 App. Div. 559, 123 N. Y.

Supp. 294; *People v. Green*, 58 N. Y. 295; *Commercial Bank v. Canal Com'rs*, 10 Wend. 25.

^{77.} *People ex rel. Ryan v. Green*, 58 N. Y. 303.

^{78.} Civil Practice Act, § 279.

^{79.} *Matter of Flaherty v. Craig*, 184 App. Div. 428, 171 N. Y. Supp. 624.

^{80.} *People ex rel. Argyle & Ft. Edward Plank Road Co. v. Com. of Highways*, 11 How. 89.

^{81.} See *supra*, Art. III-D-1, Petition, in general.

facts contained in the return, an issue of fact arises with respect to the remainder of the return.⁸²

5. Admission of facts in petition by objections.

A demurrer to an alternative writ of mandamus under the Code of Civil Procedure admitted the facts stated in the writ.⁸³ This rule was according to the established principles relating to demurrers. An objection to the sufficiency of the petition under the new practice has the same effect, and the facts stated in the petition must be deemed admitted for the purpose of deciding the objection. But conclusions in the petitions and deductions sought to be drawn therefrom are not admitted.⁸⁴

B. Return.

1. Civil Practice Act, § 1323. Return to petition for mandamus order.

A return to an alternative mandamus order and the petition therefor must be made within twenty days after the service of the order, at the office of the clerk of the county, designated in the order, in which an issue of fact joined thereupon is triable. A peremptory order must be made returnable at a special term or a term of the appellate division of the supreme court, designated in the order, to which application for the alternative order might have been made.

2. Civil Practice Act, § 1324. Return or objections to first order.

Where the first mandamus order has been duly served, a return must be made to the petition upon which the order was granted as therein required, unless it is an alternative order, and an objection to the papers in point of law is taken. In default of a return, the person or persons upon whom the order was served may be punished, upon the application of the petitioner, for a contempt of court.

3. Civil Practice Act, § 1325. Making and filing of return.

The return to a petition and alternative mandamus order must be annexed to a copy of the order, and must be filed in the office of the clerk where it is returnable, within the time specified in the order. A person who has made a return to a petition and alternative mandamus order cannot be compelled to make a further return. The return to a peremptory mandamus order must be likewise annexed to a copy of the order, and before the expiration of the first day of the term at which it is returnable, either must be delivered in open court, or be filed in the office of the clerk of the county wherein the term is to be held.

4. Civil Practice Act, § 1329. Application of certain provisions.

No pleadings are allowed in a mandamus proceeding, except as prescribed in the foregoing sections of this article. The provisions of statute or rule relating to the form and contents of complaint and answer, and to objections to either,

⁸² *People ex rel. v. Order of American Star*, 53 Super. Ct. 66.

⁸³ *People ex rel. Smith v. Mosier*, 134 App. Div. 4, 118 N. Y. Supp. 95.

⁸⁴ *People ex rel. Cohen v. Butler*, 125 App. Div. 384, 109 N. Y. Supp. 900.

apply to the petition for a mandamus order and the return, respectively; except that it is not necessary to serve a copy of either upon the attorney for the adverse party, or to verify a return, and that neither can be amended with special application to the court, or stricken out as sham.

5. Necessity of return.

Unless the person or board to whom the order is directed moves to set aside the order, or interposes objections to the moving papers in point of law, a return must be made.⁸⁵ A return is contemplated although the respondent performs the act in controversy, but as a matter of practice, full performance will generally dispose of the litigation without a return. It is no excuse for not making the return that the order has not been returned and filed.⁸⁶

Where a board of police and the individual members thereof are both made parties respondents to an order of mandamus all of them are not only at liberty to make a return thereto but it is their duty to do so.⁸⁷

6. Time for return.

Section 1323 requires the return to be made within twenty days after the service of the order. The order is irregular if it requires the return to be made at a certain day instead of requiring the return in twenty days as prescribed in the statute, but this defect may be amendable.⁸⁸ It has been said that the time to make the return may be extended by order of the court.⁸⁹

C. Form and contents of return.

1. Civil Practice Act, § 1326. Form and contents of return.

The provisions of statute or rule relating to the form and contents of an answer containing denials and allegations of new matter, except those provisions which relate to the verification of an answer, and to a counterclaim contained therein, apply to a return to a petition and alternative mandamus order, showing cause against obeying the command of the order. For the purpose of the application, each complete statement of facts assigning a cause why the command of the order ought not to be obeyed, is regarded as a separate defense and must be separately stated and numbered.

⁸⁵. *Commercial Bank of Albany v. Canal Com'rs*, 10 Wend. 25.

⁸⁶. *People v. Westchester Common Pleas*, 4 Cow. 73; *Root v. King*, 4 Cow. 403. See *Snowden v. Roberts*, 4 Cow. 69.

⁸⁷. *People ex rel. McMackin v. Bd. of Police*, 46 Hun, 299, 11 St. Rep. 403; *aff'd*, 107 N. Y. 235.

⁸⁸. *People ex rel. Mullin v. Brotherhood of Stationary Engineers*, 19 Civ. Pro. 175, 12 N. Y. Supp. 362.

⁸⁹. *People v. Judges of Ulster Co.*, 1 Johns. 64; *People v. Westchester Common Pleas*, 4 Cow. 73; *Root v. King*, 4 Cow. 403; *People v. Blackhurst*, 60 Hun, 63, 15 N. Y. Supp. 114. And see Civil Practice Act, § 1339.

2. Contents of return, in general.

The return need not be verified.⁹⁰ It should deny the material facts stated in the petition, or some of them, or allege other and additional facts, which in law will defeat the petitioner's claim.⁹¹ It should conform to the rules of pleading and be positive rather than argumentative and evasive, and the familiar rule in pleading that the evidence should not be set out should be followed.⁹² Facts, not conclusions of law, should be stated.⁹³ An equivocal return, or one pleading a statute, but substantially departing from the requirement of the statute, is not enough.⁹⁴ An allegation as to matter of law is not proper in the return, which should only set out facts, not legal principles, and where the statements of fact are outside of the issue and irrelevant to it and contain more than a substantial statement of the relevant facts, they are not proper.⁹⁵ Where fraud or collusion are set up in the return to avoid the petitioner's case, the facts should be fully pleaded.⁹⁶ Immaterial or argumentative matters or surplusage may be stricken out of a return.⁹⁷ All the material allegations, which are not traversed or denied, or successfully avoided, are to be taken as admitted, and if the return contains no sufficient answer, the petitioner is entitled to his peremptory order.⁹⁸ Facts material to the

90. Civil Practice Act, § 1329.

91. *People v. Supervisors*, 32 Barb. 473; *Commercial Bank of Albany v. Canal Com'rs*, 10 Wend. 25; *People ex rel. v. Supervisors*, 14 Barb. 52; *People ex rel. v. Com'rs*, 11 How. 89.

92. *People v. Ransom*, 2 N. Y. 496; *People v. Baker*, 35 Barb. 105; *People v. Supervisors*, 18 How. 152; *Matter of Trustees of Williamsburgh*, 1 Barb. 34.

Variance.—Where the return recited that "there was no money appropriated * * * for the payment of the services of the petitioner, and that at the time of the removal of the petitioner there was no money with which to pay for any services that he might render, and because of such lack of appropriation and lack of money said board * * * dispensed with the services of petitioner," and the decision of the referee was that the head of the department had the right "to

dismiss the relator from his employment by reason of the diminished and insufficient salary appropriation for the year," the variance was of words, and not of substance. *People ex rel. Steers v. Dept. of Health of City of N. Y.*, 86 App. Div. 521, 83 N. Y. Supp. 800; *aff'd*, 176 N. Y. 602.

93. *People ex rel. Egan v. Columbia Club*, 20 Civ. Pro. 323, 15 N. Y. Supp. 821.

94. *People ex rel. Waller v. Bd. of Supervisors*, 56 N. Y. 249.

95. *People v. Ransom*, 2 N. Y. 496; *People ex rel. v. Com'rs*, 11 How. 89.

96. *People v. Schuyler*, 51 How. Pr. 461.

97. *People v. Com'rs of Highways of Fort Edward*, 11 How. Pr. 89; *People v. Van Leuven*, 8 How. Pr. 358; *People v. Ransom*, 2 N. Y. 496.

98. *People ex rel. Sunderlin v. Ovenshire*, 41 How. Pr. 164.

issue occurring after the granting of the order may be pleaded.⁹⁹

3. Information and belief.

Statements in an affidavit opposing the granting of a peremptory mandamus in the first instance are ineffective if made on information and belief.¹ In analogy to this rule, it has been thought that allegations in the return to an alternative mandamus, if made on information and belief, or if denying knowledge or information sufficient to form a belief, are not sufficient.² This does not harmonize with the rule that the return is to be considered as an answer in an action, and later decisions support the view that allegations in the return may be made on information and belief.³ But, as the return need not be verified, there is no reason why it should resort to allegations on information or belief. Any strictness required in this respect of the allegations of the return is a heritage from the old common law whereby the return was conclusive as to matters of fact stated therein. There could be at common law no trial of issues and the only remedy of an applicant injured by a false return was an action. Under such circumstances it was reasonable to require the return to be precise and positive.⁴

4. Separate defenses.

Any number of facts constituting valid reasons for not performing the act which the proceeding seeks to compel may be averred.⁵ Where the respondent, in his return, bases his defense upon one ground, he is then estopped from setting up other defenses. Thus, where a comptroller was a defendant in mandamus proceedings seeking to require him to lease from the petitioner certain premises as directed by the common council, and he set up as his defense that there was no appropriation to pay the rent, it was held, that he was estopped from claiming that it was not his duty to execute the lease, or that the common council had no authority to require him so to do.⁶

99. *People v. Baker*, 14 Abb. Pr. 19.

1. See *supra*, Art. V, B-5.

2. *People ex rel. Andrews v. McGuire*, 29 St. Rep. 674, 8 N. Y. Supp. 852; *rev'd on another point*, 126 N. Y. 419, 38 St. Rep. 444; *People ex rel. v. Board of Assessors*, 7 Hun, 228.

3. *People ex rel. McGuire v. Brick-*

layers' Union, 20 App. Div. 8, 46 N. Y. Supp. 648.

4. *People ex rel. McMackin v. Board of Police*, 46 Hun, 299, 11 St. Rep. 403.

5. *People v. Supervisors of Ulster*, 32 Barb. 473.

6. *People ex rel. Schanck v. Greene*, 64 N. Y. 503.

D. Objections to return.**1. Civil Practice Act, § 1327. Objections to return as insufficient in law.**

The petitioner may object to the return, or to any complete statement of facts therein separately assigned as a cause for disobeying the command of the order, on the ground that the same is insufficient in law upon the face thereof.

2. Insufficient return.

The pleadings on an alternative mandamus are the petition, the return, objections to the petition, or objections to the return. If the return is insufficient in law, objections may be filed thereto, which are in the nature of a demurrer under the former practice.⁷ If the objections are well taken, the petitioner may be entitled to a final peremptory order.⁸ The respondent, however, may avoid this result by an amendment of the return on proper terms.⁹

3. Objections to return raises sufficiency of petition.

In analogy to the rule that a demurrer to an answer raised the sufficiency of the complaint, it is the rule that objections to the sufficiency of the return are to be overruled, if the petition is insufficient in law.¹⁰ The objections of the petitioner to the defendant's return subject the petition to criticism for the purpose of seeing whether it states facts sufficient to support the relief sought. If it does not, the objections to the return require no consideration.¹¹

E. Reply or counterclaim.

There is no authority for the interposition by the petitioner for a reply to the return, and it is in effect prohibited by section 1329 of the Civil Practice Act.¹² Nor can a counterclaim or set-off be pleaded in the return.¹³

7. *People ex rel. McEnroe v. Wells*, 89 App. Div. 89, 85 N. Y. Supp. 438; *People ex rel. Pelham Manor v. New Rochelle Water Co.*, 119 App. Div. 472, 104 N. Y. Supp. 92.

8. *Matter of Trustees of Williamsburg*, 1 Barb. 34; *People v. Seymour*, 6 Cow. 579; *People v. Collins*, 7 Johns. 549.

9. *People ex rel. Egan v. The Columbia Club*, 20 Civ. Pro. 323, 15 N. Y. Supp. 821.

10. *People v. Supervisors*, 32 Barb. 473.

11. *People ex rel. McGuire v. Bricklayers' Union*, 20 App. Div. 8, 46 N. Y. Supp. 648.

12. *Matter of Griffin v. Williams*, 168 App. Div. 63, 153 N. Y. Supp. 926.

13. *Hedges v. Craig*, 194 App. Div. 786, 185 N. Y. Supp. 122; *aff'd*, 231 N. Y. —; *People ex rel. Neftaniel v. Order American Star*, 53 Super. Ct. 66.

F. Further or supplemental return.

It has been thought that, while a further return cannot be compelled, the applicant can make a supplemental return.¹⁴

G. Civil Practice Act, § 1328. Notice of filing return and objections.

Where a return to a petition and alternative mandamus order has been filed, the attorney for the defendant making it must serve upon the attorney for the petitioner a notice of the filing thereof. Where the petitioner objects to the return or a part thereof in point of law, a copy of such objections must be served upon the attorney for the defendant within twenty days after the service of such a notice. Where the defendant objects to the petition or to a part thereof, a copy of such objections must be served upon the attorney for the petitioner within the time prescribed by law for filing the same. Objections in point of law raise an issue of law within the meaning of this article.

H. Motion to set aside order.

1. Civil Practice Act, § 1330. Motion to set aside order.

An alternative mandamus order cannot be vacated or set aside upon motion for any matter involving the merits. A motion to set aside such an order for any other cause or to set aside or quash a peremptory mandamus order or to set aside the service of either order must be made at a term whereat the order might have been granted.

2. Application of section.

An alternative mandamus order will not be vacated on any ground "involving the merits."¹⁵ The merits are to be determined on a trial of the issues made by the return or by the objections to the sufficiency of the petition. Thus, the order will not be dismissed upon motion because the right to the relief is barred by the statute of limitations.

As the respondent cannot move to vacate an alternative order for any matter involving the merits, he must either make a return thereto or interpose objections. If he deems the facts stated in the petition insufficient to entitle the relator to relief, he should interpose objections. If the facts are stated untruly, he must make a return; and as the respondent cannot vacate the order by motion, for matters involving the merits, he is precluded from accomplishing the same object by an appeal.¹⁶

A motion to vacate or set aside the order is founded upon some irregularity or defect in the order or procedure

14. See *People ex rel. N. Y. Underground Ry. Co. v. Newton*, 19 Civ. Pro. 416.

15. *People ex rel. Ackerman v. Lamb*, 6 App. Div. 26, 39 N. Y. Supp.

514.

16. *People ex rel. Fisk v. Devermann*, 83 Hun, 183, 64 St. Rep. 147, 31 N. Y. Supp. 593.

anterior thereto.¹⁷ The motion may be made after service of alternative order and before the return,¹⁸ but a motion to quash the proceeding should not be made until the alternative order is granted.¹⁹ The motion gives the defendant the benefit of a demurrer without resorting to that plea, since it is in the nature of a demurrer, and admits the truth of the matters alleged.²⁰

Whether mandamus is the proper remedy, or whether the petitioner has another legal remedy, are questions which involve the merits, and thus such questions should be raised by return or objections, and not by a motion to vacate the order.²¹

An alternative mandamus brought to compel the board of health to abate a nuisance will be vacated where the petition states mere conclusions of law as to the existence of the nuisance and the grievance of the petitioner.²²

The objection that the supervisors of several towns joined as petitioners for a mandamus to compel the board of supervisors to obey an order of the State assessors, if sound, must be taken by motion to quash; it does not go to the merits; and when the board has answered and a demurrer to the answer been interposed, the matter must be heard on the merits.²³

Where an alternative mandamus order is vacated, the order entered thereon is not a determination on the merits, but is analogous to a non-suit in an action. It does not bar a new proceeding.²⁴

The respondent to an alternative mandamus may waive his right to have a motion to quash the order argued at a term of the Appellate Division, or at special term, by arguing the question without objection at the trial term, as the provisions as to the place of hearing relate merely to matters of procedure.²⁵

17. *People v. Collins*, 19 Wend. 67; *Commercial Bank of Albany v. Canal Com'rs*, 10 Wend. 25; *People v. Tracy*, 1 How. Pr. 186.

18. *People v. Bd. of Supervisors*, 14 Barb. 52.

19. *People v. New York Cent., etc.*, R. Co., 28 Hun, 543.

20. *People v. College of Physicians and Surgeons*, 7 How. Pr. 290; *People ex rel. v. Supervisors*, 32 Barb. 473.

21. *People ex rel. Fulton v. Sup. of Oswego*, 50 Hun, 106, 3 N. Y. Supp.

752, 15 Civ. Pro. 379.

22. *People ex rel. Ajas v. Department of Health*, 138 App. Div. 559, 123 N. Y. Supp. 294.

23. *People ex rel. v. Bd. of Supervisors*, 85 N. Y. 323.

24. *People ex rel. Ajas v. Dept. of Health*, 138 App. Div. 559, 123 N. Y. Supp. 294.

25. *People ex rel. Ajas v. Dept. of Health*, 138 App. Div. 559, 123 N. Y. Supp. 294.

I. Defenses.

1. In general.

As indicated in the foregoing sections of this chapter, mandamus may be defended with more or less success, depending on the circumstances in particular cases, upon the following grounds: That it is issued to a person, officer, or board to control a discretion conferred by law upon them,²⁶ that it seeks to require the doing of an illegal act,²⁷ that the act has already been performed,²⁸ that the respondent is not bound to do the act,²⁹ or has no power to perform the act,³⁰ that there was no refusal by the respondent to do the act sought to be coerced,³¹ that where the act is to be performed by either of two persons there has not been a refusal on the part of both,³² that the remedy will be ineffectual,³³ that the act sought to be coerced is impossible,³⁴ that the act is pro-

26. *Hull v. Supervisors of Oneida*, 19 Johns. 259; *People v. School Officers*, 18 Abb. Pr. 165; *Ex parte Benson*, 7 Cow. 353; *Ex parte Coster*, 7 Cow. 523; *People v. Judges of Chautauqua*, 1 Wend. 73; *People v. Supervisor Court*, 19 Wend. 701; *People ex rel. Harris v. Com'rs*, 149 N. Y. 30; *People ex rel. Wooster v. Maher*, 141 N. Y. 336; *People v. Supervisors of Greene Co.*, 12 Barb. 217; *People v. Canal Board*, 13 Barb. 432; *People v. Bd. of Education*, 5 N. Y. Supp. 393; *People ex rel. Bullard v. The Contracting Board*, 33 N. Y. 383; *In re Town Bd. of Lloyd*, 7 N. Y. Supp. 165; *People ex rel. Millard v. Chapin*, 104 N. Y. 100; *People ex rel. Brown v. Bd. of Apportionment*, 52 N. Y. 227; *People ex rel. Woodward v. Rosendale*, 76 Hun, 106.

27. *People ex rel. Supervisors v. Fowler*, 55 N. Y. 254; *People ex rel. Sherwood v. Bd. of Canvassers*, 129 N. Y. 369 (370); *People ex rel. Pond v. Supervisors*, 47 St. Rep. 456, 19 N. Y. Supp. 978; *rev'd on other grounds*, 47 St. Rep. 702; *Matter of Popoff*, 10 Misc. 273, 63 St. Rep. 438, 31 N. Y. Supp. 2.

28. *Deane v. Greene Co. Supervisors*, 66 How. Pr. 461.

29. *People ex rel. Gaige v. Reardon*, 49 Hun, 425.

30. *People ex rel. Stevens v. Hayt*, 66 N. Y. 606; *People ex rel. McKone v. Green*, 11 Hun, 60.

31. *In re Whitney*, 3 N. Y. Supp. 839; *Fish v. Weatherwax*, 2 Johns. 217, note, § 15. But see *People ex rel. Welling v. Meakin*, 56 Hun, 626, 10 N. Y. Supp. 161, 24 Abb. N. C. 477; *aff'd*, 123 N. Y. 660; *People ex rel. O'Brien v. Cruger*, 12 App. Div. 536, 42 N. Y. Supp. 398.

32. *R. v. Bishop of London*, 13 East, 419.

33. *Ex parte Paine*, 1 Hill, 667; *People v. Supervisors*, 15 Barb. 607; *People ex rel. Stevens v. Hayt*, 66 N. Y. 608. See, also, *People ex rel. Krohn v. Miller*, 39 Hun, 564; *Colonie Life Ins. Co. v. Supervisors of New York*, 24 Barb. 166; *People ex rel. Sherwood v. Bd. of Canvassers*, 129 N. Y. 369 (370). Compare *People ex rel. Linnekin v. Ennis*, 18 App. Div. 412, 46 N. Y. Supp. 444.

34. *Silverthron v. Warren R. Co.*, 33 N. J. Law, 173; *People v. Chicago R. Co.*, 55 Ill. 95. See, also, *People ex rel. Green v. D. & C. R. R. Co.*, 58 N. Y. 152; and *People ex rel. Winegard v. Kromer*, 5 Misc. 54, 25 N. Y. Supp. 48; *aff'd*, 28 N. Y. Supp. 1039, 78 Hun, 58; *People ex rel. Hoffman v. Tedcastle*, 12 Misc. 468, 68 St. Rep. 135, 34 N. Y. Supp. 257.

hibited by injunction,³⁵ that the constitutionality of an act of the legislature is involved,³⁶ that the facts are of such a character as to show a want of jurisdiction,³⁷ that the petitioner has no authority to maintain the proceedings,³⁸ that the right of the relator is not clear,³⁹ that it is sought to try the title to a public office,⁴⁰ that it seeks to restrain an anticipated act,⁴¹ that it seeks to enforce a mere contract,⁴² that there is another remedy,⁴³ as by appeal,⁴⁴ that the petitioner has not

35. *People v. Village of West Troy*, 25 Hun, 182; *People ex rel. Humphrey v. Supervisors*, 30 Hun, 147; *St. Stephen's Church Cases*, 25 Abb. N. C. 244, 11 N. Y. Supp. 669. But see *Riggs v. Johnson Co.*, 6 Wall. (U. S.) 166.

36. *People v. Stevens*, 2 Abb. Pr. N. S. 348; *Matter of Woods*, 5 Misc. 575, 26 N. Y. Supp. 169. Compare *People ex rel. Burbank v. Robinson*, 14 Hun, 226; *People ex rel. v. Canal Board*, 4 Lans. 275.

37. *People v. Com'rs*, 27 Barb. 94; *Matter of Popoff*, 10 Misc. 273, 63 St. Rep. 438, 31 N. Y. Supp. 2; *People ex rel. Dady v. Supervisors*, 89 Hun, 244, 69 St. Rep. 448, 35 N. Y. Supp. 91; s. c., 6 App. Div. 228.

38. *St. Stephen's Church Cases*, 25 Abb. N. C. 247, 11 N. Y. Supp. 669; *People v. Blackhurst*, 60 Hun, 64, 15 N. Y. Supp. 114.

39. *People v. Village of West Troy*, 25 Hun, 182; *Matter of Gardner*, 68 N. Y. 467; *Matter of Hilton Bridge Co.*, 13 App. Div. 24, 43 N. Y. Supp. 99; *Matter of Finnegan*, 91 Hun, 176, 71 St. Rep. 133, 36 N. Y. Supp. 331; *People ex rel. Frost v. Fay*, 3 Lans. 398; *People ex rel. Lunney v. Campbell*, 72 N. Y. 498; *People ex rel. Jordan v. Bd. of Education*, 69 St. Rep. 622.

40. *People v. Stevens*, 5 Hill, 616; *Matter of Torney*, 7 Misc. 260, 27 N. Y. Supp. 913; *People ex rel. Rumph v. Supervisors*, 89 Hun, 38, 34 N. Y. Supp. 1128; *People ex rel. Hoffman v. Rupp*, 90 Hun, 145, 35 N. Y. Supp. 349, 749; *People ex rel. Wren v. Goetting*, 133 N. Y. 569; *Matter of Gardner*, 68 N. Y. 467. Compare *People ex rel. Drake v. Sutton*, 88 Hun, 173, 34 N. Y. Supp. 487.

41. *People ex rel. Sayles v. Fitzgerald*, 37 St. Rep. 540, 13 N. Y. Supp. 663; aff'd, 128 N. Y. 620; *People ex rel. Smither v. Richmond*, 5 Misc. 26, 25 N. Y. Supp. 144; *High on Extraordinary Remedies*, 14; *Brown v. Duane*, 60 Hun, 98, 37 St. Rep. 691, 14 N. Y. Supp. 540.

42. *People ex rel. Morrell v. Worth*, 16 Misc. 664, 72 St. Rep. 733, 37 N. Y. Supp. 126; *People ex rel. Ryan v. Aldridge*, 83 Hun, 280, 31 N. Y. Supp. 920; *People v. Bd. of Education*, 60 Hun, 486, 584, 15 N. Y. Supp. 308; *People ex rel. Bullard v. Contracting Bd.*, 33 N. Y. 382. But see *People ex rel. Cronin v. Coffey*, 62 Hun, 86, 16 N. Y. Supp. 501; aff'd, 131 N. Y. 569; *People ex rel. Weed-Parsons Co. v. Palmer*, 14 Misc. 41, 68 St. Rep. 166, 35 N. Y. Supp. 222. Compare *Matter of Finnegan*, 91 Hun, 176, 71 St. Rep. 133, 36 N. Y. Supp. 331.

43. *People v. Stevens*, 5 Hill, 616; *People ex rel. Millard v. Chapin*, 104 N. Y. 102; *People ex rel. Moulton v. Mayor*, 10 Wend. 397; *People ex rel. Wright v. Coffin*, 7 Hun, 609; *People ex rel. Bank v. Bd. of Apportionment*, 64 N. Y. 629; *Ex parte Lynch*, 2 Hill, 46; *People ex rel. Gottchius v. McGoldrick*, 67 St. Rep. 289, 33 N. Y. Supp. 441; *People ex rel. Lunney v. Campbell*, 72 N. Y. 498; *Clark v. Miller*, 54 N. Y. 528; *People ex rel. McKone v. Green*, 11 Hun, 61; *People ex rel. Perkins v. Hawkins*, 46 N. Y. 11; *People ex rel. Huntington v. Crennan*, 141 N. Y. 239, 56 St. Rep. 807. But see the limitations to this defense in *People ex rel. Weed-Parsons Co. v. Palmer*, 14 Misc. 41, 68 St. Rep. 166, 35 N. Y. Supp. 222; *People ex rel. Pennell v. Treanor*, 15 App. Div. 508, 44 N. Y. Supp. 528; *People ex rel.*

exhausted his remedy by statute, where there is one,⁴⁵ that the petitioner has not performed a condition precedent,⁴⁶ that there was no proper tender on the part of the petitioner where a tender is required,⁴⁷ that no notice has been given in a case requiring notice,⁴⁸ that the claim, the payment of which is required, has not been audited,⁴⁹ or, though audited, that the claim has been wrongfully allowed,⁵⁰ that it is sought to relieve the petitioner from the consequences of his own fraud,⁵¹ that the claim involved is fraudulent,⁵² that the public officer sought to be coerced has no money with which to perform the act,⁵³ that a payment sought to be coerced has already been made to another party,⁵⁴ that the petitioner has accepted performance by third parties,⁵⁵ that the petitioner is estopped,⁵⁶ that, in view of the facts, the court should refuse the remedy as a matter of discretion.⁵⁷

Livingston v. Taylor, 1 Abb. Pr. N. S. 200; *Buck v. City of Lockport*, 6 Lans. 255; *People ex rel. Fielder v. Mead*, 24 N. Y. 120; *McCullough v. Mayor of Brooklyn*, 23 Wend. 458.

44. *Ex parte Koon*, 1 Denio, 645; *People ex rel. Wright v. Coffin*, 7 Hun, 609; *People ex rel. Gottchius v. McGoldrick*, 67 St. Rep. 289, 33 N. Y. Supp. 441, 24 Civ. Pro. 292. Compare *People ex rel. Stevens v. Lott*, 42 Hun, 409. And see *People ex rel. Fraser v. Trustees of Hamden*, 71 Hun, 461, 24 N. Y. Supp. 974.

45. *People ex rel. Clason v. Nassau Ferry Co.*, 86 Hun, 130, 33 N. Y. Supp. 244; *People ex rel. Huntington v. Crennan*, 141 N. Y. 239, 56 St. Rep. 807.

46. *People ex rel. Stevens v. Hayt*, 66 N. Y. 606; *Matter of McGrath*, 56 Hun, 76, 9 N. Y. Supp. 168, 29 St. Rep. 704; *People ex rel. O'Brien v. Cruger*, 12 App. Div. 538.

47. *Matter of McGrath*, 56 Hun, 76, 9 N. Y. Supp. 168, 29 St. Rep. 704.

48. *People ex rel. Hasbrouck v. Bd. of Canvassers*, 18 N. Y. Supp. 303, 45 St. Rep. 614.

49. *People v. Brennan*, 18 Abb. Pr. 100.

50. *People ex rel. Merrit v. Lawrence*, 6 Hill, 245. See, also, *People ex rel. McShedon v. Stout*, 23 Barb. 349.

51. *People ex rel. Wood v. Assessors*, 137 N. Y. 204.

52. *People ex rel. Slavin v. Wendell*, 71 N. Y. 172.

53. *People v. Edmonds*, 19 Barb. 472; *People v. Hawes*, 36 Barb. 59; *People ex rel. Robinson v. O'Keefe*, 100 N. Y. 576; *People ex rel. Burbank v. Robinson*, 76 N. Y. 424. But see *People ex rel. Dannant v. Comptroller*, 77 N. Y. 45; *People ex rel. Satterlee v. Bd. of Police*, 75 N. Y. 38. But a lack of funds is no defense where an audit and not a payment of account is required. *People v. Supervisors*, 22 How. Pr. 71.

54. *Matter of Grady*, 15 App. Div. 504, 44 N. Y. Supp. 578.

55. *People ex rel. P. C. Savings Bank v. Cromwell*, 102 N. Y. 477.

56. *People ex rel. Bliss v. Bd. of Supervisors*, 15 N. Y. Supp. 748.

57. *Fish v. Weatherwax*, 2 Johns. 217, note, § 17; *People ex rel. McKone v. Green*, 11 Hun, 61; *St. Stephen's Church Cases*, 25 Abb. N. C. 246; *Van Rensselaer v. Sheriff*, 1 Cow. 512; *People ex rel. Faile v. Ferris*, 76 N. Y. 329; *People ex rel. Wood v. Assessors*, 137 N. Y. 201, 50 St. Rep. 404; *People ex rel. Lunney v. Campbell*, 72 N. Y. 498; *Matter of Sage*, 70 N. Y. 223; *People ex rel. Fiske v. Devermann*, 83 Hun, 183, 64 St. Rep. 147, 31 N. Y. Supp. 593.

2. Res adjudicata.

An application for an order of mandamus is not barred where an application for a prior order for the same purpose was dismissed "without prejudice" and there was no decision upon the merits.⁵⁸

3. Laches.

Where the petitioner has slept upon his rights for an unreasonable length of time, the courts may refuse to grant him relief by mandamus.⁵⁹ In determining what will constitute such unreasonable delay, regard should be had to circumstances justifying the delay, to the nature of the case, the relief demanded, and to the question whether the rights of defendant or other persons have been prejudiced by the

Compare *People ex rel. Gas Light Co. v. Common Council of Syracuse*, 78 N. Y. 61.

58. *People v. Bernstein Sick, etc., Soc.*, 161 App. Div. 823, 146 N. Y. Supp. 886.

59. *Ex parte Koon*, 1 Denio, 645; *People v. Seneca Common Pleas*, 2 Wend. 264; *People ex rel. Miller v. Justices of Sessions*, 78 Hun, 334, 29 N. Y. Supp. 157; *People ex rel. Milliard v. Chapin*, 104 N. Y. 102; *People ex rel. Young v. Collis*, 6 App. Div. 467, 39 N. Y. Supp. 698; *Matter of Vanderhoff*, 15 Misc. 434, 72 St. Rep. 354, 36 N. Y. Supp. 833; *People ex rel. Vanderhoff v. Palmer*, 3 App. Div. 389, 33 N. Y. Supp. 651; *People ex rel. Jordan v. Bd. of Education*, 69 St. Rep. 622, 35 N. Y. Supp. 247; *People ex rel. Byrne v. French*, 12 Abb. N. C. 156; *People ex rel. Best v. Preston*, 62 Hun, 189, 41 St. Rep. 214; *aff'd*, 131 N. Y. 644; *People ex rel. Sheridan v. French*, 31 Hun, 617, 13 Abb. N. C. 413; *People v. Tremain*, 29 Barb. 96; *People v. Taylor*, 30 How. Pr. 78; *People v. Common Council*, 52 How. Pr. 346. See *People v. Cooper*, 24 Hun, 337; *People ex rel. Miller v. Justices of Sessions*, 78 Hun, 334, 60 St. Rep. 720, 29 N. Y. Supp. 157; *People v. O'Keefe*, 17 Wkly. Dig. 536.

Member of fire department.—A member of the uniformed force of the

New York fire department was retired over his protest in October, 1896, for physical disability, and given a pension, which he continued to draw. His place was filled. In the succeeding March, and again in May, he informed the commissioners that he was recovered and desired reinstatement, and on the last occasion was told that the matter would be placed before the doctor after election. In November he saw the doctor, and was told he could not get back. Litigation to determine the legal propriety of a similar enforced retirement was pending and decided in April, 1898. The fireman began mandamus for his reinstatement September 19, 1899. *Held*, that such circumstances were sufficient to show an acquiescence in his retirement, operating to deprive him of remedy by mandamus. *People ex rel. Miller v. Sturgis*, 82 App. Div. 580, 81 N. Y. Supp. 816. Where a member of a fire department was retired upon a pension because of an injury received which rendered him insane for fourteen years, when he was restored to sanity by a surgical operation, it was held that he could not be charged with laches in subsequently delaying for two months before applying for mandamus to compel the fire commissioner to increase his pension to the amount he was lawfully entitled to receive. *People ex rel. Jennings v. Johnson*

delay.⁶⁰ Generally some injury from the delay should be shown to prevent the granting of the relief.⁶¹ The objection that the order was not timely issued may be waived.⁶²

There is no particular provision creating a limitation for a proceeding by mandamus, and hence the proceeding may be within section 53 of the Civil Practice Act prescribing a limitation of ten years.⁶³ This section is applicable to special proceedings.⁶⁴

While there is no statutory limitation within which an application for mandamus must be made, the four months' limitation applicable to an order of certiorari will be applied thereto; and the application will be denied if not made within that time, unless the delay is satisfactorily explained.⁶⁵ While a delay of over four months may in general be deemed laches, yet each case must depend on its own facts and circumstances.⁶⁶ Where, at the time of removal of an officer without notice of charges or opportunity to be heard, it was held that the Civil Service Law of 1898 did not apply to New York city, he cannot be held guilty of laches in waiting for the final determination of a test case, where he applies for a mandamus to procure reinstatement with reasonable promptness after the Court of Appeals decided that the act applied to such city.⁶⁷ But a plea that a litigation over the constitutionality of a statute, upon which the petitioner's right depended, excused his failure to apply within the required four months will not be accepted where it appears that his delay continued for six months after the Court of Appeals had finally determined the question of the constitutionality of the statute.⁶⁸

(1914), 161 App. Div. 625, 146 N. Y. Supp. 977.

60. *People ex rel. Gas Light Co. v. Common Council*, 78 N. Y. 56; *Matter of McDonald*, 34 App. Div. 512, 54 N. Y. Supp. 525.

61. *People v. Common Council*, 9 Wkly. Dig. 43; s. c., 78 N. Y. 56.

62. *People ex rel. Ehrlich v. Grant*, 61 App. Div. 238, 70 N. Y. Supp. 504.

63. *People ex rel. Nelson v. Marsh*, 82 App. Div. 571, 81 N. Y. Supp. 579; aff'd, 178 N. Y. 618; *People v. Beach*, 3 Civ. Pro. 180, 12 Abb. N. S. 156. Compare *People v. French*, 31 Hun, 317; *People v. Police Com'rs*, N. Y. Daily Reg., Aug. 2, 1883.

64. Civil Practice Act, § 10.

65. *People ex rel. McDonald v. Lantry*, 48 App. Div. 131, 62 N. Y. Supp. 630; *People ex rel. Finn v. Greene*, 87 App. Div. 346, 84 N. Y. Supp. 565; *People ex rel. Taylor v. Welde*, 28 Misc. 582, 59 N. Y. Supp. 1030; aff'd, 61 App. Div. 580, 70 N. Y. Supp. 869; *People ex rel. Dellett v. Board of Health of N. Y.*, 56 Misc. 26, 106 N. Y. Supp. 923.

66. *Matter of McDonald*, 34 App. Div. 512, 54 N. Y. Supp. 525.

67. *People ex rel. Tierney v. Scannell*, 27 Misc. 662, 59 N. Y. Supp. 679.

68. *People ex rel. Finn v. Greene*, 87 App. Div. 346, 84 N. Y. Supp. 565.

Delays of fifteen years,⁶⁹ six years,⁷⁰ two years,⁷¹ eighteen months,⁷² sixteen months,⁷³ eleven months,⁷⁴ ten months,⁷⁵ nine months,⁷⁶ have condemned the proceeding. On the other hand, the proceeding has been entertained, although a delay of eighteen months has intervened.⁷⁷

69. Fifteen years.—Where a period of fifteen years has elapsed between the enactment of a statute relative to the cancellation of tax sales and the application for relief by a person claiming the benefit thereof, mandamus is properly denied for his laches. *People ex rel. Staples v. Sommer*, 206 N. Y. 39.

70. Six years.—A mandamus to compel the reinstatement of a teacher in the public schools may be refused in the discretion of the court where there has been a delay of six years in applying therefor, and such delay is not excused by the petitioner's persistence in the prosecution of another remedy by unsuccessful appeals, although advised of his mistake in the remedy selected. *People ex rel. Steinson v. Bd. of Education*, 158 N. Y. 125, aff'g 20 App. Div. 452, 46 N. Y. Supp. 782.

71. *People ex rel. Martin v. Feitner*, 33 Misc. 357, 68 N. Y. Supp. 535; aff'd, 60 App. Div. 630, 69 N. Y. Supp. 1143.

72. *Murphy v. Keller*, 61 App. Div. 145, 70 N. Y. Supp. 405.

73. *People ex rel. Connolly v. Bd. of Education of N. Y.*, 114 App. Div. 1, 99 N. Y. Supp. 737; aff'd, 187 N. Y. 535.

74. Eleven months.—Though petitioners were entitled to preference in employment under the Civil Service Commission upon the abolition of the office of State Gas Meter Inspector, in which they were formerly employed, and the Civil Service Commission neglected to appoint them, mandamus will not lie to compel their appointment where they waited eleven months after the gas inspectorship was abolished before asserting their right; there being now no available positions in the Civil Service Commission. *People ex rel. Rehm v. Willcox*, 60 Misc. 329, 112 N. Y. Supp. 341; *People ex*

rel. Gordon v. Same, 60 Misc. 329, 112 N. Y. Supp. 341.

75. Ten months.—While there is no statutory limitation within which an application for mandamus for reinstatement by a city employee must be made, a delay of ten months by a veteran fireman before applying for a peremptory mandamus on the ground he was not served with formal charges and given a hearing and a trial thereon before dismissal from his employment as medical clerk by the board of health for unsatisfactory service, held to require the denial of his application, though he gave as his excuse lack of means to prosecute his claim until two months before he applied. *People ex rel. Dellett v. Bd. of Health of N. Y.*, 56 Misc. 26, 106 N. Y. Supp. 923.

76. Nine months.—Failure to institute mandamus proceedings until nine months after the removal is fatal unless satisfactorily explained, and the fact that relator was informed that the law was unsettled and that some applications were pending undetermined is, of itself, an insufficient excuse. *People ex rel. Croft v. Keating*, 49 App. Div. 123, 63 N. Y. Supp. 71; aff'd, 164 N. Y. 64.

77. Eighteen months.—A police officer was not guilty of laches in permitting a year and a half to elapse from the time of notification to him of a rating accorded him on the eligible list for promotion before commencing mandamus proceedings to compel the civil service commission to correct the rating for an error therein, where the time between such notification and the institution of the mandamus proceedings was consumed in ineffectual attempts to procure redress from the police commissioner and the civil service commission. *People ex rel. Edwards v. Baker*, 49 Misc. 143, 97 N. Y. Supp. 453.

ARTICLE VII.**TRIAL OF ISSUES.****A. Civil Practice Act, § 1331. Issues of fact.**

An issue of fact arises upon a denial, contained in the return, of a material allegation of the petition upon which the order was granted, or upon a material allegation of new matter contained in a return; unless an objection thereto in point of law is taken. Where the petitioner objects in point of law to a complete statement of facts separately assigned as cause for disobeying the command of the order, an issue of fact arises with respect to the remainder of the return.

B. Civil Practice Act, § 1332. Subsequent proceedings same as in an action.

Except as otherwise expressly prescribed by statute, the proceedings after issue is joined, upon the facts or upon the law, are the same, in all respects, as in an action; and each provision of statute or rule relating to the proceedings in an action apply thereto. For the purpose of the application, the petition for the order and the return are deemed to be pleadings in an action; and the final order is deemed to be a final judgment, and may be entered and docketed, and enforced, with respect to such parts thereof as are not enforced by a peremptory mandamus, as a final judgment in an action. But before the final order can be docketed or an execution issued thereupon, an enrollment must be filed thereupon as a judgment-roll in an action. For that purpose, the clerk must attach together and file in his office a certified copy of the final order, the petition and the return, or copies thereof, together with the same papers which are required by law to be incorporated into a judgment-roll in an action. Where the final order is in favor of the petitioner, it must include a peremptory mandamus.

C. Civil Practice Act, § 1333. Trial of issue of fact generally.

An issue of fact, joined as prescribed in this article, must be tried by a jury, unless a jury trial is waived or a reference is directed by consent of parties. Where the order was issued upon the application of a private person, the petitioner or the defendant is entitled to a verdict, report or decision, where he would be entitled thereto if the issue was joined in an action brought by the petitioner against the defendant to recover damages for making a false return.

D. Civil Practice Act, § 1334. Place of trial of issue of fact.

An issue of fact, if the alternative mandamus order was granted at a special term of the supreme court, is triable in the county wherein it is alleged in the petition that the material facts took place, unless the court directs it to be tried elsewhere. An issue of fact, if the alternative mandamus order was granted at a term of the appellate division of the supreme court, is triable in the county which determines the judicial department wherein the application for the order must be made; unless the appellate division directs it to be tried in another county of the same judicial department. Upon the trial of the issue of fact, the verdict, report or decision must be returned to, and the final order thereupon must be made by, the appellate division or the special term, as the case requires.

E. Civil Practice Act, § 1335. Trial of issue of law upon Appellate Division order.

An issue of law, if the alternative mandamus order was granted by the appellate division, must be tried and the final order thereupon must be made by the appellate division.

F. Civil Practice Act, § 140. Preference of mandamus or prohibition orders in Appellate Courts.

Where a mandamus order or a prohibition order has been issued from the appellate division of the Supreme Court, to a Special Term, or a judge of the same court, the cause, in the discretion of the court, or, where an appeal is taken therein to the Court of Appeals, in the discretion of that court, may be preferred over any of the causes specified in section one hundred and thirty-eight.

G. Issues at common law.

By the practice under the common law, the relator was not permitted to traverse the return notwithstanding that it might be false in fact, and the remedy was either by an action on the case for a false return, or if the matter concerned the public, by indictment of the person making the false return.⁷⁸ Even after the change in the law permitting the traverse of the return and the recovery of damages in the proceeding, the relator was entitled to recover damages he sustained by reason of the falsity of the return.⁷⁹

H. Issues under Civil Practice Act, in general.

The petition and alternative order may be met, either by objections raising an issue of law, or by a return raising an issue of fact, and upon joinder of either issue the proceedings are the same as in an action.⁸⁰

An issue is joined not by affidavits, but by the filing of a return in the office of the clerk of the county designated in the order within twenty days after service thereof, or by objections to the petition.⁸¹ The petition and return thereto are in substance pleadings upon which issues of fact or law arise according as there may be objections in point of law or denials of the facts alleged. Upon these pleadings the issues

78. *People ex rel. Goring v. President*, 13 Misc. 733, 35 N. Y. Supp. 213, 69 St. Rep. 592; rev'd on other grounds, 151 N. Y. 386; *Fish v. Weatherwax*, 2 Johns. 217, note, § 63. See, also, *People ex rel. Bentley v. Com'rs of Highways*, 6 Wend. 560; *People ex rel. McMackin v. Bd. of Police*, 46 Hun, 299, 11 St. Rep. 403.

79. *People v. Supervisors of Rich-*

mond, 28 N. Y. 112.

80. *People ex rel. Ajas v. Depart. of Health*, 138 App. Div. 559, 123 N. Y. Supp. 294; *People ex rel. Geraci v. Italian Assoc. St. Bartholomew*, 123 App. Div. 277, 107 N. Y. Supp. 1101.

81. *People ex rel. Elmira Advertiser Assn. v. Gorham*, 169 App. Div. 891, 155 N. Y. Supp. 727.

are to be determined and no substantial right is affected until such determination.⁸²

I. Jury.

The issues of fact created by the return are triable, as a matter of right, by a jury.⁸³ But if the return shows that the examination of a long account is involved, a compulsory reference may be ordered.⁸⁴ Or the parties may waive the right to a jury trial and have the issues disposed of by the court.

The jury may render a general verdict,⁸⁵ or particular issues for the jury may be settled under section 429 of the Civil Practice Act.⁸⁶

The verdict of the jury is not conclusive in the sense that it is beyond the control of the court,⁸⁷ but it has the same force and effect as if rendered in an action at law,⁸⁸ and it cannot be treated as merely advisory to the court.⁸⁹ The verdict is conclusive upon the court, unless it is set aside or a new trial

82. *People ex rel. Wilson v. African W. M. E. Church*, 156 App. Div. 386, 141 N. Y. Supp. 394.

83. *People ex rel. Geraci v. Italian Assoc. St. Bartholomew*, 123 App. Div. 277, 107 N. Y. Supp. 1101; *People ex rel. Neftaniel v. Order American Star*, 53 Super. Ct. 71; *People v. Green*, 1 Hun, 1.

Reinstatement.—One who has been expelled from a membership corporation, and brings mandamus for reinstatement, is entitled on the trial of the issues to have submitted to the jury the question whether he has been given a reasonable notice to defend himself upon the charges upon which he was expelled. *People ex rel. Ward v. Uptown Assoc.*, 26 App. Div. 299, 49 N. Y. Supp. 81.

84. *People v. Wadsworth*, 61 How. Pr. 57.

85. *People v. Board of Met. Police*, 35 Barb. 644; *People ex rel. Neftaniel v. Order American Star*, 53 Super. Ct. 72.

86. *People ex rel. Neftaniel v. Order American Star*, 53 Super. Ct. 72.

87. *People ex rel. Boyd v. Hertle*, 28 Misc. 37, 60 N. Y. Supp. 23; mod'd, 46 App. Div. 505, 61 N. Y. Supp. 965.

88. *People ex rel. McDonald v. Clausen*, 163 N. Y. 523; *People ex rel.*

Nason v. Feitner, 58 App. Div. 594, 69 N. Y. Supp. 141.

Exempt fireman.—Under sections 429 and 1333 of the Civil Practice Act, the court at special term has no power to go behind the verdict of a jury, rendered upon an issue as to whether the applicant was an exempt fireman within the provisions of the act of 1892. *People ex rel. Coveney v. Kearney*, 44 App. Div. 449, 61 N. Y. Supp. 41, 30 Civ. Pro. 12; aff'd, 161 N. Y. 648.

A verdict on the issues should not be disregarded in the absence of a motion for a new trial, in a case where, though the evidence is conflicting, there is ample evidence to sustain the verdict. It is no ground for setting the verdict aside, that the jury, in answer to a question they put to the court as to whether the court would be absolutely bound by the verdict, were told that it would not be absolutely bound. The verdict would have been reviewable on a motion for a new trial. *People ex rel. Kruse v. Woodman*, 23 St. Rep. 89, 4 N. Y. Supp. 555; aff'd without opinion, 123 N. Y. 634.

89. *People ex. rel. McDonald v. Clausen*, 163 N. Y. 523.

is granted.⁹⁰ Under section 1333 either party is entitled to a verdict when he would be entitled thereto if issue were joined in an action to recover damages for making a false return.⁹¹ If the issue is for the determination of the jury, the direction of a verdict is error.⁹² If the court has erroneously directed a verdict, it may set it aside; but if the case presents a question for the jury, a new trial should be directed.⁹³

The Trial Court does not grant the final order pursuant to the verdict, but the verdict is reported to the Special Term or to the Appellate Division, which makes the order.⁹⁴ Nor can the Trial Term dismiss the proceeding upon the merits;⁹⁵ but it can direct a verdict upon a failure of proof by the petitioner.⁹⁶ Or the Trial Term may direct a verdict when requested by both parties.⁹⁷ If a verdict is directed by the court it will be presumed to have been rightfully directed in the absence of any evidence to the contrary; and when there is no evidence upon an issue before the jury, or the weight of evidence is so decidedly in favor of one side that the court would set aside the verdict as against evidence, if rendered, it is the duty of the judge to direct the jury what verdict to render.⁹⁸ Where the respondent did not seek to go to the jury on a certain issue, and a verdict was directed for petitioner, it has the effect of a finding adverse to respondent on such issue.⁹⁹

J. Venue.

Pursuant to section 1334 of the Civil Practice Act, the issues on an alternative order of mandamus are generally tried in the county wherein it is alleged in the petition that

90. *People ex rel. Boyd v. Hertle*, 46 App. Div. 505, 61 N. Y. Supp. 965.

91. *People ex rel. Neftaniel v. Order American Star*, 53 Super. Ct. 71.

92. *People ex rel. Nicholas v. Supervisors*, 60 Hun, 387, 39 St. Rep. 863, 15 N. Y. Supp. 471.

93. *People ex rel. Ross v. Dooling*, 132 App. Div. 50, 116 N. Y. Supp. 371.

Case.—A motion for a new trial may be made without the making of a case. *People ex rel. Wieland v. Knox*, 78 App. Div. 344, 79 N. Y. Supp. 989.

94. Civil Practice Act, § 1334.

95. *People ex rel. Bean v. Clausen*, 74 App. Div. 217, 77 N. Y. Supp. 521; *People ex rel. Geraci v. Italian Assoc.*

St. Bartholomew, 123 App. Div. 277, 107 N. Y. Supp. 1101; *People ex rel. Blank v. Supreme Lodge*, 126 App. Div. 86, 110 N. Y. Supp. 148; *People ex rel. Ross v. Dooling*, 132 App. Div. 50, 116 N. Y. Supp. 371.

96. *People ex rel. Bean v. Clausen*, 74 App. Div. 217, 77 N. Y. Supp. 521; *People ex rel. Geraci v. Italian Assoc. St. Bartholomew*, 123 App. Div. 277, 107 N. Y. Supp. 1101.

97. *People ex rel. Ross v. Dooling*, 132 App. Div. 50, 116 N. Y. Supp. 371.

98. *People v. Bd. of Met. Police*, 35 Barb. 644.

99. *People ex rel. Gleason v. Scannell*, 172 N. Y. 316.

the material facts took place.¹ Where some of the material facts occurred in one district and some in another district, it is thought that the courts of either district have jurisdiction.² In determining where an issue should be tried, when the moving papers fail to disclose where the "material facts" arose, legal inferences cannot be substituted for facts.³

K. Burden of proof.

Upon the trial of issues raised by the return to the alternative order, the burden of proof follows the ordinary course in actions.⁴ The burden is on the petitioner to establish the allegations of the petition, and where neither he nor a defendant, who files a return, offers any evidence, the proceeding will be dismissed for want of proof.⁵ Upon objections being interposed to the sufficiency of the petition, the petitioner holds the affirmative of the issue.⁶

L. Discontinuance of proceedings.

An order discontinuing mandamus proceedings at the instance of petitioner, on the ground that he had no remedy by mandamus "without prejudice" to sue, should be modified, as the discontinuance is not a decision on the merits such as to bar a subsequent action.⁷ Where one, formerly an active member of the police force of the city of New York, was retired upon a pension, and he instituted a proceeding by notice of a motion to obtain a mandamus requiring defendant, as police commissioner, to reinstate him in his former position, it was held that he had a right to discontinue the proceeding but the order therefor should not contain the recital "without prejudice to a new proceeding," the right to which must depend upon the facts presented.⁸

1. *People v. Myers*, 50 Hun, 479, 3 N. Y. Supp. 365; aff'd, 112 N. Y. 676.

2. *People ex rel. Davenport v. Rice*, 68 Hun, 26, 52 St. Rep. 51, 22 N. Y. Supp. 632.

3. *People ex rel. Arnold v. Skene*, 194 N. Y. 186.

4. *People ex rel. Egan v. The Columbia Club*, 20 Civ. Pro. 323, 15 N. Y. Supp. 821.

5. *People ex rel. Melenbacker v. Hubbell*, 82 Misc. 624, 144 N. Y. Supp. 219.

6. *People v. Tyner*, 24 Barb. 348.

7. *People ex rel. Allen v. York*, 84 App. Div. 440, 82 N. Y. Supp. 863.

8. *People ex rel. Morgan v. Bingham*, 115 App. Div. 474, 101 N. Y. Supp. 410.

ARTICLE VIII.

FINAL PEREMPTORY ORDER.

A. In general.

Under the Code of Civil Procedure, after the determination of the issues in favor of the petitioner, a final order was made, and pursuant to such final order a peremptory writ of mandamus was issued directing the performance of the acts in question. Under the new practice, if the final order is in favor of the petitioner, it must include a peremptory mandamus. The final order is deemed to be a final judgment.⁹

B. By what court granted.

After a trial of the issues raised in the proceeding, the final order is not granted by the Trial Term, but the verdict, decision or report is returned to, and the final order is thereupon made, by the Special Term or Appellate Division, as the case requires.¹⁰ Although the Trial Term may direct a verdict in a proper case, it cannot dismiss the proceeding.¹¹

C. Contents of order.

The final order includes a peremptory mandamus. It should point out what the defendant has failed to do and specify the acts which he is required to perform.¹² It should command that which is in conformity with a legal obligation imposed; but it may vary the details of the manner of doing that act.¹³ It must command precisely what and no more than the party to whom it is directed is legally required to do.¹⁴ The recitals and statements in order must be sufficient to show what is required without reference to the moving papers.¹⁵

Where it appears, on an application for a peremptory mandamus to compel city officials to remove obstructions in a

9. Civil Practice Act, § 1332.

10. *People ex rel. Geraci v. Italian Assoc. St. Bartholomew*, 123 App. Div. 277, 107 N. Y. Supp. 1101; *People ex rel. Blank v. Supreme Lodge*, 126 App. Div. 86, 110 N. Y. Supp. 148; *People ex rel. Birmingham v. Grout*, 45 Misc. 181, 91 N. Y. Supp. 900; *People ex rel. Neftaniel v. Order American Star*, 53 Super. Ct. 73.

11. *People ex rel. Bean v. Clausen*, 74 App. Div. 217, 77 N. Y. Supp. 521; *People ex rel. Geraci v. Italian Assoc. St. Bartholomew*, 123 App. Div. 277,

107 N. Y. Supp. 1101; *People ex rel. Blank v. Supreme Lodge*, 126 App. Div. 86, 110 N. Y. Supp. 148; *People ex rel. Ross v. Dooling*, 132 App. Div. 50, 116 N. Y. Supp. 371.

12. *People ex rel. Green v. D. & C. R. R. Co.*, 58 N. Y. 157.

13. *Matter of P. S. Comm. v. N. Y. & Queens Co. R. Co.*, 170 App. Div. 580, 156 N. Y. Supp. 323.

14. *People ex rel. Hasbrouck v. Supervisors*, 135 N. Y. 533.

15. *Commercial Bank of Albany v. Canal Com'rs*, 10 Wend. 25.

street, that the obstructions have existed for a long time, the order should direct the officials to remove them, or in their discretion, to take appropriate measures to compel their removal by the owner or lessee, and if such proceedings are instituted, to prosecute them with all reasonable speed.¹⁶ Where a peremptory order is issued to compel a common carrier to perform its duties, it should require the company to exercise its franchise and to receive and transport freight upon such terms as are reasonable and usual and to perform its duties as a common carrier.¹⁷

A judgment in mandamus proceedings conclusively determines between the parties all the issues involved in it.¹⁸

D. Variance from petition.

Under the Code of Civil Procedure, the peremptory writ generally followed the allegations of the alternative writ.¹⁹ But issues having been taken to the allegations in the alternative writ, the court was allowed to mould its final decision according to the situation found to exist.²⁰ If a substantial right was set out in the writ, the proceeding did not fail because the relator asked for too much, or mistook to some extent the relief to which he was entitled.²¹ The final relief was not required in all instances to follow the relief sought in the alternative writ.²² Where the alternative writ was issued and the facts developed on trial, the order could award such final writ as the facts warrant, as the proceedings were made analogous to those in an action, and the judgment could, therefore, be consistent with the facts proven.²³ If the substance of the two was the same, and they differed only in immaterial details, and where the act required was easier to be performed by the defendant under the requirements of the peremptory writ than it was under the requirements of the alternative writ, the peremptory writ was sustained.²⁴

16. *People ex rel. Browning, King & Co. v. Stover*, 145 App. Div. 259, 130 N. Y. Supp. 92; *aff'd*, 203 N. Y. 613.

17. *People v. N. Y. C. & H. R. R. R. Co.*, 28 Hun, 559; *People v. N. Y. C. & H. R. R. R. Co.*, 3 Civ. Pro. 11, *rev'g* 2 Civ. Pro. 82, 63 How. Pr. 291.

18. *Lighton v. City of Syracuse*, 112 App. Div. 589, 98 N. Y. Supp. 792, *aff'g* 48 Misc. 134, 96 N. Y. Supp. 692; *rev'd*, 188 N. Y. 499.

19. *People ex rel. v. Gilroy*, 60 Hun, 507, 39 St. Rep. 526, 15 N. Y. Supp. 242.

20. *People ex rel. Keene v. Supervisors*, 142 N. Y. 278.

21. *People ex rel. Keene v. Supervisors*, 142 N. Y. 278.

22. *People ex rel. Henry v. Nostrand*, 46 N. Y. 377; *People ex rel. McLaughlin v. Bd. of Police Com'rs of City of Yonkers*, 79 App. Div. 82, 79 N. Y. Supp. 710; *rev'd*, 174 N. Y. 450.

23. *People ex rel. Broderick v. Morton*, 24 App. Div. 567, 49 N. Y. Supp. 760.

24. *People ex rel. Green v. D. & C. R. R. Co.*, 58 N. Y. 157.

As the petition under the new practice fulfills the purpose of the former writ, it is thought that the final order need not follow exactly the allegations of the petition, but that the relief may be moulded to some extent to correspond with facts developed. The variance, however, should not be greater than is allowed in other actions or proceedings.

E. Attack on alternative order.

Under the former practice prior to 1913, the issuance of the alternative writ did not affect the rights of the parties and no appeal could be taken from the order directing its issuance. The question was, therefore, left open to determination upon the application for the final order as to whether the alternative writ was properly issued.²⁵ The final writ could be denied if the alternative writ had been improperly granted. The relator was not entitled to a peremptory mandamus, even upon a verdict in his favor on issue joined on return to an alternative writ, when the record showed he had no legal right thereto on the facts.²⁶ In 1913 the reason for the rule was affected by an amendment to the Code of Civil Procedure allowing an appeal from an order granting or denying an alternative writ. But even after this amendment, there can be found authority allowing an attack on the alternative writ after the disposition of the issues.²⁷

F. Vacating or modifying final order.

Where the defendant files a return to an alternative mandamus, and upon the denial of his motion to postpone the trial allows an inquest to be taken, and the court directs a verdict in favor of the plaintiff, and an order is made directing the issuance of a peremptory mandamus, it is not permissible for the defendant to obtain from another justice an order to show cause why the inquest, final order, and peremptory order should not be vacated and so open the so-called

25. A peremptory writ of mandamus cannot issue when the alternative writ is deficient in substance; hence, where an assistant foreman of highways, seeking reinstatement after his removal without a hearing, claims the benefit of section 21 of chapter 270 of the Laws of 1902, as a volunteer fireman, the alternative writ must show affirmatively that he had served the

required term in a volunteer fire department or was a member thereof when disbanded. *People ex rel. Fogarty v. Cassidy*, 118 App. Div. 693, 103 N. Y. Supp. 671.

26. *People v. Batchellor*, 53 N. Y. 128.

27. *People ex rel. Becker v. Board of Education*, 110 Misc. 587, 181 N. Y. Supp. 804.

default. Such practice would allow one justice to review the action of another.²⁸

G. Damages.

1. Civil Practice Act, § 1338. Recovery of damages by petitioner.

Where a return has been made to a petition and alternative mandamus order issued upon the application of a private person, the court, upon making a final order for a peremptory mandamus, except where said order is directed against a state officer or officers, or an officer or officers of a municipal or private corporation, if the petitioner so elects, also must award to the petitioner, against the defendant who made the return, the same damages, if any, which the petitioner might recover in an action against the defendant for a false return. The petitioner may require his damages, where entitled thereto as aforesaid, to be assessed upon the trial of an issue of fact, if the verdict, report or decision is in his favor. Such an assessment of damages bars an action for a false return.

2. Common-law rule.

At common law there was no right to recover damages against the defendant in a proceeding by mandamus.²⁹ If the defendants interposed a false return, it was conclusive, and the only remedy of the party aggrieved was by an action for a false return.³⁰ The statute gives him his election whether he shall ask for damages in the mandamus proceeding; if he does not so elect, he is still entitled to maintain his action for damages for a false return.³¹

3. Application of section.

For many years the statute allowing damages had a broad application.³² But in 1913 an amendment was interposed to the corresponding section of the Code of Civil Procedure, which took from its application cases where the writ was directed to a State officer, or officers, or an officer or officers of a municipal or private corporation.³³ The section in terms restricts its application to cases when an alternative order has been granted, but it may be extended by judicial

28. *People ex rel. Mount Vernon Trust Co. v. Millard*, 133 App. Div. 139, 117 N. Y. Supp. 474.

29. *People ex rel. Goring v. President*, 13 Misc. 733, 35 N. Y. Supp. 213, 69 St. Rep. 592; *rev'd on other grounds*, 151 N. Y. 386.

30. Where supervisors had made a false return to a writ sued out by an individual, and the relator had thereby been deprived of damages against a town, the supervisors were held liable for damages to the extent of interest

on the amount of damages finally assessed. *People v. Supervisors of Richmond*, 28 N. Y. 112.

31. *McGraw v. Gresser*, 226 N. Y. 57.

32. *People ex rel. Deverell v. Musical Mutual Protective Union*, 118 N. Y. 109; *People ex rel. Crummey v. Palmer*, 9 App. Div. 58, 41 N. Y. Supp. 81; *rev'd on other grounds*, 152 N. Y. 217.

33. *People ex rel. Becker v. Board of Education*, 132 N. Y. Supp. 643.

construction to cases where a peremptory order is granted in the first instance.³⁴ Damages cannot be recovered against a person not made a party.³⁵

The final order may award the petitioner such damages as he might have recovered in an action against the respondent for false return, even though there be no adjudication that the return is false. But it does not follow that he is entitled to damages if the facts would not authorize them in another action or proceeding.³⁶ Damages recoverable by the relator in mandamus proceedings by reason of a false return do not include counsel fees or expenses of the trial but only damages which he could recover in an action for a false return.³⁷ The Trial Term cannot render a money judgment for the damages.³⁸

H. Fine.

1. Civil Practice Act, § 1340. Fine in certain cases.

Where a final order includes a peremptory mandamus directed against a public officer, board or other body, commanding him or them to perform a public duty enjoined upon him or them by a special provision of law, if it appears to the court that the officer, or one or more members of the board or body, without just excuse have refused or neglected to perform the duty so enjoined, the court, besides awarding to the petitioner his damages and costs, as prescribed in this article, may impose, in the same order, a fine, not exceeding two hundred and fifty dollars, upon the officer, or upon each member of the board, who has so refused or neglected. The fine when collected must be paid into the treasury of the state; and the payment thereof bars any action for a penalty incurred by the person so fined, by reason of his refusal or neglect to perform the duty so enjoined.

2. Discussion of section.

The offense for which the fine is authorized to be imposed is not disobedience of the order but the unexcused neglect of duty of which the officer was guilty before the order was granted, and which rendered the application necessary, and

34. *People ex rel. Goring v. Wappinger Falls*, 151 N. Y. 388. Contra, *People ex rel. Becker v. Board of Education*, 162 N. Y. Supp. 643.

35. *People ex rel. Walker v. Ahearn*, 139 App. Div. 88, 123 N. Y. Supp. 845; appeal dismissed, 200 N. Y. 146; affirmed, 202 N. Y. 551.

36. *People ex rel. Walker v. Ahearn*, 139 App. Div. 88, 123 N. Y. Supp. 845; affirmed, 200 N. Y. 146, 202 N. Y. 551.

37. *People ex rel. Lally v. N. Y. C. & H. R. R. Co.*, 116 App. Div. 849, 102 N. Y. Supp. 385.

Where a stockholder in mandamus proceedings to enforce his right to an inspection of the books and to take extracts therefrom succeeds only as to a portion of the relief sought, he is not entitled to recover counsel fees, as the services rendered in attempting to enforce the relief granted cannot be separated from those rendered in respect to the relief which was denied. *Clason v. Nassau Ferry Co.*, 27 App. Div. 621, 50 N. Y. Supp. 160.

38. *People ex rel. Nugent v. Police Com'rs*, 114 N. Y. 245, 23 St. Rep. 230.

the fine may be imposed at the time of issuing the peremptory order. It is entirely independent of punishment as for a contempt in disobeying the writ. But the directors of a corporation are not a public officer, body, or board under this section.³⁹ It is not a punishment within the meaning of section 1841 of the Penal Law and the awarding of the fine provided by this section of the Civil Practice Act does not prohibit a criminal proceeding against the officer for the same act. Public officers neglecting to perform public duties may be proceeded against and punished both under the provisions of the Penal Law and under section 1340.⁴⁰

I. Costs.

1. Civil Practice Act, § 1336. Costs.

Where an alternative mandamus order has been issued, costs may be awarded as in an action; except that, upon making a final order, the costs are in the discretion of the court. Where an application for a peremptory mandamus order is granted or denied, without a previous alternative mandamus order, costs not exceeding fifty dollars and disbursements may be awarded to either party as upon a motion.⁴¹

2. Alternative mandamus.

If a trial of issues raised by the petition and a return has been had, the costs are discretionary with the court.⁴² The equity of each case will govern the allowance of costs, and when the order is silent as to costs they will not be allowed.⁴³

39. *People v. State Line R. R.*, 76 N. Y. 294.

40. *People v. Meakin*, 133 N. Y. 222.

41. **Appeal.**—This section has no application to costs upon appeal. *People ex rel. Bray v. Board of Supervisors of Ulster Co.*, 65 How. Pr. 327. The costs allowed and recoverable upon an appeal from a peremptory order, when such order is affirmed, are regulated by section 1454 of the Civil Practice Act and, in the discretion of the court, are the same costs which are given on appeal from the judgment. *People v. Ulster Co. Supervisors*, 65 How. Pr. 327. See, also, *People v. Ewen*, 8 Abb. Pr. 359; *People v. Lewis*, 28 How. Pr. 159. Where the Court of Appeals reversed the decision of the Appellate Division and Special Terms sustaining a demurrer to an alternative mandamus with costs to the defendant and granted leave to the defendant to answer on payment of costs, it was held that the relator could properly

apply to the Special Term for an order granting him the costs of the Special Term. The granting of such order is discretionary, and the relator is not entitled to such costs as a matter of right. In such cases the Appellate Division costs can only be awarded by the Appellate Division itself. *People ex rel. Keene v. Supervisors*, 83 Hun, 237, 31 N. Y. Supp. 569, 64 St. Rep. 159; *aff'd*, 145 N. Y. 597.

42. **Extra allowance.**—The court has no power to grant an extra allowance in a proceeding instituted by an alternative order of mandamus to compel the reinstatement of an applicant in a position in the civil service of New York city from which he has been wrongfully removed. *People ex rel. Boyd v. Hertle*, 46 App. Div. 505, 61 N. Y. Supp. 965.

43. *People v. Densmore*, 1 Barb. 557; *People v. Supervisors of Dutchess*, 3 How. 380.

They will not ordinarily be allowed the petitioner as against a public officer acting in good faith.⁴⁴ It is not the practice to grant costs against judges or other subordinate courts, or other public officers intrusted with the discharge of judicial duties.⁴⁵ Nor will they be allowed against any public officer, when it appears his refusal to comply with the demand of the petitioner was conscientious, and founded on reasonable grounds.⁴⁶ In a case where an application for mandamus was held to be premature, as the respondent still had time to perform the duty sought to be coerced, costs were not allowed to either party.⁴⁷ Where the court at the time of the decision of the application for mandamus could offer the applicant no relief even if he were legally entitled to the order, it was held, in modifying the order of denial, that the application should have been dismissed without costs.⁴⁸ When costs are awarded as a matter of discretion they are not subject to review upon appeal.⁴⁹

3. Peremptory mandamus.

If an application for a peremptory mandamus in the first instance is granted or denied, costs not exceeding fifty dollars and disbursements are awarded to either party as upon a motion.⁵⁰ But section 1336 does not contemplate in such a case the allowance of costs to an unsuccessful party.⁵¹ Where only part of the relief asked is granted, no costs will be allowed to either party.⁵²

4. Increased costs.

Under section 3258 of the Code of Civil Procedure, a defendant was entitled to increased costs, when a final order in a proceeding was made in his favor in a special proceeding instituted by State writ, and such defendant was a public

44. *People v. Brinkerhoff*, 68 N. Y. 259.

45. *Hecox v. Ellis*, 19 Wend. 157. But when judges make a return it has been held otherwise, on the ground that they are then presumed to be indemnified by the party in interest. *People v. Common Pleas*, 18 Wend. 534.

46. *People v. Flagg*, 5 Abb. 232.

47. *People ex rel. Smither v. Richmond*, 5 Misc. 26, 25 N. Y. Supp. 144.

48. *People ex rel. Schwager v. McLean*, 36 St. Rep. 534, 13 N. Y. Supp. 384; modif'g s. c., 33 St. Rep. 715, 11 N. Y. Supp. 851.

49. *People v. Albright*, 23 How. Pr. 306.

50. Earlier statute.—Under an earlier statute prescribing the costs on mandamus, it was held that only motion costs could be allowed, where a peremptory mandamus was denied without an alternative writ. *People v. Produce Exchange*, 64 How. Pr. 523.

51. *People ex rel. Lantz v. Common Council of City of Mt. Vernon*, 95 App. Div. 75, 88 N. Y. Supp. 493.

52. *Matter of Obelisk Waterproof Co.*, 111 Misc. 1, 182 N. Y. Supp. 303.

officer. Thus, in a mandamus proceeding, if the successful defendant was a public officer, he was allowed the increased costs.⁵³ In abolishing the writ of mandamus, the Legislature failed to make a corresponding change in the section (1479) of the Civil Practice Act relating to such increased costs. The Legislature, no doubt, intended to retain the former rule, but it is an open question whether it has done so.

J. Enforcement by contempt proceedings.

The failure to comply with an order of mandamus or to make a return thereto, may be punished as a contempt of court.⁵⁴ On appeal from an order adjudging one guilty of contempt in not obeying the order the question as to the propriety of granting it cannot generally be considered.⁵⁵ The question whether the act commanded by the order was legislative or ministerial in its nature cannot be raised in a proceeding to punish, as for a contempt, the refusal of members of the municipal assembly to obey it; but can be presented only by a direct appeal from the order.⁵⁶ But one cannot be punished as for a contempt in refusing to obey a peremptory order, where the judge had no authority to grant it.⁵⁷ And impossibility of complying with the order may relieve a party from punishment for contempt.⁵⁸ It is a suffi-

53. *People ex rel. v. Speed*, 73 Hun, 302, 57 St. Rep. 295, 26 N. Y. Supp. 254; *aff'd*, 142 N. Y. 670; *People v. Colborne*, 20 How. Pr. 378.

54. *People ex rel. Garbutt v. R. C. & L. R. R. Co.*, 76 N. Y. 300.

Writ not issued.—An order was obtained directing the issuance of a mandamus, and a stipulation was entered into by the parties providing that an appeal be taken therefrom, and that no action be taken in the matter until the decision in the Court of Appeals upon such appeal, and that such matter should be then acted upon in accordance with such decision. In the evening of the same day upon which the Court of Appeals rendered its decision, the respondents took action contrary to the direction of the Supreme Court, and before the issuance of a formal writ of mandamus upon the decision of the Court of Appeals, which would prevent such action; held, that the respondents were guilty of

contempt, and that it was not a defense that a formal written mandate, issued to enforce the decision of the court, had not been issued, if, at the time of taking such action, they knew what such decision was. Parties who violate an injunction are guilty of contempt, if they know that it was granted, although it had not been served upon them, and the same principle applies upon the violation of an order for a writ of mandamus. *People ex rel. Platt v. Rice*, 80 Hun, 437; *aff'd*, 144 N. Y. 249.

55. *People v. Rochester R. R. Co.*, 76 N. Y. 294.

56. *People ex rel. Pierce v. Guggenheimer*, 44 App. Div. 399, 60 N. Y. Supp. 703.

57. *People ex rel. Lower v. Donovan*, 135 N. Y. 76, 23 Civ. Proc. 6, *rev'g* 63 Hun, 512, 45 St. Rep. 141, 18 N. Y. Supp. 501.

58. **Construction of bridge.**—It seems that where a board of super-

cient answer in proceedings to punish as for a contempt for disobedience to the order that the act sought to be enforced has been prohibited by injunction. And in such proceedings it is not proper for the court to vacate such injunction.⁵⁹

An order punishing a person for contempt of court in failing to make a return as required by an order of mandamus, not being for an act done in the presence of the court, cannot be granted on an *ex parte* application.⁶⁰ On appeal from an order directing an attachment for a contempt in disobeying mandamus, the court may direct a new peremptory order to issue in such form as to meet the exigencies of the case.⁶¹

ARTICLE IX.

APPEALS.

A. Civil Practice Act, § 1337. Appeals.

An appeal from a peremptory mandamus order where an alternative mandamus order was not previously issued, and an appeal from an order granting or denying an application for an alternative mandamus order, must be taken as from a final order made in a special proceeding. An appeal from a final order made upon an alternative mandamus order must be taken as an appeal from a judgment; and each provision of law relating to an appeal from a judgment, either to the appellate division or to the court of appeals, is applicable thereto. But where an appeal is taken, as prescribed in this section, from an order of the appellate division granting a peremptory mandamus, made upon an original application, or from a final order made upon an alternative mandamus, granted at the appellate division, the execution of the order appealed from shall not be stayed, except by the order of the same appellate division, made upon such terms as to security or otherwise as justice requires.

B. Civil Practice Act, § 1339. Stay of proceedings and enlargement of time.

Where the mandamus order was granted at a term of the appellate division, an order staying the proceedings or enlarging the time to make a return can be made only by a justice of the appellate division of the same department;

visors were commanded by mandamus to proceed and construct a bridge, which act they could not perform until the location and plans should have been approved by the Secretary of War, where such consent of the Secretary of War has been sought in good faith and cannot be procured, it will excuse delay in laying out the bridge in proceedings for contempt. *People ex rel. Keene v. Supervisors*, 142 N. Y. 278.

Reinstatement.—Where the respondent had no notice in fixing the salary

he cannot be adjudged guilty of contempt in failing to restore the petitioner to his original salary. *People ex rel. La Chicotte v. Stevenson*, 57 Misc. 64, 108 N. Y. Supp. 860.

59. *People ex rel. Duffy v. Village of West Troy*, 25 Hun, 180.

60. *Matter of Reddish*, 47 App. Div. 187, 62 N. Y. Supp. 261.

61. *People ex rel. v. Supervisors of Delaware*, 9 Abb. N. S. 408; *aff'd*, 45 N. Y. 196.

and where notice has been given of an application for a mandamus order at a term of the appellate division of the supreme court, or an order has been made to show cause at such term why a mandamus order should not issue, a stay of proceedings shall not be granted, before the hearing, by any court or judge.⁶²

C. Appealable orders.

An order granting or denying a peremptory mandamus is appealable.⁶³ An appeal is now authorized from an order granting or denying an alternative mandamus, although the rule was to the contrary prior to 1913.⁶⁴ An order of the trial term dismissing the proceeding may be reversed on appeal.⁶⁵ No appeal lies from an order of the special term denying a motion for a reargument of a motion for an order of mandamus.⁶⁶

62. When stay granted.—The court will stay the issuance of a peremptory mandamus to compel the comptroller of a city to pay an award made by commissioners under the Laws of 1893, chapter 537, where proceedings by certiorari had been issued to review the correctness of said award. *People ex rel. Purdy v. Fitch*, 147 N. Y. 362, rev'g 87 Hun, 304, 68 St. Rep. 320. Where a mandamus has been granted, and the questions decided in granting the same are important and fairly debatable, proceedings thereunder will be stayed until the appeal from the order of mandamus is decided. *People ex rel. Fleming v. Hart*, 11 N. Y. Supp. 674, 24 Abb. N. C. 266.

63. Matter of Haydorn v. Carroll, 184 App. Div. 151, 171 N. Y. Supp. 601.

Dismissal of appeal.—Where a mandamus to a board of elections imposes duties which are continuous, and cannot be completed until election day, the compliance of the board by performing some of the acts commanded is no ground for dismissal of an appeal from the order before election day. *People ex rel. Quinn v. Voorhis*, 186 N. Y. 263, rev'g 115 App. Div. 118, 100 N. Y. Supp. 717.

64. People ex rel. Ackerman v. Lumb, 6 App. Div. 26, 39 N. Y. Supp. 514;

Matter of Kreischer, 30 App. Div. 313, 51 N. Y. Supp. 802; *Matter of Goodwin*, 30 App. Div. 418, 51 N. Y. Supp. 355; *People ex rel. Levenson v. O'Donnell*, 99 App. Div. 253, 90 N. Y. Supp. 961; *People ex rel. Mt. Vernon Trust Co. v. Millard*, 127 App. Div. 77, 111 N. Y. Supp. 22; *People ex rel. Fisk v. Devermann*, 83 Hun, 183, 64 St. Rep. 147, 31 N. Y. Supp. 593; *People ex rel. Lester v. Mitchel*, 39 St. Rep. 768, 21 Civ. Pro. 112, 15 N. Y. Supp. 305.

When allowed.—An appeal lies from an order granting an alternative mandamus if it appear that the court had no jurisdiction of the controversy. *People ex rel. Ruman v. National Slavonic Soc.*, 144 App. Div. 574, 129 N. Y. Supp. 603.

65. People ex rel. Smart v. Bd. of Supervisors of Washington Co., 66 App. Div. 66, 72 N. Y. Supp. 568.

Merits.—On appeal from a Trial Term order dismissing the proceeding, instead of remitting it to the proper branch of the court, the Appellate Division will not review the record on the merits. *People ex rel. Blanks v. Supreme Lodge*, 126 App. Div. 86, 110 N. Y. Supp. 148.

66. People ex rel. Urban Water Supply Co. v. Connolly, 164 App. Div. 163, 149 N. Y. Supp. 693; *aff'd*, 213 N. Y. 706.

D. Who may appeal.

Members of a common council against whom a mandamus has been issued not only as a board, but also individually, with costs against them individually, have a right to appeal through private counsel, where the corporation counsel does not desire to appeal.⁶⁷ The fact that a board of supervisors obeyed a peremptory mandamus and an order was entered that the proceeding was terminated does not deprive the board of the right to appeal from the order.⁶⁸ A party who has obtained an extension of time to comply with a mandamus cannot thereafter appeal.⁶⁹ Where one of the claimants for property in the sheriff's possession moves for a mandamus against the sheriff to compel him to deliver it, and is opposed by the sheriff with an affidavit of the other claimant, such other claimant cannot appeal, not being a party to the record, even though he was recognized as an appellant at Appellate Division.⁷⁰

E. Review of discretion.

An order of mandamus is not always demandable as an absolute right; an application therefor is addressed in the first instance to the sound discretion of the court at special term, reviewable by the Appellate Division, and where it appears that the facts are such as to justify the court in refusing the relief, as matter of discretion, the exercise thereof will not be interfered with unless it appears that there has been an abuse of judicial discretion.⁷¹ Notwithstanding the denial of a motion for a peremptory mandamus as a matter of law and not as a matter of discretion, if the Appellate Division is of the opinion that the order should not be granted as a matter of discretion, the order denying it will

67. *People ex rel. Sherrill v. Guggenheimer*, 29 Misc. 553, 61 N. Y. Supp. 961.

68. *People ex rel. Lawrence v. Bd. of Supervisors of Del. Co.*, 48 App. Div. 428, 63 N. Y. Supp. 317.

69. *People v. Rochester R. R.*, 15 Hun, 188.

70. *People ex rel. Lee v. Lynch*, 54 N. Y. 681.

71. *People ex rel. Clements v. Williams*, 100 Misc. 569, 166 N. Y. Supp. 560.

Examination of facts.—The Appellate Division, on review by certiorari of an application for mandamus to en-

force the determination of the Board of Railroad Commissioners as to the proper operation of a railroad company, has the power to examine the facts. *People ex rel. Linton v. Brooklyn Heights R. R. Co.*, 172 N. Y. 90.

Costs.—When costs are awarded as a matter of discretion, they are not subject to review upon appeal. *People v. Albright*, 14 Abb. Pr. 305. And where no question is raised as to costs in the court below, the question will not be considered on appeal. *People ex rel. 23d St. Ry. v. Squire*, 110 N. Y. 667.

be affirmed.⁷² Where the special term denies a peremptory mandamus on the specific ground mentioned in the order that that petitioner can maintain an action at law on his demand, the Appellate Division, on appeal, is not restricted to that ground, if there is any other proper ground for denial appearing in the papers.⁷³

F. Court of Appeals.

Subject to the limitations applying generally to appeals to the Court of Appeals, that court has power to hear an appeal from a final order in a mandamus proceeding.⁷⁴ Where the granting of a mandamus order is a matter of discretion, the Court of Appeals has no power to review a refusal to grant the order.⁷⁵ If, however, the refusal of the remedy is upon the merits, and not as a matter of discretion, there

72. *Matter of Haydorn v. Carroll*, 184 App. Div. 151, 171 N. Y. Supp. 601.

73. *People ex rel. Bagley v. Green*, 1 Hun, 1.

74. *People v. Church*, 20 N. Y. 529; *People v. Supervisors*, 45 N. Y. 196; *People v. Hawkins*, 46 N. Y. 9; *People v. Nostrand*, 46 N. Y. 375; *Becker v. People*, 18 N. Y. 487.

No question involved.—The Court of Appeals will affirm the order granting a mandamus where it has been issued and fully executed, there being no question of practical importance to decide. *People ex rel. 23d St. R. R. Co. v. Squire*, 110 N. Y. 667.

75. *Matter of Dederick*, 77 N. Y. 395; *People ex rel. Lehmaier v. Interurban Railway Co.*, 177 N. Y. 296; *Van Rensselaer v. Sheriff*, 1 Cow. 501; *People ex rel. v. Supervisors*, 15 Barb. 607; *People ex rel. v. Dowling*, 55 Barb. 197; *People ex rel. v. Common Council*, 52 How. Pr. 346; *People ex rel. v. Booth*, 49 Barb. 31; *People ex rel. v. Ferris*, 76 N. Y. 326; *People ex rel. v. Campbell*, 72 N. Y. 496; *Sage v. Railroad Co.*, 70 N. Y. 220; *People v. Dowling*, 37 How. Pr. 394; *People v. Aslen*, 7 Wkly. Dig. 411.

Remedy at law.—Where a party has a sufficient remedy at law against a public officer, the court is not abso-

lutely bound to grant a mandamus, but it may at its discretion refuse, and this discretion is not reviewable by the Court of Appeals. *People ex rel. v. Thompson*, 99 N. Y. 641, following *People v. Campbell*, 72 N. Y. 496.

Stockholders.—Where the discretion of the Supreme Court in issuing an order of mandamus to compel directors of a national bank in liquidation to allow stockholders to examine its books and papers has been lawfully exercised, the act will not be reviewed by the Court of Appeals. *Tuttle v. Iron National Bank*, 170 N. Y. 9, aff'g 67 App. Div. 627, 73 N. Y. Supp. 1150.

Modification of order.—If a motion for a peremptory mandamus is absolutely denied, a subsequent motion to modify the order, so as to permit an alternative order to issue, is addressed to the discretion of the court, and not reviewable in the Court of Appeals. *People ex rel. Ins. Co. v. Fairman*, 91 N. Y. 385.

Vacating order.—The Court of Appeals will not review the discretion of the lower court in vacating or amending a peremptory order, which requires more than the respondent would be required to do. *People ex rel. Hasbrouck v. Supervisors*, 135 N. Y. 534, 48 St. Rep. 533.

may be a question for the court.⁷⁶ Where the special term, in the exercise of its discretion, denies an application for an alternative mandamus and the Appellate Division also in the exercise of discretion affirms the order denying the application, the order of affirmance is not the object of review in the Court of Appeals.⁷⁷

The Court of Appeals has no jurisdiction to review an order of the Appellate Division reversing an order directing a peremptory mandamus and granting a new trial of the issues, where the record does not show that it was based on the ground that the verdict was against the weight of evidence, as the Appellate Division has jurisdiction to reverse on that ground.⁷⁸ Where from the record it appears on an appeal from an order denying an application for a mandamus that the court below might have refused the application in the proper exercise of its discretion, the appellant in the Court of Appeals must show that the order was refused on a question of law only; if it were refused as a matter of discretion, the order refusing it will be affirmed.⁷⁹ Where a special term order refusing a mandamus does not state the ground of refusal and the facts would justify a refusal as a matter of discretion, it is not reviewable in the Court of Appeals, although the affirmance by the Appellate Division is expressly based on the questions of law involved.⁸⁰ When an order of the Appellate Division denying an application for an order of mandamus fails to indicate whether it was denied as a matter of law or in the exercise of discretion, the Court of Appeals may look into the opinion to ascertain upon which ground it based its decision, and, if it appears therefrom that the application was denied solely as a matter of law, the order is appealable.⁸¹ Where the material allegations of a petition for mandamus are admitted, or not denied, and different inferences cannot be drawn therefrom, only a question of law is presented and the decision is upon the merits and appealable to the Court of Appeals.⁸²

76. *People ex rel. v. Metropolitan R. R. Co.*, 26 Hun, 82; *People v. Sturtevant*, 9 How. 304; *People v. Lewis*, 28 How. 159, 170.

77. *People ex rel. Elmira Advertiser Association v. Gorman*, 222 N. Y. 712.

78. *People ex rel. McDonald v. Clausen*, 163 N. Y. 523.

79. *People ex rel. D. L. I. Co. v.*

Jeroloman, 139 N. Y. 14.

80. *Matter of Hart*, 159 N. Y. 278.

81. *People ex rel. Flynn v. Woods*, 218 N. Y. 124. Compare *People ex rel. D. L. I. Co. v. Jeroloman*, 139 N. Y. 17.

82. *People ex rel. Van Tine v. Purdy*, 221 N. Y. 396.

The conclusion of the trial court as to the amount of damages upon the trial of an alternative mandamus is not reviewable by the Court of Appeals.⁸³

Where the Appellate Division has directed a peremptory order of mandamus requiring the board of county supervisors to allow claims for services rendered on a quantum meruit "at such sums as are proper," the entry of an order requiring an allowance at a specified sum is erroneous, and will be corrected on appeal to conform to the direction of the Appellate Division.⁸⁴

G. Mode of appeal.

On reference to section 1337 it will be seen that a distinction is made between proceedings where an alternative order is first issued, and then a peremptory order, and those in which a peremptory order is issued in the first instance. In the latter case that section provides that an appeal is to be taken as from a final order made in a special proceeding. In the former case it is to be taken as an appeal from a judgment.⁸⁵ An appeal to the Appellate Division from a final order made upon an alternative writ of mandamus must be taken as an appeal from a judgment, and should not be placed upon the non-enumerated calendar.⁸⁶ But where an appeal is taken from a final order to the Appellate Division, without a case and exception, presenting questions of law merely, and no appeal is taken from an order denying a motion to set aside the verdict of a jury, it is properly placed on the non-enumerated calendar.⁸⁷ An appeal to the Court of Appeals from an order of the Appellate Division, reversing

83. *People ex rel. Deverell v. Mutual Protective Union*, 118 N. Y. 109.

84. *People ex rel. Spaulding v. Bd. of Supervisors of Saratoga Co.*, 170 N. Y. 93.

Where the General Term erroneously ordered a peremptory mandamus for payment of the whole of a claim, the Court of Appeals allowed an alternative writ to try the disputed questions. *People v. Schryver*, 69 N. Y. 242.

Street commissioners.—The Court of Appeals will not review the correctness of an award of damages made by street commissioners though upholding

a mandamus to compel the comptroller of the city to pay such award. Such award should be reviewed by certiorari, and the court will stay the proceedings by mandamus till such review is had. *People ex rel. Purdy v. Fitch*, 147 N. Y. 362.

85. *People ex rel. Collins v. Spicer*, 34 Hun, 584.

86. *People ex rel. Ajas v. Dept. of Health*, 138 App. Div. 559, 123 N. Y. Supp. 294.

87. *People ex rel. Connolly v. Bd. of Education of City of New York*, 113 App. Div. 315, 99 N. Y. Supp. 1.

a judgment of special term granting a new trial, after a trial of issues of fact, is not an appeal from an order, and should not be brought on as a motion, but should be placed on the general calendar.⁸⁸

Where the issues were tried by the court, either findings or a short decision must be filed by the judge, as in an action, and, where the record on appeal contains no such findings or decision, the case must be remitted to the trial judge, that a decision may be supplied.⁸⁹

H. Matters reviewed on appeal from final order.

An appeal from an order directing the issue of a peremptory order entered after a trial of the issues raised by the return to an alternative order theretofore issued brings up for review only such questions as were raised by exceptions taken at the trial.⁹⁰ Errors committed during the course of the trial or proceeding may be reviewed upon appeal from an order directing a peremptory order.⁹¹ Where an alternative mandamus is issued and a return filed thereto, a trial is had on the issues before the court, and findings are made, the exceptions to such findings present, on appeal from the final order therein made, not only questions of law, but also the facts, for review.⁹² Where the jury finds for the petitioner on the trial of an alternative mandamus, but a motion for a peremptory order is denied, the verdict cannot be reviewed upon appeal where there was no motion for a new trial.⁹³ A party on appeal cannot successfully urge that the delay occasioned by his action in appealing will render the order unavailing.⁹⁴

88. *People v. Laidlaw*, 102 N. Y. 588.

89. *People ex rel. Havron v. Dalton*, 77 App. Div. 499, 78 N. Y. Supp. 1051.

90. *People ex rel. Ging v. Lyman*, 46 App. Div. 312, 61 N. Y. Supp. 655.

Question not raised below.—Upon the hearing of an alternative mandamus, counsel, at the conclusion of the evidence, moved for a decision in favor of the respondent, upon the issues raised by the return, and at the close of the whole evidence moved for judgment and a finding that the issues of fact were as stated in the return, and it was held that he could not, on

appeal from the decision in favor of the petitioner, urge that there was a failure of proof in a certain particular not specified as a ground of his motion before the court below. *People ex rel. Kenny v. Folks*, 89 App. Div. 171, 85 N. Y. Supp. 1100.

91. *People ex rel. Boyd v. Hertle*, 46 App. Div. 505, 61 N. Y. Supp. 965.

92. *People ex rel. Berlinger v. Wells*, 85 App. Div. 378, 83 N. Y. Supp. 376; rev'd, 178 N. Y. 411.

93. *People v. Johnson*, 161 App. Div. 625, 146 N. Y. Supp. 977.

94. *People v. Contracting Board*, 46 Barb. 254.

ARTICLE X.

FORMS.

A. Petition.

1. Reinstatement in membership association.

NEW YORK SUPREME COURT — COUNTY OF KINGS.

IN THE MATTER OF THE APPLICATION OF
THOMAS R. DEVERELL, FOR AN ORDER
OF MANDAMUS

agst.

THE MUSICAL MUTUAL PROTECTIVE
UNION.

Adapted from 118 N. Y.
191.

To the Supreme Court of the State of New York:

The petition of Thomas R. Deverell respectfully shows:

That your petitioner resides in the city of Brooklyn aforesaid, is a musician, and until the 31st day of July, 1885, was a member in good standing of The Musical Mutual Protective Union, a corporation duly incorporated by an act of the Legislature of the State of New York, passed April 11, 1864, and entitled "An act to incorporate The Musical Mutual Protective Union," and the several acts amendatory thereof. That on or about the 21st day of July, your petitioner had served upon him by leaving the same at his residence the paper hereto annexed, marked Exhibit "A."

That article II of the constitution of said union is as follows, to wit:

"The object of this Union is to unite the instrumental portion of the musical profession, for the better protection of its interests in general, and the establishment of a minimum rate of prices to be charged by members of said society, for their professional services, and the enforcement of good faith and fair dealing between its members."

That petitioner attended at the time and place specified in said Exhibit "A," and that then and there petitioner was informed that the cause of the complaint being made against him was that he had written a letter to one Jules Levy. That petitioner replied that the letter was a private one to that gentleman, that he could satisfactorily explain the matter, that he had violated no article of their constitution, and that he did not think that they, the board of directors of said union, had anything to do with the matter; and that he did not recognize that they had any jurisdiction to try the complaint against him for writing a private letter to any gentleman which did not affect the union in the good faith and fair dealing existing between the members of the union. That the members of the board of directors then present held a private consultation, and when they were through told him "that is all;" that petitioner then left the building and went to his house, believing from the action and talk of the board of directors that the complaint against petitioner had been dismissed. That on or about the 28th day of July, one Edward Lovenn, a member of the said board of directors, met this petitioner and informed him that as the board of directors had learned that one of the members of the board

had some personal ill-feeling against petitioner, the said directors had put him off the board, and that the board had adjourned the hearing on the complaint against deponent.

That the usual and customary manner of doing the business of said union is to give the accused member notice of the time and place of adjournment, but that such notice was not given to petitioner, and that petitioner never had any notice, knowledge or information of the time or place of said adjournment until the 1st day of August, 1895, when petitioner received the paper hereto annexed, marked Exhibit " B."

That as appears by said Exhibit " B " petitioner, in violation of his legal rights as a member of said union, has been expelled therefrom to his serious damage and injury, and without any trial or opportunity to be heard in his defense upon the trial of the complaint against petitioner, and that petitioner has a good and substantial defense to said complaint upon the merits, as he is advised by his counsel, Jerry A. Wernberg, who resides at 285 Washington avenue, Brooklyn.

That petitioner in the business of his profession is obliged to hire a large number of musicians, and that petitioner has information and verily believes to be true that said union intends to notify all members of said union to cease working for or with petitioner, and that great and irreparable injury will be done this petitioner.

That no previous application has been made for the relief herein asked for.

WHEREFORE, Your petitioner prays that an order of mandamus be granted by this court directing the reinstatement of petitioner to all his rights, privileges and benefits which, under the constitution and by-laws of the said Musical Mutual Protective Union, belong to a member in good standing, and for such other and further relief as may be proper.

THOMAS R. DEVERELL.

(Verification.)

2. Veteran entitled to position.

SUPREME COURT, COUNTY.

IN THE MATTER OF THE APPLICATION OF
RANSOM QUA FOR AN ORDER OF MAN-
DAMUS

agst.

JOHN E. GAFFNEY, AS SEWER, ETC., COM-
MISSIONERS OF THE VILLAGE OF SARA-
TOGA SPRINGS.

Adapted from 201 N. Y.
535.

To the Supreme Court of the State of New York:

The petition of Ransom Qua respectfully shows:

That he is a citizen of the State of New York and of the United States and resides at the village of Saratoga Springs, Saratoga county, N. Y.

That the above-named John E. Gaffney, since on or about the 1st day of May, 1910, has been the commissioner and has constituted the sewer, water and street commission of said village of Saratoga Springs,

N. Y. That said village of Saratoga Springs is a municipal corporation duly organized and chartered under the authority of the Legislature of the State of New York.

That it is the power and duty of said sewer, water and street commission, under the charter of said village of Saratoga Springs, to appoint a superintendent of streets of said village; and that said office is, and has been since on or about the 23d day of March, 1910, subject to the civil service laws of the State of New York, said Civil Service Commission having on that date placed said office within the competitive class.

That heretofore and on or about the 25th day of June, 1910, your petitioner passed an open competitive examination held under the authority and supervision of the said State Civil Service Commission, for the place or position of superintendent of streets, that being the office aforesaid, and was placed upon the eligible list of the State Civil Service Commission and was so certified by said State Civil Service Commission to said sewer, water and street commission and commissioner, on the 5th day of July, 1910, as will more fully appear by the certificate of said State Civil Service Commission which is hereto annexed, marked "Exhibit A," and hereby referred to and made part of this affidavit.

That at the time of said examination the said office of superintendent of streets was held by said James Morrissey pursuant to a provisional appointment pursuant to section 4 of rule 8 of the said State Civil Service Commission, which said provisional appointment expired on the 15th day of July, 1910.

That petitioner, in his application to said State Civil Service Commission for permission to take such examination, which application was duly filed with said State Civil Service Commission, stated and set forth that he had served in the Union army during the late Civil War, and did so serve for nearly three years, that he was honorably discharged from said army at the conclusion of the war. That all of the statements and allegations set forth in said petition are true.

That the only persons certified by said State Civil Service Commission as having passed such examination as to entitle them to be placed upon the eligible list for appointment to said office of superintendent of streets were petitioner, said James Morrissey, and one C. H. Ranulf Compton, and that neither said James Morrissey nor the said C. H. Ranulf Compton was a veteran of either the army or navy of the United States in the late Civil War, nor entitled to any preference under the law.

That on the 9th day of July, 1910, petitioner was duly notified by said State Civil Service Commission that he was entitled to appointment to said office, a copy of which notification is hereto annexed, marked "Exhibit B," and is hereby made a part of this affidavit; and that in pursuance to such notification, petitioner on the 11th day of July, 1910, duly notified said State Civil Service Commission and said John Gaffney, as sewer, water and street commissioner, that he was prepared to and would accept such appointment.

That on the 15th day of July, 1910, said John E. Gaffney, as sewer, street and water commissioner, refused to appoint said petitioner to said office, a copy of the letter containing such refusal being hereto annexed, marked Exhibit "C," and made a part of this affidavit; and said John E. Gaffney, as sewer, water and street commissioner,

did, on that day, appoint said James Morrissey to said office of superintendent of streets of the village of Saratoga Springs. That at the time of said appointment petitioner had the necessary qualification and fitness to discharge the duties of such office and was not disqualified from holding such office on account of age or any physical or other disability.

That petitioner, by reason of such service in the Union army in the late Civil War, was by law entitled to preference in appointment to such office over said James Morrissey and said C. H. Ranulf Compton, which preference petitioner duly claimed.

That on or about the 16th day of July, 1910, said John E. Gaffney, as such sewer, water and street commissioner, transmitted to said State Civil Service Commission notice of the appointment of said James Morrissey to said office of superintendent of streets of the village of Saratoga Springs, and that said appointment was presented to said State Civil Service Commission at a meeting thereof held in New York city on the 22d day of July, 1910. That said State Civil Service Commission, after due consideration, and after hearing one Irving I. Goldsmith, of counsel for said John E. Gaffney, as sewer, water and street commissioner, and said James Morrissey, duly refused to accept the said appointment of said James Morrissey upon the ground that the name of a veteran of the Civil War, to wit, petitioner, appeared at the head of the eligible list for said office. That on or about the 27th day of July, 1910, said State Civil Service Commission duly notified said John E. Gaffney, as sewer, water and street commissioner, that it refused to accept the appointment of the said James Morrissey. That a copy of the communication from said State Civil Service Commission to said John E. Gaffney as said sewer, water and street commissioner, containing a notification of its refusal as above set forth, is hereto annexed, marked Exhibit "D," and made a part of this affidavit.

That the refusal of said John E. Gaffney, as sewer, water and street commissioner, to appoint petitioner to said office as above set forth, was not made in good faith.

That up until on or about the 1st day of May, 1910, said John E. Gaffney had been a member of the board of trustees of said village of Saratoga Springs, by which said board of trustees he, on or about the said 1st day of May, 1910, was appointed as such sewer, water and street commissioner.

That said James Morrissey up until on or about the 1st day of May, 1910, was a member of the said board of trustees of said village of Saratoga Springs. That on or about the said 1st day of May, 1910, said James Morrissey resigned as a member of said board of trustees, and was appointed by said John E. Gaffney as sewer, water and street commissioner to the office of superintendent of streets of the village of Saratoga Springs. That one Frank Wells had for about fourteen years prior to said 1st day of May, 1910, occupied said office of superintendent of streets of said village of Saratoga Springs, and that it was notorious that he exercised the duties of said office capably and efficiently. That on or about the said 1st day of May, 1910, said Frank Wells was removed from said office of superintendent of streets of the village of Saratoga Springs by said John E. Gaffney as sewer, water and street commissioner.

That said John E. Gaffney, as sewer, water and street commissioner, on or about the said 1st day of May, 1910, appointed his brother,

Bartholomew J. Gaffney, to the position of clerk of said sewer, water and street commission.

That on or about the said 1st day of May, 1910, said John E. Gaffney, as such sewer, water and street commissioner, appointed Benjamin R. Callahan to the position of assistant superintendent of streets of the village of Saratoga Springs.

That said Benjamin R. Callahan is the son of John H. Callahan, one of the members of the board of trustees of said village of Saratoga Springs.

That in or about the month of March, 1910, said board of trustees of the village of Saratoga Springs appointed one John T. Maines as a member of the board of health of said village of Saratoga Springs. That said John T. Maines is a brother-in-law of said John E. Gaffney.

That on or about the 1st day of May, 1910, said John E. Gaffney, as sewer, water and street commissioner, appointed one John T. Gorman to the position of caretaker at the hackstand in said village of Saratoga Springs. That said John T. Gorman is a brother-in-law of one Patrick Cavanaugh, who, up to within a few months last past, was a member of said board of trustees of said village of Saratoga Springs.

That no previous application has been made for an order in this proceeding or for an order to show cause.

WHEREFORE, Petitioner prays that an order of mandamus, peremptory or alternative, as to the court may seem proper, shall issue against said John E. Gaffney, as sewer and water and street commissioner and constituting the sewer, water and street commission of said village of Saratoga Springs, commanding him forthwith to annul the appointment of said James Morrissey to the office of superintendent of streets of the village of Saratoga Springs as above set forth and to appoint petitioner to such office and for such other and further order in the premises as to the court may seem just and proper, together with the costs of this proceeding.

(Signature.)

(Verification.)

3. Cancellation of sale for taxes.

SUPREME COURT — NEW YORK COUNTY.

IN THE MATTER OF THE APPLICATION OF
THE NATIONAL PARK BANK FOR AN
ORDER OF MANDAMUS

agst.

HERMAN A. METZ, AS COMPTROLLER OF
THE CITY OF NEW YORK, AND DANIEL
MOYNAHAN, AS COLLECTOR OF ASSESS-
MENTS AND ARREARS OF THE CITY OF
NEW YORK.

Adapted from 141 App.
Div. 600.

To the Supreme Court of the State of New York:

The petition of The National Park Bank respectfully shows as follows:

1. Your petitioner is a domestic corporation located in the State of New York and created under the laws of the United States.
2. Your petitioner is the owner in fee of a parcel of land in the

borough of The Bronx, city of New York, formerly and prior to June 6, 1895, in the town of Westchester in Westchester county. Said land is more particularly described as follows:

All that plot of land in the borough of The Bronx, city, county and State of New York, being known as Lot No. 239 on a certain map entitled "Map of Unionport, Westchester County, New York," Bennett & Savery, civil engineers, dated November 1, 1852, and filed in the office of the register of the county of Westchester, on the 23d day of August, 1854, as Map No. 29, being more particularly bounded from said map as follows: Northerly by Tenth street, two hundred and five (205) feet; easterly by Lot No. 238, two hundred and sixteen (216) feet; southerly by Ninth street, two hundred and five (205) feet; westerly by Avenue E, two hundred and sixteen (216) feet.

Said premises consist of an uninclosed vacant plot of land.

3. Your petitioner acquired title to said premises under and by virtue of two deeds, one of said deeds being from one Charles L. Guy, dated September 18, 1888, acknowledged September 29, 1888, and recorded October 3, 1888, in the office of the register of New York county in liber 1146 of conveyances, page 474, and the other of said deeds being from one Eliza M. Guy, dated September, 1888, acknowledged September 20, 1888, and recorded in said register's office on October 3, 1888, in liber 1146 of conveyances, page 477.

4. Your petitioner is informed and believes that the tax upon said premises for the year 1888, amounting to eight dollars and eighty-eight cents (\$8.88), as appears from the assessment-roll under and pursuant to which said tax was assessed, has never been paid. That on or about October 1, 1889, one Michael Rauch, then supervisor of the town of Westchester, assumed and purported to sell said premises to one Benjamin Sprague for the term of one thousand (1,000) years, said alleged sale being for the tax above mentioned, together with certain other alleged interest, penalties and other charges, making in all the sum of ten dollars and ninety-five cents (\$10.95); that no lease was ever delivered by said supervisor to said alleged purchaser.

5. On information and belief, said alleged sale was void, invalid and of no effect. Among other defects, the requirements of the statute providing for the assessment of said premises for said tax, or some of said requirements, were not substantially observed. It appears from the assessment-roll for the year 1888 that the said premises were not properly described or designated by name. A column in said assessment-roll purports to be devoted to a description of the property assessed, but there is no description given of the premises in question. Another column in said assessment-roll purports to be for the "Description of property and supposed owner," but no particulars with regard to said premises are given opposite said Lot No. 239. Said alleged sale was not advertised as provided by law; and the notice of sale, if any such was given, did not contain a description of the lands and premises to be sold, as provided by law. A notice of redemption was not posted or published as provided by law. The certificate of said alleged sale was not recorded by the town clerk in the book provided for that purpose, as provided by law. The said certificate was not alphabetically indexed by the treasurer of Westchester county in the manner provided by law, among other things there being no reference to any map filed in the office of the register of said county.

6. On July 27, 1908, petitioner caused to be tendered to James J. Donovan, Jr., deputy collector of assessments and arrears for the borough of The Bronx, city of New York, an amount in excess of the amount for which said premises were sold as aforesaid, with lawful interest to date, but said deputy collector refused to accept the same unless ordered by the court so to do.

7. On June 6, 1895, a portion of the county of Westchester, including the premises described in the petition herein, was pursuant to chapter 934 of the Laws of 1895, annexed to and became a part of the city of New York, and all claims for the payment of arrears of taxes upon said premises became by operation of law the property of the city of New York, and the collector of assessments and arrears of said city is now duly empowered as part of his official duties to receive such arrears of taxes.

WHEREFORE, Your petitioner prays that a peremptory order of mandamus issue out of this court, directed to Herman A. Metz, as comptroller of the city of New York, and to Daniel Moynahan, as collector of assessments and arrears of the city of New York, commanding said comptroller and said collector of assessments and arrears to receive payment of the amount for which said premises were sold, as aforesaid, with lawful interest, and that said alleged sale be canceled of record, and that the proper entries be made of such payment and of such cancellation, and that your petitioner have such other and further relief as may be just.

THE NATIONAL PARK BANK OF NEW YORK,

By M. H. EWER, *Cashier,*

Petitioner.

(Add verification.)

4. Compelling mayor to sign warrant.

IN RE APPLICATION OF CHRISTOPHER J.
HEFFERNAN FOR A PEREMPTORY WRIT
OF MANDAMUS.

People ex rel. Heffernan v.
Dealy, 193 N. Y. 606.

To the Supreme Court of the State of New York:

The petition of Christopher J. Heffernan respectfully shows:

1. That your petitioner is now, and at all times hereinafter mentioned has been, and still is, an attorney and counsellor-at-law, and a counsellor of this court, duly admitted and licensed, residing and practicing his profession in the city of Amsterdam.

2. That Jacob H. Dealy is now, and during all the times hereinafter referred to, has been, and still is the mayor of said city and is the presiding officer of the common council thereof, and actually presided at all the sessions of said common council during the times herein-after referred to.

That under and by virtue of the provisions of the city charter of said city said common council is composed of a mayor and sixteen aldermen.

That, among other things, it is made the duty of the mayor of said city by its charter, in conjunction with the clerk thereof, to sign all warrants ordered by the common council and draw on the city treasurer of said city for the payment of money.

That said common council is by its charter and the laws of this State authorized and empowered to employ an attorney and counsel for the transaction of its legal business, and to make full compensation for the performance of such services.

3. That on the 1st day of January, 1906, the common council of said city, at a regular session thereof, duly held at the common council chambers, duly adopted and passed, and the same was approved by the mayor thereof, a resolution, a copy of which is hereto annexed, marked "A" and made a part hereof appointing and employing your petitioner as attorney and counsel for said city for the transaction of its legal business for one year from the 1st day of January, 1906, and until his successor should be appointed, at a salary of nine hundred dollars (\$900) per year, as more fully appears from said resolution.

That in pursuance of the terms of said resolution your petitioner accepted said employment and entered upon his duties and continued therein up to and including the 31st day of December, 1906, and during said term actually performed all the duties enjoined upon him by the terms of said resolution. That petitioner has been fully paid for such services by warrants drawn upon the city treasurer of said city, signed by the mayor and countersigned by the clerk thereof.

4. That on the 1st day of January, 1907, the common council of said city, at a regular session thereof duly held at the common council chambers, duly adopted and passed, and the same was approved by the mayor thereof, a resolution, a copy of which is hereto annexed, marked "B" and made a part hereof, appointing and employing your petitioner as attorney and counsel for said city for the transaction of its legal business for one year from the 1st day of January, 1907, and until his successor should be appointed, at a salary of nine hundred dollars (\$900) per year, as more fully appears from said resolution.

That in pursuance of the terms of said resolution your petitioner accepted said employment and entered upon his duties and continued therein up to and including the 20th day of January, 1908, and during said term actually performed all the duties enjoined upon him by the terms of said resolution. That petitioner has been fully paid for said services by warrants drawn upon the city treasurer of said city, signed by the mayor and countersigned by the clerk thereof up to and including the 31st day of December, 1907.

5. That on the 21st day of January, 1908, said common council at a regular session thereof duly held at the common council chambers, by a resolution duly adopted and passed, a copy of which is hereto annexed, marked "C" and made part hereof, appointed and employed your petitioner as attorney and counsel for said city for the transaction of its legal business from the 1st day of January, 1908, for one year, and until his successor should be appointed, at a salary of nine hundred dollars (\$900) per year, payable in equal monthly installments, as more fully appears by said resolution.

That in pursuance of the terms of said resolution your petitioner accepted said employment and entered upon the performance of his duties and is now and ever since has been actually performing the same.

6. That on the 20th day of February, 1908, the city clerk of said city properly prepared and duly countersigned a warrant on the treasury of said city, in favor of your petitioner, for the payment of

said sum of seventy-five dollars (\$75), the amount of said claim. That on the 5th day of March, 1908, at the request of your petitioner, Miss Helen A. Grady presented said warrant so prepared and countersigned, as aforesaid, to said Jacob H. Dealy, mayor of said city, and then and there requested that he, the said Jacob H. Dealy, affix his signature thereto, as more fully appears by the affidavit of Miss Helen A. Grady hereto annexed, marked " I " and made part hereof.

7. That said Jacob H. Dealy, after such request made as aforesaid, wrongfully, illegally, unlawfully and in violation of the resolution employing your petitioner as attorney and counsel, and of the resolution auditing and allowing said claim and in violation of his duties as such mayor, neglected and refused, and still neglects and refuses to affix his signature to the said warrant; that as hereinbefore alleged, petitioner is unable to obtain payment of said claim until the warrant therefor is properly signed by the mayor of said city.

8. That no previous or other application has been made for the relief herein asked for.

WHEREFORE, Your petitioner asks that a peremptory order of mandamus may issue out of this court directed to said Jacob H. Dealy, mayor of the city of Amsterdam, commanding and requiring him to immediately affix his signature to the warrant herein referred to in payment of your petitioner's claim, and for such other and further relief as may be just, with costs of this application.

Dated, March 5, 1908.

CHRISTOPHER J. HEFFERNAN,
Petitioner.

(Add verification.)

(Exhibits annexed, also affidavits.)

5. Against town auditors.

IN THE MATTER OF THE APPLICATION OF
LINN L. BOYCE, ETC.

105 App. Div. 212.

To the Supreme Court of the State of New York:

The petition of Linn L. Boyce respectfully shows:

1. That your petitioner is an attorney and counsellor-at-law, and has been since November, 1875; that he resides at Albany, N. Y.; but during the performance of the services hereinafter stated he lived at Gloversville in said county of Hamilton.

2. That (insert names), during the year 1904 were, and still are, the acting town auditors, and, as such, constitute the board of auditors in and for the town of Lake Pleasant, Hamilton county, N. Y.

3. That on or about November 20, 1896, your petitioner was retained and employed by the supervisor of the said town of Lake Pleasant, to render divers legal and other services (set out services and contract under which they were rendered).

That your petitioner did on November 10, 1904, present before the board of auditors of said town of Lake Pleasant, consisting of (insert names), a duly verified account of his claim under the first or original agreement with said Asa Aird as supervisor, made in November, 1896, and ratified, approved and confirmed as hereinbefore alleged and fully set forth, in the sum of one thousand five hundred and thirty

dollars and thirty-five cents (\$1,530.35), including disbursements and interest, and being present before said board of auditors, requested that he might be permitted to give proof under oath before them of said claim and of the facts hereinbefore alleged, which the said board of auditors refused to permit.

That said board of auditors on said 10th day of November, 1904, "disallowed" said claim and account, for the reason and upon the ground as publicly stated by them in petitioner's presence, at the time of said "disallowance," that petitioner had produced no written contract or agreement with the supervisor of said town for the rendition of the services therein mentioned or for petitioner's compensation therefor.

That when said board of auditors voted to "disallow" petitioner's claim, your petitioner requested said auditors to make and sign a certificate thereof (stating their reason therefor), and file the same in the office of the clerk of said town of Lake Pleasant, as required by section 162 of the Town Law; and that said auditors openly and publicly refused to make and sign such certificate, although your petitioner prepared such certificate himself and requested them and each of them to sign the same, and, as petitioner is informed and believes, no such certificate has ever been made or filed in said town clerk's office, except as hereinafter stated.

5. That petitioner's claim and account against said town of Lake Pleasant, so presented before the said board of auditors as aforesaid, remains wholly unpaid; that there never has been any lawful audit thereof on the merits.

WHEREFORE, Your petitioner prays that a peremptory order of mandamus in the first instance may issue to (insert names), constituting said board of auditors of the town of Lake Pleasant, Hamilton county, N. Y., commanding them to reconvene as a board of auditors of said town of Lake Pleasant, at the town hall in said town, at a time to be named in said order, and reconsider their action upon the claim and account of petitioner for the sum of one thousand five hundred and thirty dollars and thirty-five cents (\$1,530.35), as aforesaid, and receive such legal proof thereon as may be offered in behalf of said petition, and thereupon reaudit said account, and make and file in the office of the town clerk of said town a certificate of their action, and for such other or further relief in the premises as may be proper, just and equitable.

.....

Petitioner.

(Add verification.)

6. State printing.

(Title.)

To the Supreme Court of the State of New York:

The petition of the Argus Company respectfully shows:

1. That it is a corporation duly organized and existing under and by virtue of the laws of this State.

2. That heretofore, and at least twenty days previous to the 15th day of December, 1885, the Comptroller and Secretary of State caused to be published, as provided for in section 1 of chapter 215 of the Laws of 1881, a notice that sealed proposals would be received for

doing the public or legislative printing for two years, from January 1, 1886.

That during the time when such publication was made, and down to and including December 31, 1885, Joseph B. Carr was such Secretary of State, and Alfred C. Chapin was Comptroller, of the State of New York.

That said Secretary and Comptroller duly met at the time appointed and opened the bids received pursuant to said notice, and said public officers could not agree upon the person or corporation to whom the award for such printing should be made.

That on the 31st day of December, 1885, the said Secretary and Comptroller could not come to an agreement, and on said date the terms of office of said Secretary and Comptroller expired. That on the 1st day of January, 1886, Frederick Cook was the duly qualified Secretary of State and the successor of said Carr as such Secretary, and Alfred C. Chapin, the duly qualified Comptroller of said State and his own successor in said office. That on said 1st day of January, 1886, the said Secretary of State and said Comptroller met and considered such bids, and awarded and executed the contract for doing the public and legislative printing for the term of two years, from January, 1886, to the relator.

A copy of said contract, which was duly executed by the relator, is hereto annexed and marked "A," and forms a part hereof.

3. That by the statutes of this State, especially chapters 215 and 621 of the Laws of 1881, it is among other things therein provided that it should be the duty of the person to whom the contract to do the public or legislative printing should be awarded to print seven hundred and nineteen copies of the journals of each house, as the same shall from time to time be delivered to him by the clerks of the Senate and Assembly respectively.

Also to print seven hundred and nineteen copies of the messages from the Governor, reports of standing or select committees, and reports and communications made in pursuance of laws, or of a resolution of either house, which matters are generally known as "documents," whenever ordered by the house to which such message, report, or communication shall be made. Also to print for the use of the members of the Legislature during its session, six hundred and forty copies of every bill, the printing of which shall be ordered by either house. And it was further provided, that the said bills and journals should be printed and distributed by the said printer within forty-eight hours after the same were placed in his hands.

That Charles A. Chickering is the clerk of the Assembly of this State, and has custody, control, and possession of the bills introduced in the Assembly and ordered printed, and is the keeper and custodian of the journal of the Assembly; that since the making of the said contract with the petitioner the said clerk has kept and has in his possession the journal of the Assembly of this State, and various bills introduced into that body ordered to be printed, and numerous messages, reports, and documents duly ordered to be printed; that the petitioner is advised by his counsel that it is the duty of said clerk to deliver the said journal and the said bills and documents to the petitioner to be printed under its contract, and that it is a matter of public concern that such matter be promptly printed under the contract and by the petitioner.

4. That said Charles A. Chickering has been heretofore duly requested by your petitioner to deliver and convey to it the journals, bills, and "documents" of said body, and the materials and "copy" thereof and therefor, for the printing of the same in accordance with said contract, but he has refused and neglected so to do, and still neglects and refuses to do so, in neglect and violation of his duty.

WHEREFORE, Your petitioner asks that a peremptory order of mandamus may issue out of this court, directed to said Charles A. Chickering, clerk of the Assembly of this State, and his assistants and subordinates, to deliver, or cause to be delivered to your petitioner, the journals, bills and documents of said body, and the material and "copy" thereof and therefor, for the printing and delivery of the same in accordance with the provisions of said contract.

THE ARGUS COMPANY,

Per W. H. JOHNSON, *Manager*.

Dated, Albany, February 17, 1886.

(Add verification as to complaint.)

B. Order to show cause why peremptory order should not be granted.

(Caption.)

(Title.)

(Adapted from 36 Hun, 491.)

Upon the annexed petition of I. H. Maynard, Deputy Attorney-General of the State of New York, let the above named, the board of supervisors of the county of Ulster, or its attorneys, show cause at a Special Term of the Supreme Court to be held in and for the county of Ulster, at the court house in Kingston, N. Y., on the 3d day of December, 1884, at 1 o'clock in the afternoon of said day, why a peremptory order of mandamus should not issue out of this court, directed to the above-named board of supervisors of the county of Ulster, requiring the said board of supervisors thereafter to forthwith raise by taxation upon the taxable property situated in the said county of Ulster, State of New York, in the same manner as other State taxes are raised, an amount sufficient to pay the indebtedness of said county mentioned in the said affidavits annexed, to the State of New York, and why such other and further relief should not be accorded in the premises as may be just, and let service of this order of less than eight days, to wit, on or before the 2d day of December, 1884, be deemed sufficient, cause therefor appearing in said petition annexed.

Dated, Albany, December 1, 1884.

C. R. INGALLS,

Justice Supreme Court.

(Special Term caption and title.)

Upon the annexed petition and affidavit of Linn L. Boyce, verified December 2, 1904, and on motion of Mead & Hatt, his attorneys, let the above-named (insert names), constituting the board of auditors of the town of Lake Pleasant, Hamilton county, N. Y., or their attorney, show cause at a Special Term of this court, to be held at the town hall, in the village of Saratoga Springs, N. Y., on the 10th day of December, 1904, at the opening of the court on that day, or as soon thereafter as counsel can be heard, why a peremptory order of mandamus should not issue out of this court, directed to the said (insert names), constituting the board of auditors of the town of Lake Pleasant, Hamilton county, N. Y., requiring them to reconvene as a board

of auditors in and for said town of Lake Pleasant, Hamilton county, N. Y., at the town hall in said town at a time to be named in such writ, then and there to reconsider and revoke their action of November 10, 1904, upon the claim of the relator for one thousand five hundred and thirty dollars and thirty cents (\$1,530.30); to permit the said relator to give lawful proof of his said claim; to thereupon reaudit relator's said claim, and to thereupon make, sign and file in the office of the clerk of said town of Lake Pleasant a certificate of their action thereon as required by section 162 of the Town Law and why such other and further relief should not be accorded in the premises as may be just and equitable.

Sufficient cause appearing therefor, let service of this order and of the petition and affidavit upon which it is granted, of less than eight days, to wit, on or before December 8, 1904, be deemed sufficient.

It also appearing that this matter, upon the merits, is triable in Fulton county, let all papers be filed and orders entered in Fulton county clerk's office.

.....
Justice Supreme Court.

C. Peremptory order in first instance.

(Caption and title.)

To the Board of Supervisors of Ulster County, N. Y.:

The order to show cause herein granted at Albany Special Term, on the 1st day of December, 1884, and made returnable on the 2d day of December, 1884, at Kingston Special Term, having been continued from said return day until the present term of this court, and coming on to be heard; after reading and filing the petition of Isaac H. Maynard, Deputy Attorney-General, verified December 1, 1884, and said order to show cause, and the affidavit of F. B. Delehanty, sworn to December 1, 1884,

And it appearing from such papers that the said county of Ulster is indebted to the State of New York for unpaid certificates assigned by the comptroller to said county in pursuance of the provisions of the several acts of the Legislature in said petition referred to, in the sum of twenty-eight thousand and ninety-eight dollars and twenty-two cents (\$28,098.22), with interest from December 1, 1884, and that, nevertheless, you have unjustly refused to raise by taxation, or cause to be raised, as required by law, the amount due the State by reason of the facts in said petition stated as appears therefrom, and which petition we have adjudged to be true as appears to us of record:

Now, On motion of, attorney for the petitioner, etc.,

It Is Ordered, That you (specifying the board or persons to whom the order is directed) forthwith raise, or cause to be raised, by taxation upon the taxable property situated in said county of Ulster, in the same manner as other State taxes are raised, the said sum of twenty-eight thousand and ninety-eight dollars and twenty-two cents (\$28,098.22), with interest thereon from December 1, 1884, and pay the same into the treasury of the State of New York.

And It Is Further Ordered, That this order be, and it hereby is, returnable at a Special Term of this court, to be held in the city of Albany on the 9th day of February next, and that you then and

there make return to the same as required by the provisions of article 79 of the Civil Practice Act.

It Is Further Ordered, That the petitioner herein is allowed the sum of fifty dollars costs as their costs of this proceeding.

.....

Justice Supreme Court.

D. Alternative order.

(Title.)

(Caption.)

To (persons to whom directed) :

On the reading and filing the petition (describe papers presented on application).

And it appearing therefrom that (state facts claimed by petitioner).

Now, On motion of, attorney for the petitioner, etc.,

It Is Ordered, That you, the (persons to whom directed) immediately after the receipt of this order (state acts sought to be performed by petitioner) or that you show cause why the command of this order should not be obeyed and make return to the petition herein, and to this order, pursuant to the provisions of the Civil Practice Act within twenty days after its service upon you.

E. Return.

1. Compliance with peremptory order.

(Title.)

The return of the defendants to the peremptory order of mandamus granted herein on the day of, shows to the court that, on the day of December,, we met at the time and place commanded in the order, and proceeded to act in accordance with the directions therein contained, and we certify and return that we apportioned the debts owing by the old town of Kingston at the time of its division, in, as follows, upon the towns of Ulster, Kingston and so much of Woodstock as was annexed thereto from said town of Kingston, as follows: That the town of Ulster be charged with nine thousand and ninety-six ten thousandths (.9096) of the whole indebtedness of said town of Kingston as it existed at the time of such division; that the town of Kingston be charged with fifty-three-thousandths (.053) of said indebtedness, and that the portion of the town of Woodstock annexed to said town from the old town of Kingston be charged with three hundred and seventy-four ten thousandths (.0374) thereof.

We further certify and return that from the abstracts presented to us we find the indebtedness of said old town of Kingston, at the time of the division, to have been the sum of twenty-two thousand five hundred and seventy-three dollars and thirty-eight cents (\$22,573.38).

In witness whereof, the members of said board of apportionment have hereunto affixed their signatures, this day of

(Signed by members individually.)

M. SCHOONMAKER,

Attorney for Defendants.

2. Alternative order.

(Title.)

Charles A. Chickering, clerk of the Assembly of the State of New York, returns and answers to the alternative writ of mandamus, a copy of which is hereto annexed, that (here insert facts set out in affidavits in answer to application for peremptory writ).

WHEREFORE, This defendant asks that the prayer of the petitioner, as set forth in the alternative writ, be denied and the proceedings dismissed.

CHARLES A. CHICKERING.

HARRIS & RUDD,

Defendant's Attorneys.

F. Decision on trial.

(Title.)

(Caption.)

The above-entitled proceeding having been reached in its order on the calendar, and a jury trial having been waived by the parties, Messrs. Rosendale & Hessberg, and E. Countryman, Esq., appearing for the relators, and Hamilton Harris and N. C. Moak, Esq., appearing for the defendants, the relator having presented and rested his case and the defendant having rested his case, and the facts being all presented to the court, and the proceedings having been tried and submitted, I do find and decide as follows:

FACTS.

1. That the allegations in the petition are correct and true, and the facts are therein correctly set forth.

2. That the legislative printing for 1886 was done by Weed, Parsons & Co., under and pursuant to the resolutions respectively of the Senate and Assembly, pending the determination of the questions involved in these proceedings. The said Weed, Parsons & Co. claimed to have a contract for legislative printing signed by Joseph B. Carr, Secretary of State, on December 31, 1885, which paper was introduced and read in evidence, signed by said Carr.

3. That provisions are now made by law for future legislative printing, after the expiration of the present contract, different from that under which the contract in question was made.

CONCLUSIONS OF LAW.

That plaintiff, relator in the above-entitled proceeding, is entitled to, and that a peremptory order of mandamus forthwith issue in the above-entitled proceeding to the defendant and his successors in office, requiring and commanding them to deliver for and during the year 1887, to the Argus Company, under and pursuant to the contract referred to in the alternative order herein with said Argus Company, all matter and copy for the printing to be done under said contract and pursuant to law.

CHARLES R. INGALLS,

Justice Supreme Court.

G. Peremptory order after trial of issues.

(Title.)

(Caption.)

To (name persons to whom directed) :

The petitioner herein having on the day of, presented a petition asking for an order of mandamus directing the above-named persons (or board) to perform certain acts hereinafter specified; and an order to show cause having been issued pursuant to said petition returnable on the day of; and on the return day of said show cause order, an alternative order of mandamus having been granted requiring you to perform such acts or to show cause why you should do so and to make a return to the petition pursuant to the provisions of article 79 of the Civil Practice Act; and a return having been made and filed by you raising issues of fact;

And said issues of fact having been tried and determined (state facts as to trial by jury, court or referee, and the return of the verdict, decision or report).

Now, THEREFORE, On motion of, attorney for the petitioner, it is

Adjudged and Decreed, That (state facts as determined).

And It Is Ordered, That you forthwith do and perform (state acts required to be performed). (State directions as to costs.)

.....

Justice Supreme Court.

H. Order staying proceedings.

(Title and caption.)

An application having been this day made for an order of mandamus directing the board of supervisors of the county of Ulster to levy and assess on the taxable property of said county the sum of twenty-eight thousand and ninety-eight dollars (\$28,098), and the same having been granted by order of the court, after hearing I. H. Maynard, Deputy Attorney-General, for the motion, and J. Newton Fiero, opposed, and it appearing that the defendant is about taking an appeal from said order, on motion of defendant's counsel, it is ordered that all proceedings on said order be stayed until the expiration of the time to appeal from said order, and in case such appeal is taken, then that all proceedings thereon be stayed till the hearing and determination of said appeal.

R. W. PECKHAM.

Enter in Ulster county.

MATRIMONIAL ACTIONS.*

ARTICLE I.

Annulment.

- A. General grounds for annulment.
 - 1. Civil Practice Act, § 1132. Action for judgment declaring nullity of void marriage or annulling voidable marriage.
 - 2. Domestic Relations Law, § 5. Incestuous and void marriages.
 - 3. Domestic Relations Law, § 6. Void marriages.
 - 4. Domestic Relations Law, § 7. Voidable marriages.
 - 5. Jurisdiction to annul marriage.
 - 6. Distinction between void and voidable marriages.
- B. Party under age of consent.
 - 1. Civil Practice Act, § 1133. Action where party under age of consent.
 - 2. Power of court.
 - 3. Age of consent.
 - 4. Consent of parents.
 - 5. Marriage in another state.
 - 6. Subsequent confirmation of marriage.
 - 7. By whom maintained.
 - 8. Parties defendant.
 - 9. Form of complaint.
- C. Former husband or wife living.
 - 1. Civil Practice Act, § 1134. Action to annul marriage when former husband or wife was living.
 - 2. In general.
 - 3. Absence of more than five years.
 - 4. Attack on prior divorce.
 - 5. Re-marriage forbidden by divorce decree.
 - 6. More than two marriages involved.
 - 7. Dissolution of former marriage after second marriage.
 - 8. Parties.
 - 9. Burden of proof.
 - 10. Bill of particulars.
 - 11. Form of complaint.
 - 12. Another form of complaint.
- D. Idiocy or lunacy.
 - 1. Civil Practice Act, § 1136. Action to annul marriage where party was an idiot.
 - 2. Civil Practice Act, § 1137. Action to annul marriage where party was a lunatic.
 - 3. Civil Practice Act, § 1138. Action to annul marriage by next friend of idiot or lunatic.
 - 4. Right to annul for mental condition.
 - 5. Form of complaint.
- E. Force, duress or fraud.
 - 1. Civil Practice Act, § 1139. Action to annul marriage on the ground of force, duress or fraud.
 - 2. Force or duress.

* For a further discussion of the matters treated in this chapter, see Schouler on Domestic Relations; B., C. & G. Consolidated Laws.

3. Fraud in general.
 4. No intention to assume martial status.
 5. Previous chastity.
 6. Representations as to former marriage.
 7. Criminal.
 8. Physical condition of defendant.
 9. Confirmation by cohabitation.
 10. Parties.
 11. Form of complaint.
- F. Physical incapacity.**
1. Civil Practice Act, § 1141. Action to annul a marriage on the ground of physical incapacity.
 2. Impotency in general.
 3. Incurable.
 4. Limitation of action.
 5. Physical examination of defendant.
- G. Action by next friend.**
1. Civil Practice Act, § 1144. Motion to vacate order allowing next friend to maintain action.
 2. Civil Practice Act, § 1145. Dismissal of complaint in action by next friend to annul a marriage.
 3. Rules of Civil Practice, Rule 276. Order allowing next friend to maintain action.
- H. Legitimacy of children.**
1. Civil Practice Act, § 1135. Legitimacy of children.
 2. Former husband or wife living.
- I. Custody and maintenance of children.**
1. Civil Practice Act, § 1140. Custody and maintenance of children.
 2. Lunacy.
 3. Former spouse living.
 4. Absence of more than five years.
 5. Infancy.
- J. Civil Practice Act, § 1142. Jury trial in action to annul marriage.**

ARTICLE II.

Divorce.

- A. Power to grant divorces.**
1. Civil Practice Act, § 1147. Action for absolute divorce.
 2. General authority of courts.
 3. Residence of parties.
- B. Complaint.**
1. Certainty of allegations.
 2. Unknown co-respondent.
 3. Negating defenses.
 4. Matters relating to alimony.
 5. Bill of particulars.
 6. Amended or supplemental complaint.
 7. Variance.
 8. Form of complaint.
- C. Defenses.**
1. Civil Practice Act, § 1153. When divorce denied, although adultery proved.
 2. Defenses, in general.
 3. Validity of marriage.

4. Abandonment.
5. Insanity of defendant.
6. Connivance or collusion.
7. Condonation.
8. Action not brought within five years.
9. Plaintiff guilty of adultery.

D. Answer.

1. Civil Practice Act, § 1148. When answer must be verified in action for divorce.
2. Recrimination.
3. Supplemental answer.
4. Form of answer.

E. Jury trial.

1. Civil Practice Act, § 1149. Jury trial in action for divorce.
2. Civil Practice Act, § 429. Jury trial of specific questions of fact; when of right.
3. Right to jury trial.
4. Issues other than adultery.
5. Settlement of issues.
6. Verdict of jury.
7. Form of notice of motion for order directing trial by jury.
8. Form of affidavit for order.
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1. Civil Practice Act, § 1151. Co-respondent as party in action for divorce.
2. Civil Practice Act, § 1152. Costs in favor of co-respondent in action for divorce.
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4. Waiver of rights.
5. Res adjudicata as to co-respondent.
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7. Notice of appearance by co-respondent.
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G. Legitimacy of children.

1. Civil Practice Act, § 1154. Legitimacy of children in action for divorce by wife.
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H. Rules of Civil Practice, Rule 278. Information as to details of divorce action.**ARTICLE III.****Separation.****A. Grounds for separation.**

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- B. Cruel and inhuman treatment.
 - 1. In general.
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 - 8. Conspiracy to procure evidence for divorce.
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- C. Conduct rendering cohabitation unsafe.
- D. Abandonment or non-support.
 - 1. In general.
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- E. Residence of plaintiff within state.
 - 1. Civil Practice Act, § 1162. Action for separation; conditions attached to maintenance.
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- F. Complaint.
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 - 2. Contents of complaint.
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 - 5. Variance.
 - 6. Form of complaint on ground of cruelty.
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- C. Evidence of adultery.
 - 1. Other acts of defendant.
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- D. Sufficiency of evidence of adultery.
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- A. Civil Practice Act, § 405. Reference in discretion of court.
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 - 5. Final judgment.
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- A. Civil Practice Act, § 1155. Maintenance and support of wife and children in action for divorce by wife.
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- E. Permanent alimony.
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 - 2. Nature of permanent alimony.
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 - 4. Amount.
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 - 5. Action dismissed.
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 - 1. Civil Practice Act, § 1156. Property rights in action for divorce by wife.
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- B. Annulment.
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- C. Separation.
- D. Collateral attack on decree.
- E. Vacating of judgment.
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 2. Contempt proceedings, in general.
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 6. Prejudice of wife.
 7. Excuses for failure to pay.
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 10. Termination of suit.
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 13. Demand for payment of alimony.
 14. Order to show cause.
 15. Service of order to show cause.
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 18. Imprisonment.
 19. Defendant without jurisdiction.
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- A. Foreign decree based on substituted service.
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- D. Who can attack illegal foreign decree.
- E. Effect of remarriage in reliance on foreign decree.

ARTICLE I.**ANNULMENT.****A. General grounds for annulment.****1. Civil Practice Act, § 1132. Action for judgment declaring nullity of void marriage or annulling voidable marriage.**

An action may be maintained to procure a judgment declaring the nullity of a void marriage or annulling a voidable marriage heretofore or hereafter entered into or contracted.

2. Domestic Relations Law, § 5. Incestuous and void marriages.

A marriage is incestuous and void whether the relatives are legitimate or illegitimate between either:

- 1. An ancestor and a descendant;
- 2. A brother and sister of either the whole or the half blood;
- 3. An uncle and niece or an aunt and nephew.¹

1. Uncle and niece.—At common law the marriage of uncle and niece was not incestuous and void, and the statute making it so is not retroactive. Otherwise the statute would be unconstitutional as impairing the obligation of a contract. The marriage of an uncle and niece before such marriages were made incestuous and void by

statute will not be annulled, when the wife was not under any disability at the time of marriage, and there was no fraud or concealment of the relationship, and she voluntarily cohabited with her husband, and has had two children. *Weisberg v. Weisberg*, 112 App. Div. 231, 98 N. Y. Supp. 260.

If a marriage prohibited by the foregoing provisions of this section be solemnized it shall be void, and the parties thereto shall each be fined not less than fifty nor more than one hundred dollars and may, in the discretion of the court in addition to said fine, be imprisoned for a term not exceeding six months. Any person who shall knowingly and wilfully solemnize such marriage, or procure or aid in the solemnization of the same, shall be deemed guilty of a misdemeanor and shall be fined or imprisoned in like manner.

(See B., C. & G. Consol. L., 2nd Ed., p. 1835.)

3. Domestic Relations Law, § 6. Void marriages.

A marriage is absolutely void if contracted by a person whose husband or wife by a former marriage is living, unless either:

1. Such former marriage has been annulled or has been dissolved for a cause other than the adultery of such person; provided, that if such former marriage has been dissolved for the cause of the adultery of such person, he or she may marry again in the cases provided for in section eight of this chapter and such subsequent marriage shall be valid;

2. Such former husband or wife has been finally sentenced to imprisonment for life;

3. Such former husband or wife has absented himself or herself for five successive years then last past without being known to such person to be living during that time.

(B., C. & G. Consol. L., 2nd Ed., p. 1836.)

4. Domestic Relations Law, § 7. Voidable marriages.

A marriage is void from the time its nullity is declared by a court of competent jurisdiction if either party thereto:

1. Is under the age of legal consent, which is eighteen years;
2. Is incapable of consenting to a marriage for want of understanding;
3. Is incapable of entering into the married state from physical cause;
4. Consents to such marriage by reason of force, duress or fraud;
5. Has a husband or wife by a former marriage living, and such former husband or wife has absented himself or herself for five successive years then last past without being known to such party to be living during that time.

Actions to annul a void or voidable marriage may be brought only as provided in the Code of Civil Procedure.

(See B., C. & G. Consol. L., 2nd Ed., p. 1842.)

5. Jurisdiction to annul marriage.

The power of the courts to annul marriages is said to be merely statutory; and the courts will exercise the function only in the cases authorized by statute,² and only by following the procedure prescribed by the Civil Practice Act.³ The court cannot decree a marriage null on the ground that one of the parties married in another State in violation of a decree in this State.⁴ The action cannot be maintained after the death of one of the parties.⁵

2. Penquat v. Phelps, 48 Barb. 566.

See Kerrison v. Kerrison, 8 Abb. N. C. 444.

3. Combs v. Combs, 17 Abb. N. C. 265.

5. Combs v. Combs, 17 Abb. N. C. 265.

4. Penquat v. Phelps, 48 Barb. 566.

In actions to annul a marriage under the provisions of the Civil Practice Act, the court acts as a court of equity.⁶ The jurisdiction of the court to annul marriage depends wholly upon the statute, except in those cases in which annulment is sought for some cause for which chancery has power to cancel or avoid all contracts, such as lunacy or fraud. Where a marriage is absolutely void because of the existence of a former spouse, the court has inherent power so to declare it.⁷

There is no general equitable jurisdiction to set aside marriages. The power to deal with matrimonial actions must be found in the statutes. The plaintiff in an action for the annulment of her marriage in which a judgment of a court of equity was entered in her favor, although the court had no jurisdiction, there being no statutory ground for the annulment, is entitled to have the judgment set aside, by a justice other than the one who presided at the trial, not because of any equitable consideration for her, but because the judgment does not rest upon jurisdictional facts, and because she has not been deprived of her marital rights by due process of law.⁸

When the prayer of the complaint is for separation, and there is no general prayer for relief, the plaintiff cannot, on demurrer, have a decree adjudging the marriage void, though there are sufficient allegations to that effect in the complaint.⁹

The law of the matrimonial domicile governs an action for the annulment of a marriage regardless of where it was solemnized or where the offense was committed. But in the absence of a statute of the State of the domicile expressly regulating foreign marriages the *lex loci contractus* governs the validity of the marriage, unless it be odious by the common consent of nations.¹⁰

6. Distinction between void and voidable marriages.

The Domestic Relations Law, sections 5-7, makes a clear and sharp distinction between marriages which are absolutely void and those which are merely voidable, and this distinction has been recognized in our jurisprudence from the earliest days.¹¹ An incestuous marriage is absolutely void;

6. *Berry v. Berry*, 130 App. Div. 53, 114 N. Y. Supp. 497.

7. *Roth v. Roth*, 97 Misc. 136, 161 N. Y. Supp. 99.

8. *Davidson v. Ream*, 178 App. Div. 362, 164 N. Y. Supp. 1037.

9. *Walton v. Walton*, 32 Barb. 203.

10. *Earle v. Earle*, 141 App. Div. 611, 126 N. Y. Supp. 317.

11. *McCullen v. McCullen*, 162 App. Div. 599, 147 N. Y. Supp. 1069.

and, unless the case falls within one of the exceptions mentioned in section 6, if one of the parties has a living husband or wife at the time of the marriage, it is void. If the marriage is merely voidable, judicial action must be taken as provided in article 67 of the Civil Practice Act, before the parties are free. If, on the other hand, the marriage is absolutely void, it imposes upon a party no legal restraint against contracting another marriage, and no judicial sentence of nullity is required to free the party imposed upon.¹² But in order to clear the record and dispose of possible disputes in matters of fact, there is a fitness and propriety in procuring a judicial decree declaring the nullity of a void marriage.¹³ The decree in such a case does not avoid the marriage, but merely declares its invalidity.¹⁴

B. Party under age of consent.

1. Civil Practice Act, § 1133. Action where party under age of consent.

An action to annul a marriage on the ground that one or both of the parties had not attained the age of legal consent may be maintained by the infant, or by either parent of the infant, or by the guardian of the infant's person; or the court may allow the action to be maintained by any person as the next friend of the infant. But a marriage shall not be annulled at the suit of a party who was of the age of legal consent when it was contracted, or by a party who for any time after he or she attained that age freely cohabited with the other party as husband or wife.

2. Power of court.

The court has clear power to annul a marriage on the ground that one of the parties was under the age of consent at the time of its solemnization.¹⁵

12. *Patterson v. Gaines*, 6 How. (U. S.) 550; *Pettit v. Pettit*, 105 App. Div. 312, 93 N. Y. Supp. 1001.

13. *Pettit v. Pettit*, 105 App. Div. 312, 93 N. Y. Supp. 1001; *McCullen v. McCullen*, 162 App. Div. 599, 601, 147 N. Y. Supp. 1069.

14. *Stein v. Dunne*, 119 App. Div. 1, 103 N. Y. Supp. 894; *aff'd*, 190 N. Y. 524.

15. *Cunningham v. Cunningham*, 206 N. Y. 341; *Silveira v. Silveira*, 34 Misc. 267, 69 N. Y. Supp. 634; *Mundell v. Coster*, 80 Misc. 337, 142 N. Y. Supp. 142.

Marriage not intended to be binding.—Where, in an action to have a marriage adjudged null and void *ab initio* upon the ground that plaintiff

was under age at the time of her marriage and that the necessary legal consent, etc., had not been obtained, it not only appears that there was no intention on the part of either plaintiff or defendant that the formal ceremony should be considered as a valid and legal marriage, but it is affirmatively established that the ceremony was entered into as a mere subterfuge for the purpose of obtaining a certificate of marriage which could be used by plaintiff in her endeavor to obtain a theatrical engagement thereby overcoming the objection that being under the legal age she could not be provided with an engagement without first having the consent of her mother or guardian to such employment, and it

At common law, the parties on arriving at the age of consent could disagree and declare the marriage void, without any divorce or court proceedings;¹⁶ but, under the present statutes, the marriage will stand unless an action is brought to annul it.¹⁷ A woman who married before the age of eighteen years, though with the consent of her parents and though cohabitation followed, may maintain an action for annulling the marriage.¹⁸ The Supreme Court has jurisdiction of an action to annul a marriage voidable under the statute, because the husband was, at the time it was contracted, under eighteen years of age, irrespective of the residence of the parties, provided the marriage was contracted within the State of New York.¹⁹ A girl married under the age of fifteen years, whose cohabitation with her husband ended before reaching the age of eighteen years, is entitled to an annulment of the marriage, and this right is not barred by her laches of over five years, where it appears that she was an ignorant girl and had been told that after

further appears that the marriage was never consummated and that defendant joined in the prayer for relief for the annulment of the marriage and that both plaintiff and defendant subsequently contracted other marital relations, the evidence is sufficient to justify a court of equity in granting the relief prayed for. *Dorgeloh v. Murtha*, 92 Misc. 279, 156 N. Y. Supp. 181.

Chancery.—In *Aymar v. Roff*, 3 Johns. Ch. 49, where a man was married to an infant under the age of legal consent, and she immediately declared her ignorance of the nature and consequences of the marriage, and her dissent from it, the court, on a bill filed, ordered her to be placed under protection as a ward of the court, and forbade all intercourse or correspondence with her, by the defendant, under pain of contempt.

16. *Kuykendall v. Kuykendall*, 112 Misc. 12, 182 N. Y. Supp. 308.

"At common law a marriage between infants of the age of consent created a status as valid and binding as a marriage between adults. The marriage of infants who had not reached

the age of consent also created a recognized status, but one subject to being disaffirmed by the parties upon arriving at the age of consent and this either with or without a judicial decree. If not so disaffirmed an election to affirm the marriage was readily inferred from slight circumstances and no new or other ceremony was necessary to complete or perfect the marriage. As Schouler says, the parties became 'bound forever' by reason of their election to remain husband and wife. The one marriage was valid from its inception for all purposes; the other was neither strictly void nor strictly voidable, and was considered as inchoate and imperfect, but, if not disaffirmed, as already stated, it ripened into a marriage equally valid for all purposes." *Wolf v. Wolf*, 111 Misc. 391, 181 N. Y. Supp. 368.

17. *Wolf v. Wolf*, 111 Misc. 391, 181 N. Y. Supp. 368.

18. *Wander v. Wander*, 111 App. Div. 189, 97 N. Y. Supp. 586; *Conte v. Conte*, 82 App. Div. 335, 81 N. Y. Supp. 923, 13 Anno. Cas. 79.

19. *Becker v. Becker*, 58 App. Div. 374, 69 N. Y. Supp. 75.

five years she would have a right to a divorce without any court proceedings.²⁰

3. Age of consent.

At common law a female of the age of twelve and a male of the age of fourteen were capable of entering into a contract of marriage.²¹ In this state the age of consent for both parties is now fixed at eighteen years.²² It is no defense that the plaintiff fraudulently represented to the defendant that he was of legal age, and that she believed him, and was thereby deceived into marrying him.²³

4. Consent of parents.

If the parties are of the statutory age, the consent of their parents is not necessary for a valid marriage.²⁴ And, on the other hand, the marriage may be annulled when the parties are under age, though their parents consented thereto.²⁵ The provisions of the Domestic Relations Law relative to marriage licenses, expressly permitting the issuance of a license to a woman under eighteen years of age where the consent of the parents or guardian is obtained, do not take away the power to annul the marriage.²⁶ The

20. *Macri v. Macri*, 177 App. Div. 292, 164 N. Y. Supp. 112.

21. *Schouler on Domestic Relations*, § 1122.

22. *Domestic Relations Law*, § 7.

23. *Quigg v. Quigg*, 42 Misc. 48, 85 N. Y. Supp. 550.

Relief denied.—Where plaintiff, a resident of this State, when only twenty years of age, induced the defendant, who was also a resident of this State and ten years his senior, to enter into a marriage with him in the State of Pennsylvania, by making therein a false affidavit as to his age in order to obtain a marriage license and by representing to her that he had the written consent of his father to the marriage but that he would not show it to the clerk of the court issuing the license, and it further appears that after the marriage, which presumably was valid in Pennsylvania, no objection was made by his parents on the return of the parties to the State of New York, where they continued to reside as husband and wife for a period

of six months, when for reasons other than non-age plaintiff became dissatisfied and he and his wife separated, the marriage will be held valid under the laws of the State of New York, and its annulment on the ground that plaintiff was not twenty-one years of age at the time of the marriage will be denied upon the ground that plaintiff has not come into court in good conscience and with clean hands but was seeking to take advantage of his own wrong. *Bays v. Bays*, 105 Misc. 492, 174 N. Y. Supp. 212.

School records as evidence of age. See *Price v. Price*, 194 App. Div. 158, 185 N. Y. Supp. 570.

24. *Bennett v. Smith*, 21 Barb. 440.

25. *Conte v. Conte*, 82 App. Div. 335, 81 N. Y. Supp. 923, 13 Anno. Cas. 79; *Wander v. Wander*, 111 App. Div. 189, 97 N. Y. Supp. 586; *Kruger v. Kruger*, 137 App. Div. 289, 122 N. Y. Supp. 23.

26. *Kruger v. Kruger*, 137 App. Div. 289, 122 N. Y. Supp. 23.

fact that a son under the age of twenty-one procures a marriage license upon his representation that he is over twenty-one and contracts a marriage without his father's consent, does not permit the father to maintain an action of annulment.²⁷

5. Marriage in another state.

It is the general rule that a marriage valid in the state where it is performed is valid everywhere. Nevertheless our courts have annulled marriages of its citizens which were solemnized in adjoining States, though they might be valid in such states. Thus where the parties who were citizens of this state went to New Jersey to be married, the girl being under the age of consent, no cohabitation following the marriage, it was annulled, though by the laws of New Jersey the marriage might have been valid.²⁸ It is said that the courts of this State have ample power to annul a marriage entered into outside the State by parties under the age of consent when the parties are citizens of the State and domiciled here. The courts of this State do not proceed in annulling the marriage of persons under the age of consent upon the theory that the marriage is absolutely void, but on the theory that it is voidable, owing to extrinsic facts or circumstances surrounding or attending it, and do not contravene the rule of law that a marriage valid where contracted is valid everywhere. For that reason, the validity in a foreign jurisdiction of the marriage of citizens of the State of New York under the legal age of consent does not prevent the courts of this State from annulling the marriage of the parties after they return to their residence within the State.²⁹

Where a woman under the age of eighteen years, a resident of the city of Buffalo, goes to Canada and is there married to another citizen of the same city without the knowledge or consent of the woman's sole surviving parent or guardian, and the parties at once return to this State and after living together two months separate, it will be inferred that the relation established by the marriage was intended by the parties to be sustained in the State of New York, and such relation is therefore subject to the laws of this State, so far as they authorize a dissolution thereof by judicial proceed-

27. *Greenberg v. Greenberg*, 97 Misc. 153, 160 N. Y. Supp. 1026.

28. *Cunningham v. Cunningham*, 206 N. Y. 341.

29. *Mitchell v. Mitchell*, 63 Misc. 580, 117 N. Y. Supp. 671. *Contra*, *Reid v. Reid*, 72 Misc. 214, 129 N. Y. Supp. 529.

ings for any cause.³⁰ But where plaintiff, in an action to annul a marriage on the claim of his non-age, was eighteen years and four months old when, without his parents' consent, he married defendant in the State of New Jersey which has no statute fixing the age of legal consent, his complaint must be dismissed upon the merits.³¹

6. Subsequent confirmation of marriage.

If the parties cohabit after one of them reaches the age of consent, such party cannot maintain an action to annul the marriage. Where a boy under eighteen years of age marries a girl under the same age and cohabits with her after he is eighteen years old, the marriage will not be annulled upon the complaint of the boy's father where the boy objects. In such case the marriage, as a matter of public policy, will be upheld if necessary as a common-law marriage.³²

The term "cohabited" is used in its popular rather than derivative meaning. Where one not yet eighteen years of age marries and after reaching such age, on one occasion at least, visited the apartment occupied by his wife, remained there over night and of his free will and accord had sexual intercourse with her, no action lies to annul the marriage on the ground that at the time it was contracted the husband had not attained the age of legal consent; the husband by such act must be deemed to have forfeited his right to an annulment of the marriage.³³

Where the judgment in an action for a separation, begun before plaintiff became eighteen years of age, was not entered until after that time and since the entry of the judgment defendant has been paying the alimony for which provision was made therein, the judgment is a bar to an action brought by plaintiff after she became twenty-one years of age to annul the marriage on the ground of her non-age.³⁴

30. *Mitchell v. Mitchell*, 63 Misc. 580, 117 N. Y. Supp. 671. But see *Donohue v. Donohue*, 63 Misc. 111, 116 N. Y. Supp. 241; holding that where residents of this State under eighteen years of age, while sojourning in Canada, where marriage by them was permitted without restriction or condition of any character, intermarry and forthwith return to this State, an action to annul the marriage upon the ground that plaintiff, the husband, was

under age when the marriage was consummated cannot be maintained.

31. *Padula v. Padula*, 96 Misc. 597, 160 N. Y. Supp. 833.

32. *Allerton v. Allerton*, 104 Misc. 627, 172 N. Y. Supp. 152.

33. *Herrman v. Herrman*, 93 Misc. 315, 156 N. Y. Supp. 688; *aff'd*, 176 App. Div. 914, 162 N. Y. Supp. 1123.

34. *Terry v. Terry*, 96 Misc. 594, 160 N. Y. Supp. 1016.

7. By whom maintained.

The action may be maintained by the party who was not of the necessary age at the time of the marriage. or it may be maintained by a parent,³⁵ guardian, or next friend of such infant. The right of a mother to maintain an action to annul the marriage of her son as under the age of legal consent, is neither stayed nor abrogated because the defendant wife had theretofore brought a similar action.³⁶ If the parties continue to cohabit and desire to retain the marriage relation, an action by a third person will ordinarily fail.³⁷ It will necessarily fail, if the parties reach the proper age before the action is brought. But, in a proper case, it is thought that the action may be brought by a parent, though both of the parties object to the action.³⁸ In such a case, there seems to be more or less discretion in the court as to whether it will set the marriage aside or whether the marriage relation will be allowed to continue.³⁹

8. Parties defendant.

Both the husband and wife are necessary parties to the action to annul the marriage. If the action is brought by a parent or another third person, both must be made parties to the action.⁴⁰

9. Form of complaint.

(Title.)

The plaintiff, for a cause of action herein, alleges:

1. That the plaintiff herein is an infant of less than the age of twenty-one years, having been born on the day of, 19..; and that on the day of, 19.., upon application duly made as provided by law, C. D. was appointed by a justice of the Supreme Court (or county judge), by an order which has been duly entered in the office of the clerk of the county of, on the day of, 19.., as guardian ad litem for such plaintiff for the purposes of this action.

35. *Kuykendall v. Kuykendall*, 112 Misc. 12, 182 N. Y. Supp. 308.

Alimony.—A parent who brings an action to annul a son's marriage, cannot be compelled to pay alimony for the support of the wife, or a counsel fee for the wife's attorney. *Stivers v. Wise*, 18 App. Div. 316, 46 N. Y. Supp. 9.

36. *Long v. Baxter*, 77 Misc. 630, 138 N. Y. Supp. 505.

37. *Marone v. Marone*, 105 Misc. 371, 174 N. Y. Supp. 151.

38. *Kuykendall v. Kuykendall*, 112 Misc. 12, 182 N. Y. Supp. 308.

39. See *Magee v. Nealon*, 108 Misc. 396, 177 N. Y. Supp. 517.

40. *Wood v. Baker*, 43 Misc. 310, 88 N. Y. Supp. 854. See, also, *Fero v. Fero*, 62 App. Div. 470, 70 N. Y. Supp. 742.

2. That the plaintiff and the defendant were married on the day of, 19.., at, county of, State of New York; and that at such times, and at all times since that time, such parties were and have been residents of such State.

3. That at the time the plaintiff and the defendant were so married, the plaintiff was not of the age of eighteen years, having been born on the day of, 19...

4. That such marriage has not been ratified by any mutual assent of the parties after the plaintiff herein attained the age of eighteen years, nor since such time has the plaintiff for any time freely cohabited with the defendant as husband (*or wife*).

WHEREFORE, The plaintiff herein prays that a judgment be had declaring such marriage contract void, and annulling such marriage, and for such other and further relief as may be just, with the costs of this action.

C. Former husband or wife living.

1. Civil Practice Act, § 1134. Action to annul marriage when former husband or wife was living.

An action to annul a marriage upon the ground that the former husband or wife of one of the parties was living, the former marriage being in force, may be maintained by either of the parties during the life-time of the other, or by the former husband or wife.

2. In general.

A marriage contracted when either of the parties has a former husband or wife living is generally void,⁴¹ though it may be merely voidable if it was contracted in good faith after an absence of the former spouse for over five years.⁴² It is not necessary to procure a decree to declare the nullity of a marriage which is absolutely void,⁴³ but it is proper to procure such a decree.⁴⁴ If void, an action may be maintained to declare its nullity;⁴⁵ if voidable, an action is proper to annul the marriage. The former marriage may, no doubt, be a common law marriage; but a common-law marriage may present more difficulty of proof.⁴⁶ In an action to annul a marriage on the ground that plaintiff's former wife was living, it is no defense that representations were made to him that he had a legal right to marry.⁴⁷

41. *Stokes v. Stokes*, 198 N. Y. 301; *Dye v. Dye*, 140 App. Div. 309, 125 N. Y. Supp. 242; *Earle v. Earle*, 141 App. Div. 611, 126 N. Y. Supp. 317; *McCullen v. McCullen*, 162 App. Div. 599, 147 N. Y. Supp. 1069.

42. *Stokes v. Stokes*, 198 N. Y. 201.

43. *Lincoln v. Lincoln*, 6 Robt. 525.

44. *Earle v. Earle*, 141 App. Div.

611, 126 N. Y. Supp. 317; *Wightman v. Wightman*, 4 Johns. Ch. 343.

45. *Appleton v. Warner*, 51 Barb. 270.

46. See *Moller v. Sommer*, 86 Misc. 110, 149 N. Y. Supp. 103; *aff'd*, 165 App. Div. 990, 150 N. Y. Supp. 1097.

47. *Price v. Price*, 2 T. & C. 659.

3. Absence of more than five years.

Where one contracts a second marriage in good faith after the absence of the former husband or wife for over five years, the second marriage is not void, but is merely voidable.⁴⁸ It is considered void only from the time it was so decreed.⁴⁹ It cannot, therefore, be generally attacked by one other than the three persons involved.⁵⁰ It is valid as against all the world unless the first husband or wife reappears.⁵¹ If a woman marries when her husband by a former marriage is alive both marriages cannot be in full force at that time. Assuming that there was no divorce, either the subsequent marriage is void or the former marriage is suspended or in abeyance, and if this is so, it is not reinstated by the return of the absentee, but is voidable and not void until so adjudged. Otherwise both marriages would be in force at the same time and to this extent polygamy would be sanctioned by law. The marriage between the parties to the later marriage is thus either void or voidable. If the wife knew or should have known that fact at the time, it was absolutely void with no binding force upon either party and their relations were not sanctioned by law, whether they realized it or not. If she did not then know it within the true meaning of the statute and she married the second time in the full belief, after due observance of the five years' provision, that her first husband was dead, the marriage was not void but voidable, binding upon both parties thereto until action by the court, and their relation was that of honorable marriage. The inquiry to find out whether a husband or wife who has disappeared is yet alive must be made with an honest effort to find out the truth and the inquiry must be continued in good faith and with the diligence required by the statute.⁵² But the action may be maintained by the second husband or wife though no imposition has been practiced and such plaintiff knew as much about the facts as the defendant.⁵³ But it has been said that the action cannot be maintained after the death of the former husband or wife.⁵⁴ Cohabitation under the second marriage is

48. *Price v. Price*, 124 N. Y. 589; *Wolf v. Wolf*, 109 Misc. 366, 178 N. Y. Supp. 726; *Cropsey v. Cropsey*, 30 Barb. 47; *Valleau v. Valleau*, 6 Paige, 207.

49. *Gall v. Gall*, 114 N. Y. 109, 22 St. Rep. 746, rev'g 12 St. Rep. 604; *Valleau v. Valleau*, 6 Paige, 207.

50. *Cropsey v. McKinney*, 30 Barb. 47.

51. *Matter of Del Genovese*, 56 Misc. 418, 107 N. Y. Supp. 1033; aff'd, 136 App. Div. 894, 120 N. Y. Supp. 1121.

52. *Stokes v. Stokes*, 98 N. Y. 301.

53. *Tiedemann v. Tiedemann*, 94 Misc. 449, 157 N. Y. Supp. 1101.

54. *Hervey v. Hervey*, 92 N. Y. Supp. 218; *Price v. Price*, 2 T. & C. 659. See, also, *Wolf v. Wolf*, 109 Misc. 366, 178 N. Y. Supp. 726.

not adulterous, but although the parties entered into it in good faith, the wife is not entitled to dower in her husband's real estate upon the dissolution of the marriage.⁵⁵ The action may be maintained during the lifetime of the parties; and the ten years' Statute of Limitations is not applicable thereto.⁵⁶

4. Attack on prior divorce.

The question of the validity of a divorce may be litigated in an action to annul a marriage on the ground that the defendant had a former husband or wife living at the time of the second marriage. If the divorce of the defendant is void, the second husband or wife may annul the second marriage. Thus, if a divorce is procured in a foreign jurisdiction under such circumstances that the courts of this State do not recognize its validity, and the party procuring the divorce marries again, the second marriage may be annulled.⁵⁷ Where an action for divorce brought in a foreign country against a resident of this State was not perfected by reason of the fact that the decree was not registered with the proper civil authorities, a second marriage by such person with a woman also a resident of this State is polygamous, and its invalidity will be declared in a suit for an annulment.⁵⁸ But if the court had jurisdiction to render the judgment of divorce, the second marriage will not be annulled on the ground that the divorce was procured by fraud or collusion.⁵⁹ The party procuring the divorce is not in a position to object to its legality. And, if the plaintiff in the annulment suit advises and procures the defendant to procure the invalid divorce, he may not be able to attack its validity.⁶⁰ If the foreign divorce is one which is sustained by the laws of our State or by the full faith and credit clause of the United States Constitution, there is no ground for the annulment of the subsequent marriage.⁶¹

55. *Price v. Price*, 124 N. Y. 589.

56. *Chittenden v. Chittenden*, 68 Misc. 172, 123 N. Y. Supp. 629; *Chittenden v. Chittenden*, 64 Misc. 649, 118 N. Y. Supp. 1005; *aff'd*, 137 App. Div. 932, 123 N. Y. Supp. 1110.

57. *Tysen v. Tysen*, 140 App. Div. 370, 125 N. Y. Supp. 479; *Davis v. Davis*, 2 Misc. 549, 22 N. Y. Supp. 191, 51 St. Rep. 509; *Mellen v. Mellen*, 10 Abb. N. C. 329. See, *infra*, Art. XVII, Foreign Divorce.

58. *Earle v. Earle*, 141 App. Div. 611, 126 N. Y. Supp. 317.

59. *Hall v. Hall*, 139 App. Div. 120, 123 N. Y. Supp. 1056; *Ruger v. Ruger*, 21 Hun, 489; *aff'd*, 85 N. Y. 483.

60. *Kaufman v. Kaufman*, 177 App. Div. 162, 163 N. Y. Supp. 566.

61. *Post v. Post*, 149 App. Div. 452, 133 N. Y. Supp. 1057; *aff'd*, 210 N. Y. 607; *Schenker v. Schenker*, 181 App. Div. 621, 169 N. Y. Supp. 35.

5. Remarriage forbidden by divorce decree.

Where the defendant has been divorced in this State and the decree forbids remarriage, a subsequent marriage in this State during the life of the former spouse is void, and the courts will declare its nullity.⁶² This rule has been applied although the party procuring the divorce has been absent during the prescribed period of five years.⁶³ And it has been said that it is not necessary that the former marriage should have taken place or have been dissolved within this State.⁶⁴ But if the second marriage is solemnized in another State and is valid in that State, it will be sustained in this State, and an action for its annulment cannot be maintained.⁶⁵

6. More than two marriages involved.

Troublesome questions may arise where more than two marriages are involved in the matrimonial complication. In an action to annul a marriage on the ground that the defendant had a former husband or wife living, the defendant may be able to show that such former marriage was void on account of one of the parties having a husband or wife living at the time of its solemnization, and if in the series of matrimonial ventures the second is void, the third may be valid.⁶⁶

62. *Roth v. Roth*, 97 Misc. 136, 161 N. Y. Supp. 99; *Gardner v. Gardner*, 98 Misc. 411, 162 N. Y. Supp. 365.

Excusing default.—Where, in an action for the annulment of a marriage upon the ground that when the contract was entered into the defendant was prohibited from remarrying by a decree of the court, an interlocutory judgment was entered in favor of the plaintiff, a motion by the defendant to vacate such judgment, made a few days before the expiration thereof, and to excuse her default in pleading and permit her to interpose an answer, setting up a marriage in New Jersey, should be denied, where it appears that in a prior action by the defendant for a separation she had an opportunity to establish the alleged marriage in New Jersey, but conceded that she could not do so. *Betts v. Betts*, 166 App. Div. 307, 151 N. Y. Supp. 790.

63. *Matter of Barrowdale*, 28 Hun, 336.

64. *Smith v. Woodworth*, 44 Barb. 198.

65. *Van Voorhis v. Brintall*, 86 N. Y. 18; *Moore v. Hegeman*, 92 N. Y. 521; *Pettit v. Pettit*, 45 Misc. 157, 91 N. Y. Supp. 979; *Kerrison v. Kerrison*, 60 How. Pr. 51; *Matter of Webb's Estate*, 1 Tucker, 372. *Contra*, *Marshall v. Marshall*, 2 Hun, 238.

66. See *Lincoln v. Lincoln*, 6 Robt. 525.

Power of court.—In an action for divorce, brought by a husband against his second wife on the ground that he had a first wife living at the time of the second marriage, he obtained a divorce by her failure to defend; the second wife was subsequently allowed to open the judgment on the ground of fraud, and to put in an answer alleging the validity of the second marriage. The third wife then obtained leave of the court to intervene, and she put in an answer insisting on the invalidity of the second marriage and the validity of hers, the third. *Held*,

7. Dissolution of former marriage after second marriage.

The fact that the prior marriage is dissolved after the solemnization of the second marriage will not render the second marriage valid.⁶⁷ Where a woman remarries while her first husband is still living, the second marriage is absolutely void, and will be declared to be so in a suit brought by the second husband, although after the second marriage the first marriage was annulled, on the ground that it was induced by the false representations of the first husband. The second marriage is not validated by ratification after the annulment of the first marriage merely because the parties thereto continue to cohabit as man and wife, if a new marriage relation is not created.⁶⁸ Where a woman did not obtain a divorce from her first husband until a month after she married again, the second marriage will be annulled where the second husband had no knowledge of the first marriage or understood that a divorce had been procured, and there is no issue of the second marriage.⁶⁹

that without an amendment to the complaint, the court could not adjudge both the second and third marriages void. *Anonymous*, 15 Abb. Pr. (N. S.) 171.

67. *Barker v. Barker*, 172 App. Div. 244, 158 N. Y. Supp. 413.

Between final and interlocutory decrees.—In an action to annul a marriage entered into in August, 1914, on the ground that the defendant had another husband living at the time of her marriage to plaintiff it appeared that an interlocutory decree had been entered in her favor in an action against the former husband for divorce and that about ten days before the entry of the final decree she was married to plaintiff, who testified that at the time of his marriage to defendant, he did not know that said final decree had not been entered. It further appeared that from the time of the marriage sought to be annulled until about a week before the present action was commenced the parties had lived as husband and wife. Held, that though the marriage involved in the

present action was illegal yet having apparently been entered into in good faith with intent to contract a valid marriage plaintiff was not entitled to the relief asked, for the reason that the facts disclosed made out a valid common-law marriage. *Wilson v. Burnett* (1918), 105 Misc. 279, 172 N. Y. Supp. 673. Where after an interlocutory decree of divorce has been entered, in favor of a wife, but before final judgment, her husband remarries, the second wife may have her marriage annulled, although it was followed by cohabitation, it appearing that she was barely eighteen years of age, that there were no children and that the amendment of § 1774 of the Code of Civil Procedure, postponing the husband's right to remarry until after entry of the final decree, had been in effect less than two months. *Pettit v. Pettit*, 105 App. Div. 312, 93 N. Y. Supp. 1001.

68. *McCullen v. McCullen*, 162 App. Div. 599, 147 N. Y. Supp. 1069.

69. *McCarron v. McCarron*, 26 Misc. 158, 56 N. Y. Supp. 745.

8. Parties.

As a general rule, any one of the three persons involved in the triangle may maintain the action. That is, it may be maintained by either the husband or wife to the second marriage, or by the party to the first marriage who was not a party to the second.⁷⁰ It may be that, upon equitable principles, the relief will be denied, when sought by the party who entered into the second marriage at a time when he knew that the first marriage was still subsisting.⁷¹ But the relief will not be denied to the participant in the second marriage, merely because she knew at the time thereof that the other party was not free to marry. Although a woman married a man with the knowledge that he was already bound by a valid and subsisting marriage, she is entitled nevertheless to a decree annulling the marriage, for it is absolutely void.⁷²

If the marriage is merely voidable, as where it was entered into after an absence of over five years by the former spouse, a third party cannot maintain the action.⁷³ It cannot be declared void, collaterally, after the death of the first spouse, in actions instituted by creditors.⁷⁴ Where a valid marriage was contracted in good faith and after the absence of a former husband for more than five years, the right of the second husband to annul the marriage on discovery of the facts does not survive the death of the former husband.⁷⁵

Where an action is brought by a husband to annul a marriage upon the ground that his wife has a former husband living, in that a decree of divorce which she obtained in a foreign State against her non-resident husband was null and void because service was made by publication and he did not appear, the former husband is not entitled to be brought in as a party defendant in the action for annulment on his own motion, being neither a necessary nor a proper party.⁷⁶ But parties interested in the estate of a deceased, who allege that testator's marriage with one claiming to be his widow was void because she had a previous husband living, have been allowed to intervene in an action brought by her to have her first marriage declared void.⁷⁷

70. *Stokes v. Stokes*, 198 N. Y. 301.

71. *Berry v. Berry*, 130 App. Div. 53, 114 N. Y. Supp. 497.

72. *Brown v. Brown*, 153 App. Div. 645, 138 N. Y. Supp. 602.

73. *Cropsey v. McKinney*, 30 Barb. 47.

74. *Cropsey v. McKinney*, 30 Barb. 47.

75. *Hervey v. Hervey*, 92 N. Y. Supp. 218; *Price v. Price*, 2 T. & C. 659.

76. *Tysen v. Tysen*, 137 App. Div. 134, 121 N. Y. Supp. 962.

77. *Tilby v. Hayes*, 27 Hun, 251.

9. Burden of proof.

Proof of prior marriage is not alone sufficient for annulment; there is a presumption in favor of innocence of defendant, to be overcome by evidence showing that former spouse had not absented himself for a period sufficient to raise presumption of death.⁷⁸ Evidence that the defendant had a husband or wife living three years before the second marriage, does not justify the annulment of the second marriage, because the presumption of the defendant's innocence is stronger than the presumption of the continuance of the life of the former husband or wife.⁷⁹ One who seeks to annul a marriage because his wife had another husband living at the time of the marriage and because her alleged divorce from such former husband was void has the burden of showing facts which render the marriage void.⁸⁰ Where the defendant does not appear in an action to annul a second marriage on the ground that the husband by the former marriage is still living, the plaintiff need merely allege and prove the former marriage, that the former husband was living at the time of the marriage with the plaintiff, and that the former marriage has not been annulled or dissolved. It is not necessary for the plaintiff to negative by allegation, or proof, the exceptions or provisos contained in section 6 of the Domestic Relations Law.⁸¹

10. Bill of particulars.

In an action to annul a marriage on the ground that the wife had a former husband living, the court will not order a bill of particulars stating the time and place of the former marriage, if ceremonial; or, if not ceremonial, the times and places when and where defendant lived with such person as his wife, as this would require plaintiff to disclose his evidence.⁸²

78. *Fagin v. Fagin*, 83 Misc. 304, 151 N. Y. Supp. 809; *Lazarowicz v. Lazarowicz*, 91 Misc. 116, 154 N. Y. Supp. 107.

79. *Smith v. Smith*, 194 App. Div. 542, 185 N. Y. Supp. 558.

80. *Hall v. Hall*, 139 App. Div. 120, 123 N. Y. Supp. 1056.

81. *McCullen v. McCullen*, 162 App. Div. 599, 147 N. Y. Supp. 1069.

82. *Carrie v. Davis*, 41 App. Div. 520, 58 N. Y. Supp. 820.

11. Form of complaint.

(Title of action.)

The plaintiff, for a cause of action herein, alleges:

1. That the above-named plaintiff and defendant were married at county of, State of New York, on the day of, 19..; and that at such time the said plaintiff and defendant were residents of the State of New York, and that the plaintiff is now a resident of, county of, State of New York.

2. That the said plaintiff and defendant lived together as husband and wife from the time of said marriage until on or about the day of, 19...

3. That at the time of said marriage the said defendant was the husband (*or wife*) of one L. M., who was then living; that the said defendant and the said L. M. were married at, county of, State of, on the day of, 19.., and at the time of the marriage of the above-named plaintiff and defendant the said marriage of the said defendant with the said L. M. was and still is in full force and effect.

4. That when the marriage of the said plaintiff and defendant herein was contracted, plaintiff contracted the same in good faith and fully believed that L. M., the former husband (*or wife*) of the said defendant was dead (*or that the marriage between the said L. M. and the defendant had been dissolved; or if the former marriage of the defendant was unknown to the plaintiff, such fact should be stated; or if for any other reason the plaintiff supposed that the defendant was qualified to enter into the contract of marriage, it should be so stated in detail*).

5. That the issue (*if any*) of the marriage between the plaintiff and the defendant herein is one child, L. B., a boy (*or girl*) who was born, on the day of, 19.., and that such child is now living.

WHEREFORE, The plaintiff prays that the marriage between the plaintiff and the defendant herein be annulled and declared void, and that it be adjudged that the said L. B., the issue of the marriage between the said plaintiff and the defendant, be for all purposes the legitimate child of the plaintiff and be entitled to succeed as such, in the same manner as other legitimate children, to the real and personal estate of the said plaintiff, and that the said plaintiff be awarded the care and custody of said child, and for such other and further relief as may be just and proper, with the costs of this action.

12. Another form of complaint.

SUPREME COURT — ULSTER COUNTY.

WILLIAM H. STEWART

agst.

ANNIE STEWART.

The complaint of the above plaintiff respectfully shows to this court that the above plaintiff married the above defendant at the city of Kingston, Ulster county, New York, on the 2d day of July, 1899;

that both the said plaintiff and defendant were then inhabitants and residents of said county of Ulster, and the said plaintiff has ever since been and is now an inhabitant and resident of said county; that the said plaintiff and defendant lived together as husband and wife from the time of said marriage down to sometime in the spring of the year 1902 at and in the county of Ulster; that the issue of said marriage of the said plaintiff and defendant were two children, William H. Stewart, born April 13, 1901, and now living with his grandfather at Hurley, Ulster county, and Frederick Stewart, born December 26, 1902, and now deceased; that prior to the marriage of the said defendant to this plaintiff the said defendant had been the wife of one Charles Tate and had, as this plaintiff is informed and believes, commenced proceedings in the High Court of Justice in England, to procure a divorce from said Charles Tate, and that such proceedings had been had in said action that a decree had been entered in said action.

(Here insert decree or statement of contents.)

The complaint further shows that the said plaintiff supposed at the time of his said marriage with the defendant, that the defendant was fully divorced from her former marriage and could legally enter into the marriage relation with this plaintiff, and the said plaintiff is informed that the said defendant then supposed that she had been fully divorced from her former marriage and could legally enter into the marriage relation with this plaintiff; that the plaintiff and defendant lived together as husband and wife, plaintiff supposing himself to have been legally married to her, until the spring of 1902; and this plaintiff is informed and believes that the said defendant lived with the plaintiff, as his wife, supposing herself to be his lawful wife, until the spring of 1902, when she received letters from England advising her that her said divorce from said Charles Tate had not become absolute at the time of her said marriage to this plaintiff, and she, therefore, then first knew that there was any question as to this plaintiff's marriage with the said defendant being lawful; the complaint further shows that in the spring of 1902 the said defendant informed this plaintiff that there was some question as to the legality of their said marriage by reason of her divorce from Charles Tate not having become absolute at the time of such marriage, and suggesting that they be remarried; that this plaintiff, not understanding such statement and not then believing the same, refused to enter into such remarriage, and that they then separated and have not since lived together as man and wife; that this plaintiff and said defendant have not lived or cohabited together as man and wife since this plaintiff learned of and heard that there was any question as to the legality of said marriage; that the said child, William Henry Stewart, has, since such separation, been under the care and control of this plaintiff; that soon after said separation the said defendant removed to the Province of Ontario, Canada, and has since continued to reside there; that, as this plaintiff is informed and believes, the said defendant, on September 20, 1904, at South Hampton, Province of Ontario, married one Isaac Aves, and has since continued to live and cohabit with him as his wife at Burgoin and Stratford, in said Province of Ontario, until August, 1890; that said defendant committed adultery with the said Isaac Aves at various times, between the said 20th day of September, 1904, and August, 1906, at the places above named, and at

the house and residence of the said Aves, and lived with him in adulterous intercourse; that such adultery was committed without the connivance, privity or procurement of this plaintiff; that five years have not elapsed since the plaintiff discovered the fact of such adultery, or since the commencement of such adulterous intercourse was discovered by this plaintiff, and that the plaintiff has not voluntarily cohabited with the defendant since such discovery or since such adultery as aforesaid:

WHEREFORE, The said plaintiff demands the judgment of this court:

1. Whether or not this plaintiff and the said defendant ever became husband and wife;

2. If the court finds they did become husband and wife, then this plaintiff demands judgment that the bonds of matrimony between this plaintiff and said defendant be dissolved;

3. That the custody of the said child, William Henry Stewart, be awarded to this plaintiff.

R. BERNARD,
Plaintiff's Attorney.

D. Idiocy or lunacy.

1. Civil Practice Act, § 1136. Action to annul marriage where party was an idiot.

An action to annul a marriage on the ground that one of the parties thereto was an idiot may be maintained at any time during the life-time of either party by any relative of the idiot, who has an interest to avoid the marriage.

2. Civil Practice Act, § 1137. Action to annul marriage where party was a lunatic.

An action to annul a marriage on the ground that one of the parties thereto was a lunatic may be maintained at any time during the continuance of the lunacy, or, after the death of the lunatic in that condition, and during the life of the other party to the marriage, by any relative of the lunatic who has an interest to avoid the marriage. Such an action may also be maintained by the lunatic at any time after restoration to a sound mind; but in that case, the marriage should not be annulled if it appears that the parties freely cohabited as husband and wife after the lunatic was restored to a sound mind.

3. Civil Practice Act, § 1138. Action to annul marriage by next friend of idiot or lunatic.

Where no relative of the idiot or lunatic brings an action to annul the marriage, the court may allow an action for that purpose to be maintained at any time during the life-time of both the parties to the marriage, by any person as the next friend of the idiot or lunatic. But this section does not apply where the marriage might have been annulled at the suit of the lunatic, as prescribed in the last section.

4. Right to annul for mental condition.

An insane person, or one so deranged as not to understand the ordinary affairs of life, is incompetent to marry. Without mental capacity to give consent there can be no valid

marriage. If the person was only temporarily insane, and afterward, during a lucid interval, consents to the union, the marriage will be confirmed and valid.⁸³ It must be satisfactorily shown that the party in whose behalf the action is brought was mentally incapable of understanding the nature, effect and consequences of the marriage; proof of insane delusions or hallucinations on other subjects is not sufficient.⁸⁴ To maintain an action to annul a marriage on the ground that defendant is a lunatic, it must appear that such cause existed at the time of the marriage.⁸⁵

The committee of the person and property of an incompetent cannot as such, under section 1377 of the Civil Practice Act, maintain an action to annul the marriage of the incompetent on the ground that he is a lunatic and was such at the time of his marriage. Since the action to annul a marriage is purely statutory, such an action can be maintained only by a relative, or next friend, of the incompetent, or the incompetent himself, after his restoration to sanity.⁸⁶ An action by the "next friend" of the lunatic should be brought in the name of such friend, not in the name of the lunatic.⁸⁷

Section 1137 permits the action to be brought by a relative of the lunatic after his death; and, in such an action, the plaintiff cannot be required to pay alimony to the defending wife or to furnish her with means to defend the action.⁸⁸

It has been held that the action cannot be brought by the person of sound mind, but is only available to the insane person after recovery or to one in his or her behalf.⁸⁹

83. *Wrightman v. Wrightman*, 4 Johns. Ch. 343

Presumption of sanity.—In an action to annul a marriage on the ground of the lunacy of the husband, it appeared that two days after the marriage an inquisition was found, declaring the husband to be of unsound mind, and that he had been for six months previous; the wife at the time of the marriage had notice of the pendency of the proceedings in lunacy. Held, that such finding was only presumptive evidence of insanity previous to the marriage, and the court in the action having found the husband of sound mind at the time of the marriage, which finding was affirmed at Appellate Division, it was conclusive on appeal to the Court of Appeals. The presumption is always one of

sanity. *Banker v. Banker*, 63 N. Y. 409.

84. *Meekins v. Kinsella*, 152 App. Div. 32, 136 N. Y. Supp. 806.

85. *Forman v. Forman*, 53 St. Rep. 639, 24 N. Y. Supp. 117. See, also, *Kemmelick v. Kemmelick*, 114 Misc. 198, 186 N. Y. Supp. 3.

86. *Walter v. Walter*, 217 N. Y. 439; aff'g, 170 App. Div. 870, 156 N. Y. Supp. 713.

87. *Kemmelick v. Kemmelick*, 114 Misc. 198, 186 N. Y. Supp. 3.

88. *Farnham v. Farnham*, 227 N. Y. 155.

89. *Reed v. Reed*, 106 Misc. 85, 175 N. Y. Supp. 284; aff'd, 195 App. Div. 531, 186 N. Y. Supp. 897, wherein it was said: "Clearly a party who procures a marriage by fraud or a party who marries knowing that he is in-

When an incompetent has not been declared insane, he is a necessary party to an action to annul a marriage contracted by him during incompetency, although it is brought by a relative appointed to bring the action as next friend.⁹⁰ In an action by a relative of a wife to annul her marriage on the ground that at the time of the contract she was a lunatic, and that the marriage was procured by fraud, the wife is a necessary party, and it is error to deny her application to intervene.⁹¹

5. Form of complaint.

(Title of action.)

The plaintiff, for a cause of action herein, alleges:

1. That the above-named plaintiff and defendant were married at, county of, State of New York, on the day of, 19..; and that at such time the said plaintiff and defendant were residents of the State of New York, and the plaintiff is now a resident of, county of, State of New York.

2. That at the time such marriage was contracted the plaintiff was a lunatic, and as such lunatic was incapable of contracting such marriage.

3. That the plaintiff remained a lunatic until about the day of, 19.., when he was restored to a sound mind, and has since that time ever been of a sound mind.

4. That the said plaintiff and the defendant herein have not freely cohabited as husband and wife since the said plaintiff was so restored to sound mind.

5. That, the issue (*if any*) of the marriage between the plaintiff and the defendant herein is one child, L. B., a boy (*or girl*) who was born, on the day of, 19.., and that such child is now living.

WHEREFORE, The plaintiff prays that a judgment be had annulling such marriage and declaring such marriage contract void; and that it be adjudged that the said L. B., the issue of the marriage between the said plaintiff and the defendant, be for all purposes the legitimate

capable ought not to be permitted to avoid the marriage, the one for his fraud or the other for his incapacity. Neither of them, however, is expressly debarred from bringing suit. The sane party, to a marriage with an insane person is under the statute in a precisely similar situation. He is neither given nor expressly denied a right to maintain an action. We think that the Legislature in expressly naming the particular parties who might bring suit for annulment intended thereby to exclude all other persons from rights of action. Accordingly, we hold that a

sane party to a marriage with an insane party may not bring suit to avoid it on the ground of insanity. It is clearly for the public good that this should be the law. Otherwise a man knowingly marrying an insane woman might, after cohabitation, discard her at will."

90. *Anderson v. Hicks*, 150 App. Div. 289, 134 N. Y. Supp. 1018; *Kemmelick v. Kemmelick*, 114 Misc. 198, 186 N. Y. Supp. 3.

91. *Coddington v. Lanier*, 75 App. Div. 532, 78 N. Y. Supp. 276.

child of the plaintiff and be entitled to succeed as such, in the same manner as other legitimate children, to the real and personal estate of the said plaintiff, and that the said plaintiff be awarded the care and custody of said child, and for such other and further relief as may be just and proper, with the costs of this action.

E. Force, duress or fraud.

1. Civil Practice Act, § 1139. Action to annul marriage on the ground of force, duress or fraud.

An action to annul a marriage on the ground that the consent of one of the parties thereto was obtained by force, duress or fraud may be maintained at any time by the party whose consent was so obtained. Such an action may also be maintained during the life-time of the other party by the parent or the guardian of the person of the party whose consent was so obtained, or by any relative of that party who has an interest to avoid the marriage. But a marriage shall not be annulled on the ground of force or duress if it appears that, at any time before the commencement of the action, the parties thereto voluntarily cohabited as husband and wife; or on the ground of fraud, if it appears that, at any time before the commencement thereof, the parties voluntarily cohabited as husband and wife, with a full knowledge of the facts constituting the fraud.

2. Force or duress.

A judgment may be granted annulling a marriage on the ground of duress of the husband by threats of the wife's brother, and fear of violence at the hands of her father.⁹² Where, after the birth of a child of which the plaintiff was the father, the mother coerced him by threats of bodily violence, to be inflicted by her brother, to go through the form of a marriage ceremony and he complied upon the express understanding, embodied in a writing, that they should never live together as husband and wife nor have any claim upon each other because of, or arising from, the marriage ceremony, and it is established that they had not cohabited or lived together as husband and wife, the plaintiff is entitled to a decree of annulment on the ground that his consent to the marriage was procured under duress.⁹³

3. Fraud in general.

A marriage induced by the fraud of one of the parties may, in a proper case, be annulled.⁹⁴ The jurisdiction of the courts

92. *Anderson v. Anderson*, 74 Hun, 56, 57 St. Rep. 868, 26 N. Y. Supp. 492; *aff'd*, 147 N. Y. 719.

93. *Houle v. Houle*, 100 Misc. 28, 166 N. Y. Supp. 67.

94. *Perry v. Perry*, 2 Paige, 501.

Limitation of action.—Before the

Revised Statutes, a suit to annul a marriage on the ground of fraud could not be maintained after six years. *Montgomery v. Montgomery*, 3 Barb. Ch. 132.

Hypnotic influence.—In an action to annul a marriage on the ground of

to annul a marriage on the ground of fraud is not derived from statute, but arises from inherent jurisdiction of the Court of Chancery to set aside any contract into which one of the parties has been induced to enter by fraud. The fraud, to induce a court to set aside a contract of marriage, is different from that which would be sufficient in ordinary cases, and no fraud will avoid a marriage which does not go to the very essence of the contract, and is not in its nature such a thing as would prevent the party either from entering into the marriage relation or as, after the party has entered into the relation, would preclude him or her from the performance of the duties which the law and custom imposes upon a party to such a contract⁹⁵ Fraud that will justify the annulment of a marriage must be a false representation expressly or impliedly made of an existing fact that is a material consideration to the wronged party.⁹⁶ The fraud referred to is not one as to the character or property of the defendant.⁹⁷ The burden of proof is on the plaintiff to show, not only that the misrepresentation complained of was as to a fact which was an essential element of plaintiff's assent to the marriage, but also that such misrepresentation was of such a nature as to deceive a person of ordinary prudence.⁹⁸ While marriage contracts are based upon considerations peculiar to themselves and public policy is concerned with the regulation of the family relation, nevertheless the law of this State considers marriage in no other light than that of a civil contract, requiring for its validity that full and free consent which is the essence of all ordinary contracts; every misrepresentation of a material fact made with the intention to induce another to enter into an agreement and without which he would not have done so justifies the court in vacating the agreement, and there is no valid reason for excepting the marriage contract from the general rule.⁹⁹

While a belief in spiritualism is not *per se* sufficient cause for setting aside a marriage and conveyance of property, yet where a shrewed, designing, lewd and unchaste woman, in

fraud and hypnotic influence practiced by the wife, thereby preventing that consent or meeting of the minds requisite to constitute a valid contract, evidence held insufficient. *Vazakas v. Vazakas*, 109 N. Y. Supp. 568.

^{95.} *Fisk v. Fisk*, 6 App. Div. 432, 39 N. Y. Supp. 537; *Roth v. Roth*, 97 Misc. 136, 161 N. Y. Supp. 99.

^{96.} *Schachter v. Schachter*, 109 Misc. 152, 178 N. Y. Supp. 212.

^{97.} *Klein v. Wolfsohn*, 1 Abb. N. C. 134.

^{98.} *Bahrenburg v. Bahrenburg*, 88 Misc. 272, 150 N. Y. Supp. 589.

^{99.} *DiLorenzo v. DiLorenzo*, 174 N. Y. 467.

middle age, knowing that an old man was deaf and living in seclusion and is a firm believer in spiritualism, takes advantage of such belief, seeks his acquaintance, pretends to be a medium and to receive communications from spirits commanding that they marry and that the old man convey to her valuable property, claims to be a clairvoyant physician and to be able to cure deafness, and by other fraudulent devices induces the old man to marry her and to convey to her the property, the marriage will be annulled and the conveyance set aside as procured by fraud and undue influence.¹

False representations to a school girl fifteen years of age, inducing her to consent to a marriage ceremony; to the effect that her parents knew of the purpose, and would not object; that she need not live with him for several years, but the ceremony could be kept secret, she, by reason of immaturity or mental weakness, not understanding the nature of the contract, are sufficient grounds for declaring the marriage void.²

An annulment of a marriage on the ground of fraud should not be granted solely upon the testimony of the plaintiff that the defendant, who before the marriage protested his undying love, shortly after the marriage told her that he did not love her and never intended to, and insisted that she get a divorce from him.³ Allegations that defendant represented to plaintiff his age as twenty-one when in fact he was but twenty years and some months, and that just prior to their marriage he told her she need not leave her home and could always continue to reside there, are insufficient to justify a decree annulling the marriage on the ground of fraud, though it has not been consummated by cohabitation, where each of the parties was over the age of legal consent.⁴

Where a husband absolutely refuses to have a Hebrew religious ceremony performed in fulfillment of his promise made to his wife before the civil marriage, it has been held that she is entitled to a decree adjudging the marriage null and void where it appears that she had never cohabited with nor been supported by him.⁵ But, on the other hand, it has been held that a man's refusal to keep his promise to a woman that after the civil marriage he would enter into a religious ceremony with her, is not fraud in a legal sense and will not

1. *Hides v. Hides*, 65 How. Pr. 17,
1 N. Y. Anno. Cases, 383.

2. *Moot v. Moot*, 37 Hun, 288.

3. *Schaeffer v. Schaeffer*, 160 App.
Div. 48, 144 N. Y. Supp. 774.

4. *Williams v. Williams*, 71 Misc.
590, 130 N. Y. Supp. 875.

5. *Rubinson v. Rubinson*, 110 Misc.
114, 181 N. Y. Supp. 28.

support an action for the annulment of their marriage, though it was never consummated.⁶

4. No intention to assume marital status.

Proof that immediately after the defendant's marriage to the plaintiff, who was pregnant by him, he took her to her mother's house and left her, never went to see her, and within a day or two after the marriage ceremony left the place where he was and since, for more than six years, has neither been seen nor heard from, justifies a finding that when the marriage ceremony was performed the defendant never intended to fulfill the duties of a husband to a wife, but at that time intended to abscond and abandon her, and in an action to annul the marriage for fraud the plaintiff will be granted a decree.⁷ Where, in an undefended action to annul a marriage, the plaintiff testifies that she was induced to marry the defendant in reliance upon his representations that he would marry her and that with her money, and money of his own, he would buy a hotel and go into business, and she further testifies that two days after the marriage she drew her money from the savings bank and gave it to him upon his representation that it was to be paid on account of the purchase-price of the hotel and that up to the date of the trial of the action she had not seen him nor learned of his whereabouts, judgment will be awarded in her favor.⁸

5. Previous chastity.

Previous unchastity of one of the parties is no ground for annulling the marriage relation. The concealment by the husband of illicit relations with a woman, and having children by her, prior to his marriage to another, affords no ground for the annulment of the marriage, as it does not affect the essentials of the contract of marriage.⁹

But the parties may make prior conduct an essential element of the marriage contract so that misrepresentations by a party as to his or her chastity may afford ground for annulment.¹⁰ Misrepresentations as to chastity may be

6. *Schachter v. Schachter*, 109 Misc. 152, 178 N. Y. Supp. 212.

7. *Moore v. Moore*, 94 Misc. 370, 157 N. Y. Supp. 819.

8. *Robert v. Robert*, 87 Misc. 629, 150 N. Y. Supp. 366.

9. *Glean v. Glean*, 70 App. Div. 576, 75 N. Y. Supp. 622, 10 Anno. Cases, 473.

10. *Domschke v. Domschke*, 138 App. Div. 454, 122 N. Y. Supp. 892.

Action against third person.—One who, in the belief that a woman is virtuous, is induced to marry her by the false representation of a third party, by whom she is at the time pregnant, may maintain an action for damages against the wrongdoer upon

grounds for an annulment of a marriage for fraud because, as a matter of law, it may be material upon the question of consent, which is essential to the contract of marriage.¹¹ Where, in a wife's action to have her marriage with defendant annulled for fraud it appears that he procured plaintiff's consent to the marriage by false representations as to his past life, though frankly stating it was not spotless and that he knew plaintiff regarded these matters as material, without which she would not have married him, and neither the interests of the community nor of their child require that the court should refuse to free the plaintiff from the marriage, she will be given judgment annulling same.¹²

A marriage although consummated will be annulled for fraud where the woman on inquiry of her intended husband stated that she had been the wife of a man then deceased, and that he was the father of her child, when in truth she had been his mistress and the child was a bastard, if the plaintiff did not cohabit with her after the discovery of the fraud. It is true that such misrepresentation does not go to the *essentialia* of the marriage contract, as prior chastity is not a necessary qualification for marriage, but chastity, if insisted upon, may be made an essential qualification.¹³

Where in an action for the annulment of a marriage it appears that the consent of the plaintiff to marry the defendant was obtained by a fraudulent representation and stratagem causing him to believe that he was the father of her child, and that but for the fraud he would not have consented to the marriage, such misrepresentation must be deemed of a material nature, and the court may properly annul the marriage if it appears that the plaintiff has not,

the broad ground of the loss of *consortium*, to which the husband is entitled and of which, by the fraud complained of, he, has been deprived. *Kujek v. Goldman*, 150 N. Y. 176, aff'g 9 Misc. 34, 29 N. Y. Supp. 294.

11. *Domschke v. Domschke*, 138 App. Div. 454, 122 N. Y. Supp. 892.

12. *Libman v. Libman*, 102 Misc. 444, 169 N. Y. Supp. 900.

13. *Domschke v. Domschke*, 138 App. Div. 454, 122 N. Y. Supp. 892. In an action to annul a marriage on the ground that defendant falsely represented to plaintiff that her illegitimate child had been born in lawful wedlock to her and F., it appears that at the time of the marriage plaintiff knew

that defendant had been unchaste with at least another beside himself, and he made no effort to verify defendant's statement as to the place where and the year in which she claimed that her ceremonial marriage to F. had taken place, and it further appears that defendant, who denied having made the misrepresentation alleged, in answer to a printed question in the marriage license described herself as never having been married, plaintiff fails to establish his case by that fair preponderance of evidence required by law, and judgment will be granted in favor of defendant. *Bahrenburg v. Bahrenburg*, 88 Misc. 272, 150 N. Y. Supp. 589.

with full knowledge of the facts constituting the fraud, voluntarily cohabited with the defendant before the commencement of the action.¹⁴

Where defendant before her marriage was pregnant by another than her husband, the plaintiff, who neither before nor after the marriage had sexual intercourse with her and did not know of such pregnancy at the time of the marriage, is entitled to have it annulled for fraud.¹⁵

Where it appears that the plaintiff in an undefended action to annul a marriage for fraud, by reason of defendant's giving birth to a child one month after marriage, married defendant with full knowledge of her advanced state of pregnancy; and there is no proof of any deception on the part of defendant, inducing plaintiff to marry her, and the only testimony as to the birth of any child at all is that of plaintiff himself, the testimony does not warrant a judgment in his favor.¹⁶

6. Representations as to former marriage.

The fact that a husband supposed that his wife had not been married, when in fact she had formerly been married to a person from whom she procured a divorce, is insufficient to support an action of annulment.¹⁷ A husband is not entitled to a decree of nullity upon the ground that the former husband of his wife obtained a divorce from her by collusion, and that the plaintiff married her on the faith of the representation that she had procured a valid divorce from her former husband.¹⁸ A representation by a woman that she is a maiden, when in fact she is a widow or divorced with legal capacity to marry, is not such a fraud as to authorize the annulment of the marriage.¹⁹ But it has been held that,

14. *Di Lorenzo v. Di Lorenzo*, 174 N. Y. 467, rev'g 71 App. Div. 509, 75 N. Y. Supp. 878. See, also, *Scott v. Shufeldt*, 5 Paige, 43. See, also, *Tait v. Tait*, 3 Misc. 218, 52 St. Rep. 645, 23 N. Y. Supp. 597, holding that a marriage will not be annulled on the ground that plaintiff was induced to contract it by reason of a false representation that defendant was pregnant by him.

15. *Fontana v. Fontana*, 77 Misc. 28, 135 N. Y. Supp. 220. Compare *Barth v. Barth*, 5 Law Bull. 87. And see *Shrady v. Logan*, 17 Misc. 329, 40 N. Y. Supp. 1010, holding that the fact

concealed from a husband that the wife before marriage had given birth to an illegitimate child does not, in itself, constitute such fraud as will authorize an annulment of the marriage.

16. *Bange v. Bange*, 46 Misc. 196, 94 N. Y. Supp. 8.

17. *Fisk v. Fisk*, 6 App. Div. 432, 39 N. Y. Supp. 537.

18. *Kinnier v. Kinnier*, 53 Barb. 454.

19. *Fisk v. Fisk*, 12 Misc. 466, 34 N. Y. Supp. 33, 67 St. Rep. 834, 25 Civ. Pro. 38; s. c., 1 N. Y. Anno. Cases, 380; s. c., 6 App. Div. 432, 39 N. Y. Supp. 537. See also, *Muller v. Muller*, 21 Wkly. Dig. 287.

where a wife upon her discovery, only a few hours after her marriage, that her husband had been previously married, without having cohabited with him, returns to her home and has since resided there, her marriage will be annulled upon the ground of fraud.²⁰

7. Criminal.

Where a defendant, by fraudulently representing himself as an honest, industrious man, induced the plaintiff, a young woman, to marry him, when he was, in fact, a notorious and professional thief and since committed to prison, the marriage was annulled.²¹ And, where the plaintiff was married to the defendant, who at the time was a young man enjoying a good reputation, and an investigation made prior to the marriage disclosed nothing against his character, although in fact he was engaged in criminal pursuits, and he was arrested a few months after a marriage for obtaining money under false pretenses, and it appeared that plaintiff left him on learning some of these facts and did not thereafter cohabit with him, it was held that the circumstances constituted a fraud and that the marriage should be annulled.²²

Where the complaint in an action for the annulment of a marriage alleges that plaintiff was induced to marry defendant on his representations that he was an honest and law-abiding citizen and a duly licensed attorney-at-law, that after the marriage plaintiff learned that defendant had done time as a convict, and that he was not a member of the bar, but the testimony of defendant as to improper intimacy with plaintiff prior to their marriage and her pregnancy is corroborated by two reputable physicians, both of whom testified that with plaintiff's consent they made a physical examination of her, the complaint must be dismissed.²³

8. Physical condition of defendant.

A marriage procured by deception as to the health and marriageable condition of the defendant may be declared void.²⁴ An action will lie to annul a marriage on the ground that defendant at the time of its celebration was afflicted with a chronic and contagious disease, which he concealed from plaintiff, notwithstanding that at the time of the trial

20. *Weill v. Weill*, 104 Misc. 561, 172 N. Y. Supp. 589.

21. *Keyes v. Keyes*, 6 Misc. 355, 26 N. Y. Supp. 910.

22. *King v. Brewer*, 8 Misc. 587, 60

St. Rep. 632, 29 N. Y. Supp. 1114, 31 Abb. N. C. 325.

23. *Berus v. Berus*, 83 Misc. 624, 146 N. Y. Supp. 554.

24. *Meyer v. Meyer*, 41 How. Pr. 311.

he had practically recovered therefrom.²⁵ Where, in reliance upon defendant's statement that he was in good health, the minor daughter of plaintiff entered into marriage with him, when in fact he was afflicted with a chronic and contagious venereal disease, which she contracted from him and which endangered her life, she is entitled to an annulment of the marriage as procured by fraud, he being physically unable to discharge the marital functions.²⁶

A marriage may be annulled on the ground of fraud, where the wife, previous to the marriage, in response to an inquiry on the subject by her prospective husband, said that she was physically and mentally capable of being a wife, but did not know for certain whether she would be able to bear children, and suppressed the fact that her ovaries had been removed by a surgical operation.²⁷

Where, in an action to annul a marriage on the ground that defendant, knowing himself to be afflicted with tuberculosis, was guilty of fraud in concealing from and misrepresenting to plaintiff the actual facts, knowledge of which plaintiff alleges would have precluded her from entering into the marriage, and it appears that within a few days subsequent to the marriage a physician diagnosed defendant's case as tuberculosis and incurable, and that thereafter plaintiff no longer continued to cohabit with him, and there are no children of the marriage, plaintiff will be granted a judgment.²⁸

A wife, after having been married three years, cannot maintain an action to annul her marriage on the ground that three years before it was contracted her husband told her he was perfectly well, where in the intervening six years he had enjoyed periods of good health, but at the end of the period his health had declined and physicians pronounced his malady tuberculosis, and where it appears that he had previously received medical treatment adapted to that disease, but had thereafter improved under such treatment and subsequently enjoyed apparent good health.²⁹

25. *Svenson v. Svenson*, 178 N. Y. 54, rev'g 78 App. Div. 536, 79 N. Y. Supp. 657.

26. *Anonymous*, 21 Misc. 765, 49 N. Y. Supp. 331.

27. *Wendel v. Wendel*, 30 App. Div. 447, 52 N. Y. Supp. 72, rev'g 22 Misc.

152, 49 N. Y. Supp. 375.

28. *Sobel v. Sobol*, 88 Misc. 277, 150 N. Y. Supp. 248.

29. *Gumbiner v. Gumbiner*, 72 Misc. 211, 131 N. Y. Supp. 85; *Smith v. Smith*, 112 Misc. 371, 184 N. Y. Supp. 134.

A man who at the time of his proposal of marriage asks the woman if there was anything that would make their life unhappy is entitled to a frank and full disclosure as to her mental condition. When her answer to his question is " No " and it appears that she had been treated for a mental or nervous disorder in an institution, that her sister was confined in a hospital for the insane and that a brother had been treated in a hospital for a mental disorder, and within a year after the marriage she became insane and was confined in several institutions during a period of three years, and since has been continually an inmate of a State hospital, incurably insane, suffering from *dementia praecox*, the husband is entitled to a judgment for the annulment of the marriage on the ground of fraud in the concealment of material facts.

9. Confirmation by cohabitation.

A marriage cannot be annulled for fraud or duress where the parties after the commencement of the action voluntarily cohabited as husband and wife, with full knowledge of the facts constituting the fraud or duress.³⁰ A husband cannot allege, as a ground for annulling his marriage, that his wife made false representations to him, whereby he was induced to marry her, when he otherwise would not have done so, when, during cohabitation, he discovered the falsity of such representations, yet continued to cohabit with her two years after such discovery.³¹

10. Parties.

The action for annulment may be brought by the party wronged, or by a parent of such party.³² If brought by a parent, both husband and wife must be made parties defendant.³³ A mother will, as an *amicus curiæ*, be permitted to attack a decree annulling, for fraud, the marriage of her infant daughter, where it is shown to the court that the decree was procured by collusion between the infant and her husband.³⁴

30. *Steimer v. Steimer*, 37 Misc. 26, 74 N. Y. Supp. 714; *McGill v. McGill*, 179 App. Div. 343, 166 N. Y. Supp. 397; 99 Misc. 86, 163 N. Y. Supp. 462.

31. *Muller v. Muller*, 21 Wkly. Dig. 287.

32. *Sloan v. Kane*, 10 How. Pr. 66.

33. *Fero v. Fero*, 62 App. Div. 470, 70 N. Y. Supp. 742.

34. *Steimer v. Steimer*, 37 Misc. 26, 74 N. Y. Supp. 714.

11. Form of complaint.

(Title of action.)

The plaintiff, for a cause of action herein, alleges:

1. That the above-named plaintiff and defendant were married at, county of, State of New York, on theday of, 19..; and that at such time the said plaintiff and defendant were residents of the State of New York, and that the plaintiff is now a resident of, county of, State of New York.

2. That the consent of the plaintiff to said marriage was obtained by force and duress, and that the plaintiff was made to believe that if he did not marry the said defendant the brother of said defendant would shoot and kill him, the said plaintiff, and that serious violence would be committed upon him by defendant's father, and the said defendant's brother threatened to kill said plaintiff if he did not marry the defendant, which threats were made with the knowledge and concurrence of the defendant; that in the fear that said threats would be carried out and that plaintiff would be killed or grievously wounded and hurt if he did not, the said plaintiff married the defendant to avoid such hurt or death.

3. That the said plaintiff and defendant have never since such marriage cohabited together as husband and wife.

WHEREFORE, The plaintiff demands judgment that the aforesaid marriage be annulled and declared void, and that each of the parties be freed from the obligations thereof, and for such other relief as may be necessary, with the costs of this action.

F. Physical incapacity.**1. Civil Practice Act, § 1141. Action to annul a marriage on the ground of physical incapacity.**

An action to annul a marriage on the ground that one of the parties was physically incapable of entering into the marriage state may be maintained by the injured party against the party whose incapacity is alleged; or such an action may be maintained by the party who was incapable against the other party, provided the incapable party was unaware of the incapacity at the time of marriage, or if aware of such incapacity, did not know it was incurable. Such an action can be maintained only where an incapacity continues and is incurable; and must be commenced before five years have expired since the marriage.

2. Impotency in general.

The court cannot decree an annulment for impotence except under the statute.³⁵ Sterility is not a sufficient ground.³⁶ To warrant the relief, the incapacity must have existed at the time of the marriage.³⁷ The fact that there have been children born of the marriage disposes of the issue of competency.³⁸ A marriage will not be annulled, in the absence of

35. *Burtis v. Burtis*, Hopk. 557.

Paige, 554.

36. *Devanbagh v. Devanbagh*, 5 Paige, 554.

38. *Riley v. Riley*, 73 Hun, 575, 57 St. Rep. 270, 26 N. Y. Supp. 164.

37. *Devanbagh v. Devanbagh*, 5

fraud, because of the wife's epilepsy, which limited but did not prevent copulation.³⁹

Although fraud is alleged in an action to annul a marriage because of physical incapacity, the allegation will be treated as surplusage.⁴⁰

The courts decline to grant annulment for physical incapacity where, by reason of the advanced years of the parties at the time of the marriage, the desire for support and companionship, rather than the usual motives of marriage, must have actuated them. The marriage of a soldier's widow, fifty-six years old and drawing a pension, with one sixty-nine years of age will not be annulled for his physical incapacity.⁴¹

Where a wife sues to annul her own marriage on the ground of her own physical incapacity, resulting in a hysterical condition and mental and emotional disturbances, and produces medical testimony, which is neither precise in revelation nor clear in description of the physical conditions, and fails to substantiate the plaintiff's contention, her application for judgment should be denied, without prejudice to a renewal upon additional proof.⁴²

3. Incurable.

The marriage will not be annulled, unless the incapacity is incurable.⁴³ If a slight operation will remove the incapacity without endangering life and health, the fact that one refuses to submit to such an operation does not justify annulment in an action by the incapable spouse; but if the incapacity can be cured only by a dangerous operation it is incurable within the law.⁴⁴

4. Limitation of action.

The action must be brought within five years after the marriage or it will be barred by the limitation in section 1141. This statutory limitation is part of our public policy. It declares a rule of the ecclesiastical courts, that the injured party cannot unreasonably delay proceedings for relief without being open to the charge of want of sincerity and promptitude. Divorces for alleged impotency early led to abuse and fraud. Hence the limit on the time to avoid a marriage rests upon a basis quite different from the periods to begin other

39. *Elser v. Elser*, 160 N. Y. Supp. 724.

40. *Deitch v. Deitch*, 162 App. Div. 25, 146 N. Y. Supp. 1019; *aff'd*, 213 N. Y. 708.

41. *Hatch v. Hatch*, 58 Misc. 54, 110 N. Y. Supp. 18.

42. *Anonymous v. Anonymous*, 69 Misc. 489, 126 N. Y. Supp. 149.

43. *Devanbagh v. Devanbagh*, 5 Paige, 554.

44. *Anonymous*, 158 N. Y. Supp. 51. See also, *Devanbagh v. Devanbagh*, 6 Paige, 175.

civil suits.⁴⁵ The prescribed period is a statute of limitation, and the objection must be set up in the answer or it is waived.⁴⁶ Although the action for annulment was not commenced within the time limited by the section, the court cannot refuse to annul the marriage if the defense was not taken by the answer.⁴⁷ The Statute of Limitations in such an action is governed solely by section 1141, requiring it to be commenced before five years have expired since the marriage. Such an action cannot be maintained as one for the fraud of the defendant in representing himself to be potent, and is not governed by the six-year statute prescribed by section 48 of the Civil Practice Act.⁴⁸

5. Physical examination of defendant.

In an action to annul a marriage on the ground of physical disability of the husband, the court has power to direct and enforce a surgical examination of the defendant.⁴⁹ There being no fixed and definite procedure laid down by the court or by any statute to control the examination, the method to be adopted must rest largely in the judicial discretion of the Special Term. In the absence of peculiar and unusual features, the examination and the evidence of the examining surgeons should not be taken before a referee prior to the trial, but should be taken before the court during the progress of the trial.⁵⁰

In proceedings to annul a marriage on the ground of the wife's physical incapacity, a motion for an order requiring her to submit to a physical examination was properly refused on condition that she waive the incompetency as witnesses of her attending physicians who had examined her, and consent to their testifying.⁵¹

45. *Deitch v. Deitch*, 161 App. Div. 492, 46 N. Y. Supp. 782.

46. *Kaiser v. Kaiser*, 16 Hun, 602.

Amendment of answer.—An order at the Special Term permitting the defendant in an action for the annulment of a marriage on the ground of physical incapacity to amend his answer by alleging that the plaintiff did not commence the action within five years from the time of the marriage of the parties, affirmed. *Deitch v. Deitch*, 161 App. Div. 492, 46 N. Y. Supp. 782.

47. *McNair v. McNair*, 140 App. Div. 226, 125 N. Y. Supp. 1; rev'g, 68 Misc. 570, 125 N. Y. Supp. 191.

48. *Deitch v. Deitch*, 162 App. Div. 25, 146 N. Y. Supp. 1019; aff'd, 213 N. Y. 708.

49. *Gore v. Gore*, 103 App. Div. 168, 93 N. Y. Supp. 396; *Cahn v. Cahn*, 21 Misc. 506, 48 N. Y. Supp. 173; *Devanbagh v. Devanbagh*, 5 Paige, 554.

50. *Gore v. Gore*, 103 App. Div. 168, 93 N. Y. Supp. 396.

51. *Geis v. Geis*, 116 App. Div. 362, 101 N. Y. Supp. 845.

G. Action by next friend.

1. Civil Practice Act, § 1144. Motion to vacate order allowing next friend to maintain action.

A motion to vacate an order allowing a person to maintain an action to annul a marriage as next friend of an infant, idiot or lunatic must be made at a term held by the judge who granted it, unless he is dead, out of office or unable to hear it by reason of sickness or otherwise; or unless he expressly directs it to be heard at a term held by another judge.

2. Civil Practice Act, § 1145. Dismissal of complaint in action by next friend to annul a marriage.

Where an order has been granted allowing the next friend of an infant, idiot or lunatic to maintain an action annulling a marriage, the court to which application for final judgment is made nevertheless may dismiss the complaint if justice so requires, although, in a like case, the party to the marriage, if plaintiff, would be entitled to judgment.

3. Rules of Civil Practice, Rule 276. Order allowing next friend to maintain action.

An order allowing a person to maintain an action to annul a marriage as the next friend of an infant, or as the next friend of an idiot or lunatic, may be granted by the court, in its discretion, without notice, or on notice to such persons and in such manner as it deems proper.

H. Legitimacy of children.

1. Civil Practice Act, § 1135. Legitimacy of children.

The following provisions govern the effect of declaring a marriage void or annulling a voidable marriage upon the legitimacy of children of the marriage:

1. If a marriage be annulled on the grounds that one or both of the parties had not attained the age of legal consent, a child of the marriage is deemed the legitimate child of both parents.

2. If a marriage be annulled on the ground of the idiocy or lunacy of one of the persons entering into the marriage, a child of the marriage is deemed the legitimate child of the parent of sound mind, and the court by the judgment may decide that a child of the marriage is the legitimate child of the parent of unsound mind.

3. If a marriage be annulled on the ground of the idiocy or lunacy of both of the persons entering into the marriage, the court by the judgment may decide that a child of the marriage is the legitimate child of either or both parents.

4. If a marriage be annulled on the ground of force, duress or fraud, a child of the marriage is deemed the legitimate child of both parents unless the court by a judgment decides otherwise as to either or both parents.

5. If a marriage be declared a nullity as incestuous, a child of the marriage is deemed the legitimate child of both parents.

6. If a marriage be declared a nullity or annulled upon the ground that the former husband or wife of one of the parties was living, the former marriage being in force, if it appears, and the judgment determines, that the subsequent marriage was contracted by at least one of the parties thereto in good faith,

and with the full belief that the former husband or wife was dead or that the former marriage had been annulled or dissolved, or without any knowledge on the part of the innocent party of such former marriage, a child of such subsequent marriage is deemed the legitimate child of the parent who at the time of the marriage was competent to contract. If either or both parties to such subsequent marriage were incompetent to contract, the court by the judgment may decide that a child of the marriage is the legitimate child of such an incompetent.

7. If a marriage be declared a nullity or annulled for any cause or under any conditions other than those specified in the foregoing subdivisions, the court by the judgment may decide that a child of the marriage is the legitimate child of either or both of its parents.

8. If the court be authorized by this section to decide that a child of a marriage is the legitimate child of either or both of its parents, the judgment may limit the effect of the legitimatization, to rights other than succession to real and personal property of a deceased parent.

2. Former husband or wife living.

A marriage contracted during the lifetime of a former husband or wife is not to be considered valid for any other purpose concerning property than that of preserving the inheritance of the offspring from the competent parent.⁵² But the marriage in good faith of a woman, whose husband disappeared five years before and who she had reason to believe was dead, is valid as to all the world, unless the first husband reappears and institutes an action to annul the same; and such marriage renders legitimate her child by the second husband, born before her second marriage.⁵³

I. Custody and maintenance of children.

1. Civil Practice Act, § 1140. Custody and maintenance of children.

If a marriage be declared a nullity or annulled, the court, by the judgment or by subsequent order, may award the custody of a child of the marriage to either party as the interests of the child require, and may make provision for his education and maintenance out of the property of either or both of its parents if the marriage shall have been declared a nullity, and out of the property of the guilty parent, if the marriage shall have been annulled.

2. Lunacy.

Where a marriage is annulled because of the lunacy of the wife existing at the time of the marriage, the husband may not appoint a testamentary guardian for a child, the issue of such marriage, if its mother is still living.⁵⁴

52. *Spicer v. Spicer*, 16 Abb. (N. S.) 112. App. Div. 894, 120 N. Y. Supp. 1121.

53. *Matter of Del Genovese*, 56 Misc. 418, 107 N. Y. Supp. 1033; *aff'd*, 136 54. *Matter of Tombo*, 86 Misc. 361, 149 N. Y. Supp. 219.

3. Former spouse living.

In an action to annul a marriage on the ground that a former husband of defendant is still living, the plaintiff is not entitled, as a matter of right, to the custody of the issue of the marriage, or to have the same declared his legitimate offspring, unless it appear that he either did not know of the former marriage or believed the former husband to be dead. The fact that the defendant told him before the marriage that she had obtained a valid divorce in another State from her first husband, and that he believed her and married her relying on such statement, does not necessarily entitle him to their custody.⁵⁵

4. Absence of more than five years.

Although, after the first wife is discovered to be living, continued cohabitation under a second marriage will furnish to the first wife no ground for divorce until the second marriage is annulled, yet such cohabitation is improper upon moral grounds, and where it has been indulged in, neither party, upon the annulment of the second marriage, can be regarded as an innocent party, entitled to the custody of the children, but in such case the court may award their custody to either parent as the interest of the children requires.⁵⁶

5. Infancy.

Where the wife brings an action to annul the marriage on the ground of her infancy, the court has power to award to her the custody of the children of the marriage. The husband in such a case is the guilty parent within the meaning of section 1140, and in a proper case he may be compelled to contribute to the support of the children.⁵⁷

J. Civil Practice Act, § 1142. Jury trial in action to annul marriage.

In an action to annul a marriage, except where it is founded upon an allegation of the physical incapacity of one of the parties thereto, the court, upon the application of either of the parties, must make an order directing the trial, by a jury of all the issues of fact; or, of its own motion, it may make an order directing the trial by a jury of one or more issues of fact; for which purpose, the questions to be tried must be prepared and settled.

55. *Baylis v. Baylis*, 146 App. Div. 517, 131 N. Y. Supp. 671; *aff'd*, 207 N. Y. 446.

56. *Safford v. Safford*, 31 Abb. N. C.

73, 27 N. Y. Supp. 640.

57. *Nealon v. Nealon*, 195 App. Div. 694, 187 N. Y. Supp. 295.

ARTICLE II.

DIVORCE.

A. Power to grant divorces.

1. Civil Practice Act, § 1147. Action for absolute divorce.

In either of the following cases, a husband or a wife may maintain an action against the other party to the marriage to procure a judgment divorcing the parties and dissolving the marriage by reason of the defendant's adultery:

1. Where both parties were residents of the State when the offence was committed.
2. Where the parties were married within this State.
3. Where the plaintiff was a resident of the State when the offence was committed and is a resident thereof when the action is commenced.
4. Where the offence was committed within the State and the injured party when the action is commenced is a resident of the State.

2. General authority of courts.

The dissolution of the marriage relation does not depend upon the will of the contracting parties, but the relation is a status, a legal condition established by law, and thus the State can, on any terms it pleases, dissolve the marriage of any persons over whom it has jurisdiction. The jurisdiction of the courts in actions for divorce is confined to the authority conferred by statute, and the grounds on which a decree may be made are matters of positive legislation.⁵⁸ Adultery is the only ground for what is termed a "divorce" in this state. The courts have no common-law jurisdiction over the subject of divorce; their authority is confined altogether to the exercise of such express and incidental powers as are conferred upon them by statute.⁵⁹ The ecclesiastical law of England in relation to divorce forms no part of the law of this State.⁶⁰ The right of a party to the marriage contract to have it dissolved by reason of the infidelity of the other party is given as a favor to the injured party and the action must be brought voluntarily.⁶¹

58. *Chamberlain v. Chamberlain*, 63 Hun, 96, 43 St. Rep. 502, 17 N. Y. Supp. 578; *Dickinson v. Dickinson*, 63 Hun, 516, 45 St. Rep. 323, 18 N. Y. Supp. 485; *Erkenbrach v. Erkenbrach*, 96 N. Y. 456.

59. *Griffin v. Griffin*, 47 N. Y. 134; *Davis v. Davis*, 75 N. Y. 221; *Erken-*

brach v. Erkenbrach, 96 N. Y. 456; *Ackerman v. Ackerman*, 200 N. Y. 72; *Burtis v. Burtis*, Hopk. 457; *Wells v. Wells*, 10 St. Rep. 248.

60. *Jones v. Jones*, 90 Hun, 414, 35 N. Y. Supp. 877, 70 St. Rep. 319.

61. *Lake v. Lake*, 124 App. Div. 89, 108 N. Y. Supp. 964.

3. Residence of parties.

Section 1147 of the Civil Practice Act prescribes the cases in which the courts of this state will take jurisdiction of an action of divorce.⁶² And the relief will not be granted except in the cases there mentioned.⁶³ If a married woman dwells within the state when she commences an action against her husband for divorce, she is deemed a resident, although her husband resides elsewhere.⁶⁴ The domicile of the wife does not follow that of a husband, where his conduct has been such as to entitle her to an absolute divorce and she comes to or remains in this State and begins an action for divorce.⁶⁵

Every State has a right to determine the status of persons domiciled within its territory, which right includes the power to decree a divorce, which must be recognized as effecting a dissolution of the marriage contract in sister States; jurisdiction of the person of a domiciled citizen of a State may be acquired by the courts of that State, by substituted service as authorized by the *lex fori*, though at the time he be in fact abiding in another State.⁶⁶

The plaintiff must allege in the complaint and prove upon the trial the facts showing that the marriage took place within the State or that the parties resided therein under such circumstances that the courts take jurisdiction of the action.⁶⁷ And, in an action of separation, if the defendant interposes a counterclaim for a divorce, he will not be granted affirmative relief, unless he shows facts sufficient to give the court jurisdiction of an action for divorce, though such facts may be sufficient as a defense.⁶⁸

When the parties are not both residents of the State when the offence is committed, and were not married in the State, and the offence was not committed in this jurisdiction, while

62. Earlier statute.—Under chapter 246 of the Laws of 1862, where the marriage is solemnized abroad, the statute requires that the injured party shall be an actual inhabitant of the State at the time of the commission of the offense and when suit was begun. *Otto v. Otto*, 8 Wkly. Dig. 413. Where defendant was a non-resident at the time of the adultery, and committed it out of the State, the other party cannot obtain a divorce unless he was an actual inhabitant when the offense was committed and when suit was begun; a coming temporarily in the State to bring suit and then departing does

not make him an inhabitant. *McNeel v. McNeel*, 3 Edw. 550.

63. *Dickinson v. Dickinson*, 63 Hun, 516, 18 N. Y. Supp. 485, 45 St. Rep. 323.

64. Civil Practice Act, section 1166. And see, *infra*, Art. IV, Residence of Wife in Divorce or Separation.

65. *Gebhard v. Gebhard*, 25 Misc. 1, 54 N. Y. Supp. 406.

66. *Hunt v. Hunt*, 72 N. Y. 217.

67. *Jarvis v. Jarvis*, 3 Edw. Ch. 462; *Dickinson v. Dickinson*, 63 Hun, 516, 18 N. Y. Supp. 485, 45 St. Rep. 323.

68. *Crouch v. Crouch*, 193 App. Div. 221, 183 N. Y. Supp. 657.

the injured party was a resident therein, the plaintiff must have been a resident of the State when the offence was committed and also when the action was brought.⁶⁹

Although the marriage took place in Michigan, and the offence was committed in Virginia, the residence of the husband in New York makes that the proper forum for her action for divorce, although she was visiting in Michigan at the time of the offence.⁷⁰

Where the plaintiff is a resident of this State, was a resident when the offence charged was committed and when the action was commenced, and the marriage was solemnized here, the courts of the State have jurisdiction of an action for divorce where the defendant is a non-resident and service was made upon him by publication.⁷¹

The mere fact that parties have been married in this State has been held not sufficient to confer jurisdiction on the court in an action for divorce irrespective of their residence, where the summons is served by publication.⁷² Where the adultery was committed in New York, during the residence of the parties there, and the defendant resided there at the time of commencement of the suit, our courts have jurisdiction.⁷³

Where in divorce an order of publication is obtained on an affidavit that defendant's domicile was originally in this State, and that he never intended or expressed an intention to acquire a residence elsewhere, and these statements are not contradicted, the court is justified in holding him a resident.⁷⁴ Where it appeared in the wife's suit that her husband came into the State a short time before filing the bill, and that he had continued to reside there since that time, it was held that she was presumed to be a resident at the time of the filing of the bill.⁷⁵

A judgment of divorce is presumed to have been regularly and legally rendered, and where the record does not disclose how the court acquired jurisdiction, it will be presumed till the contrary appears.⁷⁶

69. *Dickinson v. Dickinson*, 45 St. Rep. 323, 63 Hun, 516, 18 N. Y. Supp. 485.

70. *Harris v. Harris*, 83 App. Div. 123, 82 N. Y. Supp. 568.

71. *Scragg v. Scragg*, 44 St. Rep. 845, 18 N. Y. Supp. 487.

72. *Barber v. Barber*, 89 Misc. 519, 151 N. Y. Supp. 1064.

73. *Forest v. Forest*, 6 Duer, 102.

74. *De Meli v. De Meli*, 5 Civ. Pro. 306.

75. *Johnson v. Johnson*, 4 Paige, 460.

76. *Wells v. Wells*, 10 St. Rep. 248.

B. Complaint.⁷⁷**1. Certainty of allegations.**

A charge of adultery, by way of crimination or recrimination, should be so stated that the adverse party may be prepared to meet it at the trial. It must be charged with reasonable certainty of time and place, and the name of the person with whom it was committed stated, unless averred to be unknown.⁷⁸ But, where the wife alleges the communication to her by her husband, long after marriage, of a disease, the fruit of an illicit connection, she is not bound to allege when, where, or with whom he had the adulterous connection.⁷⁹ A motion made to make the complaint more definite and certain will be granted if the allegation is in the form of a charge of common and notorious prostitution, at a certain date, and thereafter during the whole of a period indicated, in a certain city.⁸⁰ Where the complaint alleges that the defendant, from the 1st of November previous up to the time of the verification of the complaint, went to, visited, and at various houses and places of prostitution or assignation in the city of New York, which time and places plaintiff is unable to particularize, committed adultery and had carnal connection with a person named therein, the allegation should be rendered more definite and certain as to the place at which the adultery was committed.⁸¹ But an answer in an action for divorce alleging adultery by plaintiff in a certain city with persons whose names were unknown, cannot be required to be made more definite and certain; the remedy is by a bill of particulars.⁸²

2. Unknown co-respondent.

Where the complaint in an action for divorce alleges the commission of adultery with a person whose name is unknown to the plaintiff, between certain dates, and in a specified city, and further alleges that the plaintiff is unable to state the time and place more particularly, it is sufficient to authorize proof of the offense, although none is given of the other offenses which were particularly charged.⁸³ But an allega-

^{77.} The motives of the parties in separating or in bringing the divorce action are immaterial. *Parsons v. Parsons*, 191 App. Div. 545, 181 N. Y. Supp. 642.

^{78.} *Wood v. Wood*, 2 Paige, 108.

^{79.} *Clark v. Clark*, 30 Super. Ct. 276.

^{80.} *Tim v. Tim*, 16 Abb. Pr. (N. S.)

39, 47 How. Pr. 253.

^{81.} *Cardwell v. Cardwell*, 12 Hun, 92.

^{82.} *Kelly v. Kelly*, 12 Misc. 457, 34 N. Y. Supp. 255, 68 St. Rep. 133.

^{83.} *Mitchell v. Mitchell*, 61 N. Y. 398, distinguishing *Tim v. Tim*, 16 Abb. Pr. (N. S.) 39.

tion that the defendant in a certain month committed the offence, in the city of New York, with a female whose name is unknown to plaintiff, and the particular circumstances of which are unknown to plaintiff, will not suffice. If the person be unknown the complaint should state particularly the place where the offence occurred, as at a house specified, or the like.⁸⁴ An allegation that the plaintiff on the first or second Saturday of a certain month committed adultery with a female whose name is not known to this defendant at the house known as No. 52 in said street, in the city of New York, between the hours of three and five o'clock in the afternoon, and that said house had been kept as a house of prostitution or assignation, is sufficiently certain and precise.⁸⁵ Where the allegation was that the plaintiff is informed and believes that at divers times, between the 1st of July, 1879, and the commencement of this action, at various places in said village of Saratoga Springs, N. Y., but at which particular time and places plaintiff is unable to state, defendant has committed adultery with a female, and with women whose names and name are unknown to plaintiff, it was held not sufficiently definite and certain; and that a motion for a bill of particulars should be made before answer.⁸⁶ A decree of divorce should be granted to a plaintiff where the complaint alleged the commission of adultery by the defendant with a named woman between stated dates and contained also a general allegation that he committed adultery between said dates with certain women to the plaintiff unknown, where the proof shows that the defendant committed adultery between the dates stated in the general allegation with a woman who was not specifically named in the complaint, though it does not sustain the allegation that he committed adultery with the woman named.⁸⁷

3. Negating defenses.

Under rule 277 of the Rules of Civil Practice, (formerly Rule 72 of the General Rules of Practice), unless the complaint is verified and contains allegations negating certain of the defenses specified in section 1153, judgment will not be rendered for the relief demanded until the plaintiff's affidavit be produced stating such facts. As a matter of expediency it is, therefore, customary to insert such allegations in the

84. *Heyde v. Heyde*, 6 Super. Ct. 692. 215.

85. *Anonymous*, 17 Abb. Pr. 48.

87. *Miller v. Miller*, 194 App. Div.

86. *Gridley v. Gridley*, 7 Civ. Pro.

183, 185 N. Y. Supp. 313.

complaint. Such matters are inserted in the complaint to avoid the necessity of an affidavit under the Rule.⁸⁸ The defenses prescribed by section 1153 are not available to the defendant unless they are pleaded.⁸⁹ It is only on an application for a judgment by default that these possible defenses are required to be negatived by the plaintiff by a verified complaint or affidavit.⁹⁰

4. Matters relating to alimony.

Allegations in a complaint by a wife respecting the amount and value of defendant's property with a view to alimony, are unnecessary. The matter of alimony is a question for the court after judgment.⁹¹

5. Bill of particulars.

In an action by a husband for divorce for adultery, the wife is entitled to a bill of particulars showing the time, place, and circumstances of each act of adultery charged.⁹² But where the plaintiff names the places where the offense was committed, and names one of the alleged paramours, the bill of particulars will not be granted as to times which are particularly within the knowledge of the defendant.⁹³ Under an allegation that the defendant is "living in adulterous intercourse," a bill of particulars would be improper.⁹⁴ Where all that the defendant requires to raise the issue is a denial of the allegations of the complaint, a motion for a bill of particulars before answer may be denied, but this does not preclude him from obtaining one after issue joined in order to prepare for his defense, and leave for such motion should be granted.⁹⁵

Where the co-respondent is named and the places of the commission of adultery are specified in a complaint for divorce, and plaintiff is unable to specify times with more particularity, a bill of particulars should not be required, regardless of the fact that she expects to prove her case by circumstantial evidence.⁹⁶

88. *Lowenthal v. Lowenthal*, 157 N. Y. 236.

89. *Thompson v. Thompson*, 127 App. Div. 296, 111 N. Y. Supp. 426.

90. *McCarthy v. McCarthy*, 143 N. Y. 235.

91. *Forrest v. Forrest*, 6 Duer, 102.

92. *Hunter v. Hunter*, 38 Misc. 672, 78 N. Y. Supp. 243.

93. *Oviatt v. Oviatt*, 14 Misc. 127, 35 N. Y. Supp. 654.

94. *Carpenter v. Carpenter*, 42 St. Rep. 577, 17 N. Y. Supp. 195.

95. *Bullock v. Bullock*, 85 Hun, 373, 66 St. Rep. 493, 32 N. Y. Supp. 1009.

96. *Krauss v. Krauss*, 73 App. Div. 509, 77 N. Y. Supp. 203.

A bill of particulars should not be granted in such form as to exclude evidence of the general course of conduct; especially where the party from whom it is to be obtained states that he is ignorant of the particular times and places other than the occasions specifically set forth, and that he does not expect to prove any other specific instances of misconduct, but to prove intimacy and conduct, admissions and statements which would establish the fact of guilt.⁹⁷

Where a complaint for divorce was entirely indefinite as to the time, place or person, when, where, or with whom, the adulteries charged therein were committed, and all charges were denied by a verified answer, such a motion was granted upon the defendant's attorney's affidavit that he could not safely go to trial without particulars as to the times, places and persons—the court considering that, as the case was one where a bill should be ordered and the defendant clearly could have no knowledge of the particulars superior to that of his attorney, the attorney was the better judge whether the case could safely be tried without them.⁹⁸

In an action for divorce in which the marriage is denied, the defendant is entitled to a bill of particulars as to the time and place of the alleged marriage, and the person by whom it was celebrated, if any, but not as to cohabitation.⁹⁹

The affidavit of an attorney in an action of divorce is insufficient to entitle defendant to a bill of particulars, as it fails to establish ignorance on the part of defendant of the facts sought to be disclosed.¹

6. Amended or supplemental complaint.

An amendment after trial will not be allowed for the purposes of charging adultery with another co-respondent known to the plaintiff when the action was commenced.² And the plaintiff cannot set up in a supplemental complaint acts of adultery alleged to have been committed by defendant after the joinder of issue upon the original complaint,³ although the defendant has interposed a counterclaim setting up acts of adultery committed by the plaintiff, in consequence of which the plaintiff cannot discontinue his action without

97. *Ketcham v. Ketcham*, 32 App. Div. 26, 52 N. Y. Supp. 961.

98. *Kirkland v. Kirkland*, 39 Misc. 423, 80 N. Y. Supp. 21.

99. *Bullock v. Bullock*, 85 Hun, 373, 32 N. Y. Supp. 1009, 66 St. Rep. 493.

1. *De Carrillo v. De Carrillo*, 53 Hun, 359, 6 N. Y. Supp. 305.

2. *Israel v. Israel*, 54 App. Div. 408, 66 N. Y. Supp. 777.

3. *Faas v. Faas*, 57 App. Div. 611, 68 N. Y. Supp. 509; *Campbell v. Campbell*, 69 App. Div. 435, 74 N. Y. Supp. 979. See, also, *Ames v. Ames*, 109 Misc. 161, 178 N. Y. Supp. 177.

leave of the court.⁴ A plaintiff will not be permitted to set up by a supplemental complaint a cause of action not existing at the time the action was begun, but only to set up facts bearing upon the original cause of action which existed when the action was begun, or facts occurring after the action was commenced, but affecting the relief to which the plaintiff would be entitled under the original cause of action.⁵ If it is desired to bring subsequent adulteries before the court, a second action seems to be the proper procedure.⁶

7. Variance.

The proof must correspond with the allegations in the complaint. Where the complaint contains an allegation of adultery with a particular person, evidence of adultery with another person is not sufficient.⁷

8. Form of complaint.

(Title of action.)

The plaintiff, for a cause of action herein, alleges:

1. That the plaintiff and the defendant were married on the day of, 19.., at the city of, county of, State of New York.

2. (*Allege in case parties were not married within the State.*) That the above-named plaintiff and defendant are now and have been since such marriage residents of the city of, county of, State of New York (*or state such other jurisdictional matters as are required by section 1147 of the Civil Practice Act*).

3. That, upon information and belief, since the date of said marriage, and on or about the day of, 19.., at, in the city of, county of, State of (*here definitely state time and place of alleged adultery*), the defendant committed adultery with (*stating name of person with whom adultery was committed.*)

(*If the name of the person with whom the adultery was committed is unknown, the allegation may be as follows: That on or about the day of, 19.., at, in the city of, county of, State of, the defendant committed adultery with a woman whose name is unknown to the plaintiff.*)

4. That at divers places within the city of, county of, State of, and at various times between the day of, 19.., and at the time of bringing this action, at what particular times and places plaintiff is unable to state,

4. *Faas v. Faas*, 57 App. Div. 611, 187.
68 N. Y. Supp. 509.

5. *Faas v. Faas*, 57 App. Div. 611,
68 N. Y. Supp. 509.

6. *Cordier v. Cordier*, 26 How. Pr.

7. *Parsons v. Parsons*, 191 App. Div.
545, 181 N. Y. Supp. 642; *Bokel v.*
Bokel, 3 Edw. 376; *Kane v. Kane*, 3
Edw. 389.

the defendant has committed adultery with one A. B. (*or with divers persons to the plaintiff unknown*).

5. That such adultery was committed without the consent, connivance, privity or procurement of the plaintiff.

6. That five years have not elapsed since the discovery by the plaintiff of the fact that such adultery had been committed by the defendant, and that the plaintiff has not voluntarily cohabited with the defendant since such discovery (*and also where at the time of the offense charged the defendant was living in adulterous intercourse with the person with whom the offense is alleged to have been committed, it should be alleged that five years have not elapsed since the commencement of such adulterous intercourse was discovered by the plaintiff*).

7. That the plaintiff has not forgiven or condoned such adultery, and that no action for a divorce has been brought by the defendant against this plaintiff, nor has a judgment or decree in such an action ever been obtained in any court of any state, territory or foreign country.

8. That the plaintiff is not possessed of any real or personal property in her own name, and that she has no means of livelihood, except such as are afforded her by the above-named defendant; that the defendant is seized and possessed of real and personal property to the value of dollars; that he is engaged in the business of (*state nature of business or employment*).

9. That the following children have been born of the marriage between the above-named plaintiff and defendant: (*State names of children and dates of birth.*)

WHEREFORE, The plaintiff prays judgment divorcing the said plaintiff and defendant, and that their marriage be dissolved; that the plaintiff be awarded the care and custody of the above-named children; that the defendant be required to make suitable provisions for the support, maintenance and education of such children and for the support of this plaintiff, and that the plaintiff have temporary alimony; and for such other and further relief as may be just and proper, with the costs of this action.

C. Defenses.

1. Civil Practice Act, § 1153. When divorce denied, although adultery proved.

In either of the following cases, the plaintiff is not entitled to a divorce, although the adultery is established:

1. Where the offence was committed by the procurement or with the connivance of the plaintiff.

2. Where the offence charged has been forgiven by the plaintiff. The forgiveness may be proved, either affirmatively, or by the voluntary cohabitation of the parties with the knowledge of the fact.

3. Where there has been no express forgiveness, and no voluntary cohabitation of the parties, but the action was not commenced within five years after the discovery by the plaintiff of the offence charged.

4. Where the plaintiff has also been guilty of adultery under such circumstances that the defendant would have been entitled, if innocent, to a divorce.

2. Defenses, in general.

Under Rule 277 of the Rules of Civil Practice, judgment will not be rendered for the plaintiff unless substantially the matters stated as defenses in the first three subdivisions of section 1153 are negatived, either by a verified complaint or by affidavit. All the subdivisions of section 1153 contain matters of affirmative defense to be alleged and proved by the defendant.⁸ The Rule applies only when judgment is sought by default,⁹ and not to contested actions.¹⁰ Thus, if the defendant wishes to show condonation,¹¹ connivance,¹² misconduct of the plaintiff,¹³ or other matters mentioned in the Rule, the defense must be set up in the answer. It may be however, that if such defenses are shown, they will not be disregarded because they are not pleaded.¹⁴

Where the defendant in an action for absolute divorce neither appears nor answers, the court cannot on its motion examine the plaintiff to show that he was guilty of adultery and deny the decree upon that ground.¹⁵

3. Validity of marriage.

In order to be entitled to a decree of divorce, the plaintiff is bound to prove a marriage between the parties. If the marriage is void by reason of one of the parties having a former husband or wife, a divorce action based on an allegation of adultery will fail. Or, if the marriage is incestuous, an action for a divorce will fail.¹⁶ Where a wife, discovering that her husband had a former wife living, separated from

8. *McCarthy v. McCarthy*, 143 N. Y. 235; *Lowenthal v. Lowenthal*, 157 N. Y. 236; *Thompson v. Thompson*, 127 App. Div. 296, 111 N. Y. Supp. 426; *Farace v. Farace*, 61 How. Pr. 61.

9. *McCarthy v. McCarthy*, 143 N. Y. 235.

10. *Ackerman v. Ackerman*, 123 App. Div. 750, 108 N. Y. Supp. 534; *aff'd*, 200 N. Y. 72.

11. *Merrill v. Merrill*, 41 App. Div. 347, 58 N. Y. Supp. 503; *Roe v. Roe*, 14 Hun, 612; *Smith v. Smith*, 4 Paige, 432; *Hopper v. Hopper*, 11 Paige, 46; *Roe v. Roe*, 14 Hun, 612.

12. *Lowenthal v. Lowenthal*, 157 N. Y. 236.

General denial.—When the answer in an action for divorce is merely a general denial, setting up no affirmative defence, so that no issue of con-

nivance is raised, and questions are framed for trial by a jury, including a question as to the plaintiff's connivance, but no proof is offered by the defendant on the subject, and the jury answers the submitted question of adultery in the affirmative, the court may properly set aside, on motion, and disregard an answer of the jury stating, by mistake, that there was connivance on the part of the plaintiff. *Lowenthal v. Lowenthal*, 157 N. Y. 236, *aff'd* 92 Hun, 385, 36 N. Y. Supp. 1053.

13. *Roe v. Roe*, 14 Hun, 612.

14. *Karger v. Karger*, 19 Misc. 236, 44 N. Y. Supp. 219.

15. *Thompson v. Thompson*, 127 App. Div. 296, 111 N. Y. Supp. 426.

16. *Audley v. Audley*, 196 App. Div. 103, 187 N. Y. Supp. 652.

him, and upon his commencing illicit relations with a third person, sued for divorce, it was held that the husband was not, by his marriage with plaintiff, estopped from alleging and proving his former marriage as a bar to the action, and he might set that up as a ground of affirmative relief, which might entitle him to a decree of nullity of the second marriage, and which would preclude her claiming further alimony.¹⁷ But where a plaintiff was divorced at suit of his wife and married again, and the second wife sued for divorce, and pending the action the former decree was annulled on application of the first wife, and he sought to set this up as a defense to the second action, it was held that he was not entitled to file an amended or supplemental answer.¹⁸

4. Abandonment.

Where a wife is entitled to a divorce for adultery, her abandonment of her husband is no defense to the action.¹⁹ A husband's abandonment of his wife confers no license upon her to offend against the marital vows; nor will it prevent him from obtaining a divorce from her upon proof of her subsequent infidelity.²⁰

5. Insanity of defendant.

The insanity of the defendant at the time of the commission of the adultery in question is a defense to an action for a divorce based on that ground.²¹ But insanity, at time of suit brought, will not bar an action of divorce, where it appears that the defendant committed the act of adultery while he was of sound mind, although he subsequently became insane and was, for several years previous to and at the time of the commencement of the action, a lunatic.²² The defense is one which should be pleaded by the defendant and the burden of proof is on the defendant to show his insanity at the time in question.²³ But where the defendant sets out a

17. *Finn v. Finn*, 62 How. Pr. 83.

18. *Van Prochazka v. Von Prochazka*, 3 N. Y. Supp. 301.

19. *McNeir v. McNeir*, 76 Misc. 661, 129 N. Y. Supp. 481; *aff'd*, 151 App. Div. 889, 135 N. Y. Supp. 1126.

20. *Mattison v. Mattison*, 60 Misc. 573, 113 N. Y. Supp. 1024.

21. *Laudo v. Laudo*, 188 App. Div. 699, 177 N. Y. Supp. 396. See, also, *Horn v. Horn*, 142 App. Div. 848, 127 N. Y. Supp. 448.

22. *Rathbun v. Rathbun*, 40 How. Pr. 328.

23. *Laudo v. Laudo*, 188 App. Div. 699, 177 N. Y. Supp. 396.

Not pleaded.—Where on the trial of an action for divorce both parties recognized insanity of the defendant as the real issue in the case and proceeded accordingly, it was not reversible error to receive the testimony of a physician on that subject, although insanity was not pleaded as a

record showing insanity at a time previous to the adultery as a defense, the burden of proving that the defendant was not insane at the time of the commission of the offence is upon the plaintiff.²⁴

6. Connivance or collusion.

If the offense is committed by the procurement or with the connivance of the plaintiff, the divorce will be denied.²⁵ Where a husband by procurement and connivance induced the co-respondent to attempt to commit adultery with his wife, which attempt was afterward successful, he is not to be entitled to a divorce.²⁶ Where defendant commits acts of adultery for the avowed purpose of furnishing evidence for a divorce, which evidence is communicated to plaintiff, collusion is shown and the divorce will be denied.²⁷

Collusion, as that term is used in matrimonial actions, is an agreement between a husband and wife to procure a judgment dissolving the marriage contract, which judgment, if the facts were known, the court would not grant. The fact that at or about the time when a wife obtains a judgment of absolute divorce, certain financial transactions between the husband and wife were settled, or that the wife makes and the husband accepts a provision for his future maintenance and support, is not a badge of fraud or collusion, or even a suspicious circumstance requiring investigation.²⁸ The collusion for which a decree of divorce will be set aside is collusion in procuring or conniving at the act or acts of adultery and not an arrangement to take steps to facilitate the proceedings in the action for divorce.²⁹ The mere fact that a husband who believes that his wife has committed adultery in the past and suspects that she is about to do so again, with the intention of procuring evidence thereof, fails to actively interfere and prevent its commission, does not constitute connivance.³⁰

defense, especially where plaintiff's counsel had already introduced proof as to defendant's rationality at the time of the commission of the adultery. *Laudo v. Laudo*, 188 App. Div. 699, 177 N. Y. Supp. 396.

24. *Cook v. Cook*, 53 Barb. 180. Div. 300, 86 N. Y. Supp. 1078; *Helmes*

25. *Galloway v. Galloway*, 92 App. v. *Helmes*, 24 Misc. 125, 52 N. Y. Supp. 734; *Huntley v. Huntley*, 73 Hun, 261, 26 N. Y. Supp. 266, 57 St. Rep. 287.

26. *Armstrong v. Armstrong*, 45 Misc. 260, 92 N. Y. Supp. 165.

27. *Cowan v. Cowan*, 23 Misc. 754, 53 N. Y. Supp. 93.

28. *Doeme v. Doeme*, 96 App. Div. 284, 89 N. Y. Supp. 215.

29. *Dodge v. Dodge*, 98 App. Div. 85, 90 N. Y. Supp. 438.

30. *Pettee v. Pettee*, 77 Hun, 595, 28 N. Y. Supp. 1067, 60 St. Rep. 529; *aff'd*, 148 N. Y. 735; *Reiersen v. Reiersen*, 32 App. Div. 62, 6 Anno. Cases, 291, 52 N. Y. Supp. 509, overruling

It is not collusive for the defendant, on appeal to the Court of Appeals from an order granting a new trial, to stipulate for judgment absolute on affirmance.³¹

Where a detective, employed by a husband to procure evidence against his wife, hired an assistant who entertained the wife and took her to the house where the alleged adultery was committed, the husband is chargeable with the acts of his agent and is not entitled to a divorce.³²

Where in an undefended action for divorce the husband plaintiff, a Hebrew, testifies that he was married in Russia to defendant, who is also a Hebrew, that when they had been in this country about seven years, at her solicitation he gave her a "Get" in the presence of ten witnesses and that she went back to Russia and he has never seen her since, and there is evidence to show that thereafter she was married in Russia to another and is living with him as his wife, there must be judgment for a dismissal of the complaint upon the merits, as the offense complained of was committed by the procurement of the plaintiff or with his connivance.³³

7. Condonation.

If the adulterous act of the defendant has been condoned the plaintiff cannot secure a divorce based on such act. Thus, a divorce will not be granted where there has been voluntary cohabitation with knowledge of the adultery.³⁴ An answer may set up not only the adultery of plaintiff, but also the condonation of the defendant's adultery.³⁵ But to constitute condonation, some knowledge must exist sufficiently substantial upon which to base a belief, and usually there must be some means of making legal proof of the commission of the offense before condonation will be implied from cohabitation.³⁶ Continued cohabitation, after the discovery of

Karger v. Karger, 19 Misc. 236, 44 N. Y. Supp. 219, holding that where the husband permits the adultery of his wife when he might easily prevent it, he is not entitled to a divorce.

31. *Conger v. Conger*, 77 N. Y. 432.

32. *McAllister v. McAllister*, 137 N. Y. Supp. 833.

33. *Shilman v. Shilman*, 105 Misc. 461, 174 N. Y. Supp. 385; *aff'd*, 188 App. Div. 908, 175 N. Y. Supp. 681; *aff'd*, 230 N. Y. 554.

34. *Pitts v. Pitts*, 52 N. Y. 593; *Karger v. Karger*, 19 Misc. 236, 44 N.

Y. Supp. 219; *Williamson v. Williamson*, 1 Johns. Ch. 488; *Johnson v. Johnson*, 14 Wend. 637.

Evidence not sufficient to warrant a finding that the wife did not condone her husband's acts by living and sleeping with him for six weeks or more after she had contracted a venereal disease from him. *Moore v. Moore*, 135 N. Y. Supp. 425.

35. *Wood v. Wood*, 2 Paige, 108; *Smith v. Smith*, 4 Paige, 432.

36. *Merrill v. Merrill*, 41 App. Div. 347, 58 N. Y. Supp. 503.

facts which merely lead to a suspicion of infidelity, does not necessarily constitute condonation.³⁷ In order to establish condonation, the plaintiff should have such knowledge as would justify a reasonable person in concluding that the fact existed; a mere hysterical jealousy where the fact is denied by the alleged guilty party is not sufficient.³⁸ And the control which the husband exercises over the wife is to be considered in determining whether she has condoned his acts.³⁹

Where it is shown that the plaintiff in an action for divorce voluntarily cohabited with the defendant after the entry of an interlocutory judgment in his favor, a final judgment entered pursuant to section 1176 of the Civil Practice Act on the expiration of three months will be vacated on motion, for the offense has been condoned.⁴⁰

Condonation by subsequent cohabitation does not bar a subsequent action for divorce, predicated on such adultery, where the consideration is upon the promise by the guilty party that he would in all things, thereafter, treat his wife kindly and in proper manner, and would in all things be a good and affectionate husband, and he has violated his promise.⁴¹ Upon conditional forgiveness, the injury is revived upon the repetition of the offence.⁴²

While plaintiff is bound to negative the forgiveness of the offence on account of which relief is asked and to prove such fact where the defendant makes default, yet, where the defendant interposes an answer, he should, if he intends to rely upon the condonation as a defence, allege the same in his answer and establish it by proof.⁴³

8. Action not brought within five years.

The divorce will not be granted, although the defendant's adultery is proved, if the action was not commenced within five years after the discovery by the plaintiff of the offence charged. If the defendant has been living in adulterous intercourse, the five year period commences to run when the

37. *Harris v. Harris*, 83 App. Div. 123, 82 N. Y. Supp. 568.

38. *Diggs v. Diggs*, 187 App. Div. 859, 175 N. Y. Supp. 791.

39. *Wood v. Wood*, 2 Paige, 108; *Hoffmire v. Hoffmire*, 7 Paige, 60.

40. *Cary v. Cary*, 144 App. Div. 846, 129 N. Y. Supp. 444.

41. *Timerson v. Timerson*, 2 How. Pr. (N. S.) 26.

42. *Smith v. Smith*, 4 Paige, 432;

Johnson v. Johnson, 14 Wend. 637; *Burr v. Burr*, 10 Paige, 20; *aff'd*, 7 Hill, 207; *Davies v. Davies*, 55 Barb. 130. See those cases as to whether cruelty will revive a condoned adultery, while *Hoffmire v. Hoffmire*, 7 Paige, 60, is authority that conviction for felony is cruelty which revives condoned adultery.

43. *Merrill v. Merrill*, 41 App. Div. 347, 58 N. Y. Supp. 503.

plaintiff first discovers the relation, and the action cannot be maintained although the relation continued within the five year period.⁴⁴ A finding that, during six years before the commencement of the action, the defendant was living in open adultery, bars the plaintiff's right to a judgment.⁴⁵

Neither the period of five years after the discovery of the adultery which forms the ground for an action of absolute divorce, limited for the commencement of such an action by section 1153 of the Civil Practice Act nor the period prescribed by the general Statute of Limitations, runs while the defendant is without the jurisdiction of the court where process may not be personally served upon him.⁴⁶ The continued non-residence of a party excepts, by virtue of section 19 of the Civil Practice Act, the right of a plaintiff to bring an action, from the five-year limitation; nor is the fact that a plaintiff may commence an action by the substituted service of process material on this question.⁴⁷ A decree of divorce should not be denied upon the ground that the action was not commenced within five years after the discovery by the plaintiff of the offense charged, where the proof shows that the defendant after deserting the plaintiff in 1891 obtained a void divorce in Florida in 1896, and the plaintiff, though hearing he had married, after using every effort did not find out with whom the marriage was contracted, where it took place or where the defendant was located, except in an indefinite way, until through the efforts of her brother she learned these facts in 1902 and brought her action within five years thereafter.⁴⁸

9. Plaintiff guilty of adultery.

Adultery committed by the plaintiff, when set up in the answer, is a perfect defense to an action for an absolute divorce, and is also a ground for affirmative relief in the same action.⁴⁹ A divorce will not be granted to either party if both are guilty.⁵⁰ But a husband may have a divorce for his wife's adultery, though he also has been guilty of a like offense with her connivance.⁵¹ Adultery by the plaintiff after

44. *Ackerman v. Ackerman*, 200 N. Y. 72.

45. *Church v. Church*, 7 St. Rep. 177.

46. *Gouch v. Gouch*, 69 Misc. 436, 127 N. Y. Supp. 476.

47. *Ackerman v. Ackerman*, 200 N. Y. 72.

48. *Ackerman v. Ackerman*, 123

App. Div. 750, 108 N. Y. Supp. 534; *aff'd*, 200 N. Y. 72.

49. *Winston v. Winston*, 165 N. Y. 533; *McNamara v. McNamara*, 9 Abb. Pr. 18; *Anonymous*, 17 Abb. Pr. 48.

50. *Peck v. Peck*, 44 Hun, 290; *Wood v. Wood*, 2 Paige, 108.

51. *Bleck v. Bleck*, 27 Hun, 296.

the commencement of the action is a bar the same as though committed before the action.⁵² Recriminating charges will be sustained on less evidence than would be required to sustain an action of divorce.⁵³

D. Answer.

1. Civil Practice Act, § 1148. When answer must be verified in action for divorce.

The answer of the defendant in an action for divorce may be made without verifying it, notwithstanding the verification of the complaint, except that an answer containing a counterclaim which charges adultery must be verified in respect of such counterclaim where the complaint is verified.⁵⁴

2. Recrimination.

The adultery should be set up in the answer in the same manner, and be accompanied by the same allegations, as is required when it is charged in the complaint.⁵⁵ Such an answer is regarded as setting up a counterclaim, and in order to raise an issue upon such charges in the answer a reply must be interposed.⁵⁶ A defendant who alleges as a separate defense that the plaintiff at various times and places within and around the city of New York, not precisely known to the defendant, lived in adultery with a person named, should be compelled to give a bill of particulars as to the time and place at which such adultery was committed, even though the answer demands no affirmative relief.⁵⁷ The answer need not allege any facts which are necessary to give jurisdiction in an action for divorce, the defense of adultery itself being sufficient without such proof.⁵⁸

3. Supplemental answer.

The court may permit a supplemental answer alleging the commission by the plaintiff of acts of adultery since the commencement of the action.⁵⁹ Such an answer may be permitted for the purpose of obtaining affirmative relief as well as for a defense.⁶⁰ And the fact that both parties have

52. *Smith v. Smith*, 4 Paige, 432.

53. *Peck v. Peck*, 44 Hun, 290.

54. Source.—The provision that defendant need not verify the answer in an action for divorce is taken from the Revised Statutes, and in accordance with the holding in *Sweet v. Sweet*, 15 How. Pr. 169; *Anable v. Anable*, 24 How. Pr. 169.

55. *Morrell v. Morrell*, 3 Barb. 236.

56. *Leslie v. Leslie*, 2 Abb. Pr. 311,

40 Barb. 9.

57. *Weis v. Weis*, 123 App. Div. 409, 107 N. Y. Supp. 1061.

58. *Leseur v. Leseur*, 31 Barb. 330.

59. *Strong v. Strong*, 3 Robt. 669; *Smith v. Smith*, 4 Paige, 432. See, also, *Ames v. Ames*, 109 Misc. 161, 178 N. Y. Supp. 177.

60. *Blanc v. Blanc*, 67 Hun, 384, 23 St. Rep. 822, 22 N. Y. Supp. 264.

noticed the action for trial does not deprive the court of power to permit a supplemental answer.⁶¹ Where a child is born to the wife after the commencement of the action, and the wife alleges that the husband is the father, and the pleadings indicate that the child may have been begotten after the date of the alleged offenses, the wife should be permitted to serve a supplemental answer in order that the legitimacy of the child may be determined.⁶²

4. Form of answer.

(Title.)

The defendant, for his answer to the plaintiff's complaint herein:

1. Denies the allegations of paragraphs marked "3," "4" and "5" (*and any other allegations controverted*) of the complaint.

2. And for a further and separate defense to the alleged cause of action set forth in the plaintiff's complaint, the defendant alleges that the adultery charged in the complaint and alleged to have been committed by defendant with A. B., on or about the day of, 19.., was committed by the procurement and with the connivance of the plaintiff as follows, to wit: (*Here set forth the facts.*)

3. And for a further and separate defense to the alleged cause of action set forth in the plaintiff's complaint, the defendant alleges that prior to the commencement of this action the adultery alleged to have been committed by the defendant with A. B., on the day of, 19.., was discovered by the plaintiff; such discovery having been made on or about the day of, 19.., and that the plaintiff knowing the same to have been committed, forgave the defendant and thereupon voluntarily cohabited with the defendant as his wife, and resided and lived with him at street, in the city of, N. Y., and that the plaintiff did so live and cohabit with the defendant as his wife from the day of, 19.., to the day of, 19... (*or set forth facts showing forgiveness by the plaintiff affirmatively*).

4. And for a further and separate defense to the alleged cause of action set forth in the plaintiff's complaint, the defendant alleges that on or about the day of, 19.., and more than five years prior to the commencement of this action, the adultery alleged to have been committed by the defendant with A. B., on the day of, 19.., was discovered by the plaintiff, and that the plaintiff then knew and ever since has known that said adultery was committed by the defendant.

5. And for a further and separate defense to the alleged cause of action set forth in the plaintiff's complaint, the defendant alleges that on or about the day of, 19.., at, the plaintiff committed adultery with one C. D.; that said adultery was committed without the consent, connivance, privity or procurement of the defendant; that five years have not elapsed since the discovery of the fact by defendant that such adultery had been com-

61. *Blanc v. Blanc*, 67 Hun, 384, 51 St. Rep. 822. 22 N. Y. Supp. 264.

62. *Kohl v. Kohl*, 189 App. Div. 915, 178 N. Y. Supp. 898.

mitted and that the defendant has not voluntarily cohabited with the plaintiff since the commission of said act of adultery, and the discovery thereof by defendant; that there is not now pending in any court of competent jurisdiction any action between the parties hereto, other than this action, for a divorce upon the ground of adultery or any other ground, nor has any decree been granted by any court of competent jurisdiction in such an action.

6. And for a counterclaim to the alleged cause of action set forth in plaintiff's complaint, the defendant alleges: (*Here set forth all the facts necessary to be alleged in a complaint for a divorce.*)

WHEREFORE, The defendant demands judgment in his favor, dissolving the marriage between the plaintiff and the defendant, together with the costs of this action.

E. Jury trial.

1. Civil Practice Act, § 1149. Jury trial in action for divorce.

If the answer in an action for divorce puts in issue the allegation of adultery, the court must upon the application of either party, or it may of its own motion, make an order directing the trial by a jury of that issue; for which purpose the questions to be tried must be prepared and settled.⁶³

2. Civil Practice Act, § 429. Jury trial of specific questions of fact; when of right.

Where a party is entitled by the constitution, or by express provision of law, to a trial by jury, of one or more issues of fact in an action not specified in section four hundred and twenty-five of this act, he may apply upon notice to the court for an order directing all the questions arising upon those issues to be distinctly and plainly stated for trial accordingly. Upon the hearing of the application, the court must cause the issues, to the trial of which by a jury the party is entitled, to be distinctly and plainly stated. The subsequent proceedings are the same as where questions arising upon the issues are stated for trial by a jury, in a case, where neither party can, as of right, require such a trial; except that the finding of the jury upon such questions so stated is conclusive in the action unless the verdict is set aside, or a new trial is granted.

3. Right to jury trial.

The right in a divorce action to a jury trial on the issue of adultery is a constitutional and statutory right.⁶⁴ The right to trial by jury on the question of adultery, when put

63. Preference.—Under subdivision 18 of section 138 of Civil Practice Act, a preference is allowed to an action for absolute divorce in which an order has been made granting temporary alimony.

64. *Wilcox v. Wilcox*, 116 App. Div. 423, 101 N. Y. Supp. 828; *Moot v. Moot*, 86 Misc. 495, 149 N. Y. Supp. 302; *aff'd*, 164 App. Div. 525, 149 N. Y. Supp. 901; *Conderman v. Con-*

derman, 44 Hun, 181; *mod'd*, 116 N. Y. 635; *Ulbricht v. Ulbricht*, 89 Hun, 479, 35 N. Y. Supp. 324; *Batzel v. Batzel*, 42 Super. Ct. 561; *Morrell v. Morrell*, 17 Hun, 324; *Anonymous*, 3 Abb. N. C. 161.

Under the old Code of Procedure, an action of divorce had to be tried by a jury, unless a jury trial was waived. *Dietz v. Dietz*, 48 How. Pr. 114.

in issue, has existed ever since the power was given to the courts of this State to grant divorces. This power was transferred to the Court of Chancery by the Laws of 1787 and continued in the revision of the statutes. It existed at the time of the adoption of the Constitution of 1846, and is therefore continued by the provision, "The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever."⁶⁵ A divorce suit is said to be a suit in equity with a statutory right to a jury trial of the issue of adultery.⁶⁶ Either party to the action has an absolute right to a trial by jury of such issue.⁶⁷ Where the defendant denies charges of adultery made against him he is entitled as matter of right to a trial of the issues by a jury; likewise the same privilege extends to the plaintiff upon the counter-charges of adultery made by the defendant.⁶⁸ The right is not affected by rule 157 of the Rules of Civil Practice, requiring the framing of issues within twenty days after issue joined, as that rule has no application to the issues in a divorce action.⁶⁹ It is improper to impose as condition of granting temporary alimony that the wife waive a jury trial and consent to a trial of the action before the court or a referee.⁷⁰ It is not a matter of right, if the allegations of complaint are not denied by the answer.⁷¹

A party may waive the right to a trial by jury.⁷² But the right is not waived by noticing the cause for trial at Special Term, after the other party has filed a similar notice.⁷³ And

65. *Lowenthal v. Lowenthal*, 68 Hun, 366, 51 St. Rep. 882, 22 N. Y. Supp. 858.

66. *Tietzel v. Tietzel*, 122 App. Div. 873, 107 N. Y. Supp. 878.

67. *Cohen v. Cohen*, 160 App. Div. 240, 145 N. Y. Supp. 652.

68. *Yates v. Yates*, 211 N. Y. 163, rev'g 147 App. Div. 915, 131 N. Y. Supp. 1086.

69. *Moot v. Moot*, 214 N. Y. 204; *Wilcox v. Wilcox*, 116 App. Div. 423, 101 N. Y. Supp. 828; *Haff v. Haff*, 64 Misc. 122, 118 N. Y. Supp. 52; *Conderman v. Conderman*, 44 Hun, 181; mod'd, 116 N. Y. 635.

70. *Lowenthal v. Lowenthal*, 68 Hun, 366, 22 N. Y. Supp. 858, 15 St. Rep. 882.

71. *Galusha v. Galusha*, 43 Hun, 181.

72. *Right waived*.—Where, after the

court in an undefended action for divorce had directed the entry of an interlocutory judgment in plaintiff's favor, the case was reopened on motion of defendant who put in an answer and testified, and six months after the entry of an interlocutory judgment in plaintiffs favor it was vacated on motion of defendant and a new trial granted because of collusion between the parties as to the specific act of adultery upon which the interlocutory judgment had been found, a motion by defendant to frame issues for a jury upon the new trial will be denied, as under the circumstances the right to a jury trial has been waived. *Fischer v. Fischer*, 64 Misc. 121, 117 N. Y. Supp. 1103; aff'd, 143 App. Div. 935, 128 N. Y. Supp. 1123.

73. *Wilcox v. Wilcox*, 116 App. Div. 423, 101 N. Y. Supp. 828.

the right is not lost by delay to have issues framed.⁷⁴ Nor should the right be denied because the moving party has stipulated that the cause shall be placed on the Special Term calendar and has served notice of trial. The cause should be placed on the Special Term calendar, and if either party desires to make application for a jury trial under section 1149, it is the duty of the court to cause the question of the fact arising upon the denial of adultery to be stated for trial before a jury under section 429.⁷⁵

Where the parties have stipulated for a reference of the issues, the court has no authority, in the absence of a reason sufficient in law, to vacate the order of reference and direct a jury trial.⁷⁶

4. Issues other than adultery.

The practice of submitting any issue other than of adultery to a jury in an action for divorce has been disapproved because the other issues, if necessary, may be tried by the court, after the verdict upon the issue of adultery.⁷⁷ Where the only issue in an action for divorce is the marriage of the parties, there is no authority for its submission to a jury.⁷⁸ Where defendant denies the adulterous acts and pleads that she was insane at the time, and demands a trial by jury of the issue of adultery, she is not also entitled to a jury trial of the issue of insanity, as that issue should be determined by the court after the rendition of the verdict on the issue of adultery.⁷⁹ It seems that when the answer, in an action for divorce, sets up affirmative defenses, and the only issue sent to a jury is that of adultery, and the other issues are tried in equity, it would be proper practice to return the finding on the issue of adultery to the Special Term, it being conclusive there, and then to file a decision as to all the issues under section 440 of the Civil Practice Act.⁸⁰

5. Settlement of issues.

The issues as to adultery must be settled before notice of trial can be given or the cause placed on the Trial Term calendar.⁸¹ Issues are only to be made for the trial of the

74. *Ulbricht v. Ulbricht*, 89 Hun, 479, 35 N. Y. Supp. 324.

75. *Tietzel v. Tietzel*, 122 App. Div. 873, 107 N. Y. Supp. 878.

76. *Ryerson v. Ryerson*, 55 Hun, 191, 27 St. Rep. 945, 7 N. Y. Supp. 726.

77. *King v. King*, 156 N. Y. Supp. 276.

78. *Wood v. Platt*, 57 Misc. 140, 108

N. Y. Supp. 948.

79. *Wilcox v. Wilcox*, 116 App. Div. 423, 101 N. Y. Supp. 828.

80. *Lowenthal v. Lowenthal*, 157 N. Y. 236, aff'g 92 Hun, 385, 56 N. Y. Supp. 1053.

81. *Tietzel v. Tietzel*, 122 App. Div. 873, 107 N. Y. Supp. 878; *Leslie v. Leslie*, 11 Abb. Pr. (N. S.) 311.

facts contested by the pleadings. The allegations expressly made on the one side and denied on the other, and those only, are to be tried.⁸² Where an action for divorce for adultery is reached on Special Term calendar, and on defendant's application issues are ordered framed, the court may order the trial thereon to proceed on any day it chooses, before a jury.⁸³

The defendant is entitled to have the issues framed with such a degree of definiteness as will avoid surprise on the trial and enable him to prepare his defense.⁸⁴ Great care should be had to add such certainty to the charges of misconduct on the part of the defendant as will afford a complete opportunity to meet them on the trial.⁸⁵ In framing issues for a jury trial, an issue as to whether defendant committed adultery with the corespondent "at divers times between the 1st day of January, 1904, and the date of the commencement of this action, at divers places in the city of New York and elsewhere," is too general and indefinite as to place.⁸⁶

6. Verdict of jury.

Where the issue of adultery is sent to a jury upon the application of either party, as provided by section 1149 of the Civil Practice Act, the finding of the jury thereon is, by force of section 429, conclusive unless the verdict is set aside or a new trial is granted.⁸⁷ But, as to other issues, the verdict is merely advisory to the trial court, which may either adopt, modify, or disregard it and make its own findings.⁸⁸

The granting of a new trial in a divorce case is determinable by the rules which prevail in a court of equity. Unless the alleged errors be such as to render the trial an unfair one or substantially affect the verdict, a new trial will be denied.⁸⁹ The judge presiding at the trial of an action brought by a husband to obtain an absolute divorce from his wife has power to set aside a verdict exonerating the wife from the charge of adultery; but such power should not be exercised except under circumstances which demonstrate

82. *Morrell v. Morrell*, 3 Barb. 236.

83. *Compton v. Compton*, 46 Super. Ct. 579.

84. *Bush v. Bush*, 103 App. Div. 588, 93 N. Y. Supp. 159.

85. *DeCarillo v. DeCarillo*, 53 Hun, 359, 17 Civ. Pro. 220, 25 St. Rep. 423, 6 N. Y. Supp. 305.

86. *Bush v. Bush*, 103 App. Div. 588, 93 N. Y. Supp. 159.

87. *Lowenthal v. Lowenthal*, 157 N. Y. 237, aff'g 92 Hun, 385, 56 N. Y. Supp. 1053; *Lusk v. Lusk*, 31 Misc. 312, 65 N. Y. Supp. 401; *Horn v. Horn*, 73 Misc. 14, 130 N. Y. Supp. 591.

88. *Horn v. Horn*, 73 Misc. 14, 130 N. Y. Supp. 591.

89. *Forrest v. Forrest*, 25 N. Y. 501.

that the verdict is the result of sympathy, or of some other improper influence, or has been reached in flagrant disregard of clear and convincing proof furnished by the uncontradicted testimony of disinterested witnesses.⁹⁰

Where the jury disagrees on all of the issues except one, as to which they were directed to find for defendant, there is a mistrial and no judgment can be rendered thereon, but upon a new trial all the issues are to be considered.⁹¹

Where a direction to the jury to find in a particular manner was given upon a misapprehension, the court may disregard the finding and determine the fact according to the truth of the matter. On a trial for a divorce, the court should make a decision concisely stating the grounds on which the issues are decided.⁹²

It is proper for the court, where the issue of adultery has been tried by a jury, to order exceptions to be heard in the first instance at the Appellate Division; in such case the verdict of a jury is not simply advisory, as in equity cases, but is conclusive unless set aside or a new trial granted.⁹³

The court may properly refuse to instruct the jury that, before they could find that the defendant had committed adultery, they must come to the conclusion that no other inference than guilt could be drawn from the evidence, and that, while the act of adultery might be established by presumptive evidence alone, "yet such evidence must lead inevitably to that fact, exclusive of every other conclusion," as such a charge is improper.⁹⁴

7. Form of notice of motion for order directing trial by jury.

(Title of action.)

TAKE NOTICE, That upon the affidavit of, attorney for the plaintiff in the above-entitled action, and upon the summons and complaint, affidavit of service thereof and the answer of the defendant herein, copies of which are served herewith upon you, the said attorney for the plaintiff herein, will move this court at a Special Term thereof to be held at, in the of, on the day of, 19.., at 10 o'clock in the forenoon (*or at the opening of court*), or as soon thereafter as counsel can be heard, for an order directing the trial by a jury of the issues arising on the allegation of adultery herein, and preparing and settling the questions to be tried and distinctly and plainly stating the same

90. *Donnelly v. Donnelly*, 50 App. Div. 453, 64 N. Y. Supp. 83.

91. *Smith v. Smith*, 27 Misc. 252, 57 N. Y. Supp. 774.

92. *Lowenthal v. Lowenthal*, 92 Hun, 385, 36 N. Y. Supp. 1053, 72 St. Rep.

276; *aff'd*, 157 N. Y. 236.

93. *Carpenter v. Carpenter*, 9 N. Y. Supp. 583.

94. *Roth v. Roth*, 90 App. Div. 88, 85 N. Y. Supp. 640; *aff'd*, 183 N. Y. 520.

for trial accordingly and for such other relief as to the court may seem just and proper.

A copy of such issues of fact, which it is desired should be submitted to a jury, is hereto annexed and served upon you.

8. Form of affidavit for order.

(Title of action.)

(Venue.)

....., being duly sworn, deposes and says:

1. That he is the attorney for the plaintiff in the above-entitled action;

2. That such action is brought to procure a divorce upon the ground of adultery of the defendant, as charged in the complaint herein, and that the answer of the defendant puts in issue the allegations of adultery as contained in such complaint;

3. That such action was commenced by the service of a summons and complaint upon the defendant on the day of, 19...; and that the defendant served his answer herein on the day of, 19...; and copies of such summons and complaint, and the affidavit of service thereof is annexed hereto, and marked Exhibit A; a copy of the answer to such complaint is annexed hereto, and marked Exhibit B;

4. That the plaintiff herein desires that the issues of fact pertaining to the adultery should be tried by a jury, and that an order be granted by this court directing that such issue be so tried. A statement of such issues of fact desired to be tried is hereto annexed.

Sworn to before me, this day }
of, 19... }

9. Form of proposed issues of fact.

(Title of action.)

Statement of Proposed Issues of Fact to be Submitted to Jury.

The following questions of fact are desired by the plaintiff to be submitted to the jury for trial:

1. Did the defendant, on the day of, 19..., at, commit adultery with?

(Each of the questions of fact should be distinctly stated and with sufficient certainty as to the charges of misconduct on the part of the defendant, so that complete opportunity may be given to meet such charges by proof upon the trial.)

10. Form of proposed amendments to issues.

(Title of action.)

The following amendments are proposed by the defendant to the issues of fact proposed to be submitted by the plaintiff to a jury in this action:

1. Strike out question No. 1, and insert in its place the following:
(State definitely the proposed substitute for such question.)

.....
Attorney for the Defendant.

Office and P. O. Address,, N. Y.

TAKE NOTICE, That the defendant herein proposes the foregoing amendments to the issues of facts proposed by the plaintiff for trial by a jury in the above-entitled action.

Dated,

.....
Attorney for the Defendant.

Office and P. O. Address,, N. Y.
To,
Attorney for the Plaintiff.

11. Form of order directing the trial of issues by jury.

(Title of action.) (Caption.)

On reading and filing the summons, the pleadings in this action, and proof of service of the summons and complaint and the affidavit of, attorney for the plaintiff, and on the statement of the issues of fact arising thereon, proposed by the above-named plaintiff to be submitted to a jury for trial, and on the amendments proposed by the defendant to such issues, and on hearing the said, of counsel for the plaintiff, and, of counsel for the defendant in opposition, now, on motion of, attorney for the plaintiff, it is

ORDERED, That the following questions of fact, involved in the issues arising upon the pleadings herein, be tried by a jury; it is hereby further

ORDERED, That such trial be had at a Trial Term of this court to be held at, in the city of, on the day of, 19.., or as soon thereafter as the same may be heard.

The following are the questions of fact to be submitted hereunder:

1. (*State questions of fact as settled.*)

Enter:

.....
.....

F. Rights of co-respondent.

1. Civil Practice Act, § 1151. Co-respondent as party in action for divorce.

In an action brought to obtain a divorce on the ground of adultery, the plaintiff or defendant may serve a copy of his pleading on the co-respondent named therein. At any time within twenty days after such service on said co-respondent, he may appear to defend such action so far as the issues affect such co-respondent. If no such service be made, then at any time before the entry of judgment any co-respondent named in any of the pleadings shall have the right to appear either in person or by attorney in said action and demand of plaintiff's attorney a copy of the summons and complaint, which must be served within ten days thereafter, and he may appear to defend such action so far as the issues affect such co-respondent.

2. Civil Practice Act, § 1152. Costs in favor of co-respondent in action for divorce.

In an action for divorce where a co-respondent has appeared and defended, in case no one of the allegations of adultery controverted by such co-respondent shall be proved, such co-respondent shall be entitled to a bill of costs against the person naming him as such co-respondent, which bill of costs shall consist only of the sum now allowed by law as a trial fee, and disbursements, and such co-respondent shall be entitled to have an execution issue for the collection of the same.

3. Appearance by co-respondent.

The statutory provisions giving rights to alleged co-respondents were first enacted in 1899. Prior to that time, a corespondent could not be made a party on her own application, but was allowed to appear, examine witnesses and testify, and to produce witnesses.⁹⁵ Under the statute a corespondent has practically all the rights which a party would have. After an interlocutory decree has been granted, the court has power to open the judgment and permit an infant corespondent not represented at the trial by her guardian *ad litem* to intervene and to give her an opportunity to be heard on the merits in defense of her chastity.⁹⁶ The corespondent in a divorce suit may intervene and defend as to her individual guilt before final decree, even though an interlocutory decree has been entered.⁹⁷ But it is doubtful if the corespondent has a right to come in after the entry of an interlocutory judgment and have the issues reopened and retried, in order that she may assert her defense.⁹⁸ But a motion by a corespondent to set aside an interlocutory decree of divorce and to settle issues has been granted, where the moving papers tended to establish her virginity.⁹⁹

95. *Clay v. Clay*, 21 Hun, 609; same principle, *Tilby v. Hayes*, 27 Hun, 251; 21 Hun, distinguished and commented on in *Quigley v. Quigley*, 45 Hun, 23, 9 St. Rep. 486.

96. *Shaw v. Shaw*, 140 N. Y. Supp. 388.

Admissions of defendant.—A corespondent who has appeared and is represented by his own counsel cannot claim that it is reversible error to allow his wife to testify to admissions made by the plaintiff as to improper relations with the corespondent, where no objection is taken on his behalf, but only on behalf of the plaintiff by her own attorney. Such evi-

dence is admissible against the plaintiff to prove her adultery, and whether or not it is admissible against the corespondent, his defense cannot deprive the defendant of the right to use any competent evidence which he would otherwise have against the plaintiff. *Olenick v. Olenick*, 185 App. Div. 809, 174 N. Y. Supp. 140.

97. *Shaw v. Shaw*, 156 App. Div. 379, 141 N. Y. Supp. 425.

98. *Boller v. Boller*, 111 App. Div. 240, 97 N. Y. Supp. 609; *Howatt v. Howatt*, 158 App. Div. 28, 142 N. Y. Supp. 908.

99. *Shaw v. Shaw*, 156 App. Div. 379, 141 N. Y. Supp. 425.

Where a party named as corespondent in a divorce action, within a few days after learning of the pendency of such action, serves a notice of appearance upon the attorney for the plaintiff and demands a copy of the complaint, and thereafter a copy thereof is served upon his attorney in accordance with such demand, his motion to vacate an interlocutory judgment entered prior to his appearance, and for permission to come in and defend in so far as the issues affect him, should be granted.¹

Where the husband sued for an absolute divorce, and his wife denied the charges and set up a counterclaim of adultery on his part, the corespondent is entitled to interplead and have a jury trial of the issues affecting her, though the husband does not answer.²

A motion by the corespondent, upon whom no copy of the summons and complaint had been served, made after a verdict in favor of the plaintiff on the issue of adultery, but before the entry of the interlocutory judgment, to stay the entry thereof until after the issues raised by answer to be afterward interposed shall be disposed of, based upon the affidavit of her attorney only, should be denied, unless also supported by her own affidavit denying the truth of the charges of adultery.³

4. Waiver of rights.

A corespondent in divorce, who has been cognizant of the proceedings had and has appeared as a witness, is not entitled upon intervening to have a new trial of the issues already disposed of.⁴ Where the corespondent sat throughout the trial with defendant and his attorneys, consulted with them in the court room, heard testimony to the effect that she was the proprietress of an assignation house, and all the testimony of plaintiff and her witnesses, beside the testimony of members of her own family, a motion by her made, after a verdict in favor of plaintiff for an order compelling plaintiff to accept service of her answer denying the allegations of the complaint and for a stay of entry of plaintiff's interlocutory judgment, must be denied on the ground that the corespondent had waived her statutory right to appear and defend in the action.⁵

1. *Dicks v. Dicks*, 155 App. Div. 418, 139 N. Y. Supp. 1068.

2. *Rixa v. Rixa*, 10 Anno. Cases, 119, 35 Misc. 227, 71 N. Y. Supp. 815.

3. *Stafford v. Stafford*, 170 App.

Div. 172, 156 N. Y. Supp. 25.

4. *Boller v. Boller*, 111 App. Div. 240, 97 N. Y. Supp. 609.

5. *Stafford v. Stafford*, 92 Misc. 563, 156 N. Y. Supp. 459.

5. *Res adjudicata* as to co-respondent.

A corespondent may so become a party to a divorce action wherein allegations of adultery are made against him that he will be bound by the adjudication therein.⁶ Where a corespondent was not originally served with a copy of the summons and complaint, but he voluntarily appears and demands service of the latter, a judgment rendered in such action is binding on him.⁷ But, where the judgment roll, in an action brought by a wife against her husband for absolute divorce, does not show that the corespondent was a party to the action, such judgment is not binding upon her as to the issues of adultery tried therein, and it is reversible error to admit the judgment roll in evidence in an action thereafter brought by the wife against such corespondent to recover damages for the alienation of the affections of her husband.⁸

6. Costs.

Section 1152 modifies the general rule that costs in an action for absolute divorce are in the discretion of the court, by providing that the corespondent, if successful, should be entitled to his costs against the person naming him as corespondent. It was held that where the corespondent had failed in his defense, it was within the discretionary power of the court to award costs against him from the time of the service of the answer.⁹ Where, in an action by a husband for divorce, the wife counterclaims and names as corespondent a lady who lives with her husband, upon the reconciliation of the parties, discontinuance of the suit will not be permitted against the objection of the corespondent except upon the payment of an extra allowance to her to compensate her for her expenses in hiring counsel and preparing to defend her good name in court.¹⁰ Where, the corespondent, upon whom the summons and complaint were duly served, did not answer, but her attorney took part in the trial which resulted in a judgment dismissing the complaint on the merits, a motion to vacate a separate judgment for costs entered by the corespondent, will be granted.¹¹

6. *Hendrick v. Biggar*, 209 N. Y. 440, rev'g 151 App. Div. 522, 136 N. Y. Supp. 306.

7. *Hendrick v. Biggar*, 209 N. Y. 440, rev'g 151 App. Div. 522, 136 N. Y. Supp. 306.

8. *Hendrick v. Biggar*, 209 N. Y. 440, rev'g 151 App. Div. 522, 136 N.

Y. Supp. 306.

9. *Billings v. Billings*, 73 App. Div. 69, 76 N. Y. Supp. 628.

10. *Stubbert v. Stubbert*, 66 Misc. 560, 123 N. Y. Supp. 1080.

11. *Mehlenbacker v. Mehlenbacker*, 77 Misc. 343, 136 N. Y. Supp. 210.

7. Notice of appearance by co-respondent.

(Title of action.)

TAKE NOTICE, That, the person named in the above-entitled action for a divorce, as co-respondent, appears in such action, and that I am retained by and appear as attorney for him herein, and demand that a copy of the summons and complaint and other papers in and notices in this action be served on me at my office, at, N. Y.

Dated,

.....
Attorney for Co-respondent.

Office and P. O. Address,, N. Y.

To,
Attorney for Plaintiff.

8. Form of answer of co-respondent.

(Title of action.)

The answer of the co-respondent named in the complaint in the above-entitled action respectfully shows to this court:

1. That he has been named in the complaint of the plaintiff in the above-entitled action as co-respondent and is charged with the commission of adultery with the defendant in the following allegations of the complaint: (*Here quote allegations to be denied.*)

2. That he denies the said allegations of the complaint.

WHEREFORE, He prays judgment against such plaintiff for his costs herein as provided by law.

.....
Attorney for Co-respondent.

Office and P. O. Address,, N. Y.
 (Verification.)

G. Legitimacy of children.**1. Civil Practice Act, § 1154. Legitimacy of children in action for divorce by wife.**

Where the action for divorce is brought by the wife, the legitimacy of any child of the marriage, born or begotten before the commencement of the action, is not affected by the judgment dissolving the marriage.

2. Civil Practice Act, § 1157. Legitimacy of children in action for divorce by husband.

Where the action for divorce is brought by the husband, the legitimacy of a child born or begotten before the commission of the offence charged is not affected by a judgment dissolving the marriage; but the legitimacy of any other child of the wife may be determined as one of the issues in the action. In the absence of proof to the contrary, the legitimacy of all the children begotten before the commencement of the action must be presumed.¹²

12. Child born before marriage.—Where the complaint of the husband tenders no issue as to legitimacy, the wife can have no determination of the

question whether a child which she bore before marriage was the issue of such marriage. *Tully v. Tully*, 28 Misc. 54, 59 N. Y. Supp. 818.

3. Rules of Civil Practice, Rule 279. Pleading and trial of issue of illegitimacy of children.

In an action by a husband for a divorce, if he wishes to question the legitimacy of any of the children of his wife, the allegation that they are, or that he believes them to be illegitimate, shall be made distinctly in the complaint. On default, proofs shall be taken respecting the question of legitimacy as well as on the other matters stated in the complaint, and if the issue be tried by a jury, an issue on the question of the legitimacy of the children shall be awarded and tried at the same time.

4. Evidence of non-access.

Non-cohabitation cannot be proved by a witness deposing that the parties had not resided together since their separation, to the best of his knowledge and belief; but the person with whom the wife had resided since that time should be called to prove that fact.¹³

One who seeks a decree, declaring the children of his wife illegitimate, must produce some other evidence of his non-access than the mere fact that his wife was living in open adultery with another person.¹⁴

H. Rules of Civil Practice, Rule 278. Information as to details of divorce action.

An officer of a court with whom the proceedings in an action to annul a marriage or for divorce or separation are filed, or before whom the testimony is taken, or his clerk, either before or after the termination of the suit, shall not permit a copy of any of the pleadings or testimony, or any examination or perusal thereof, to be taken by any other person than a party, or the attorney or counsel of a party who had appeared in the cause, except by order of the court.

If the evidence on the trial of such an action be such that public interest requires that the examination of the witnesses should not be public, the court or referee may exclude all persons from the room except the parties to the action and their counsel and the witnesses, and in such case may order the evidence, when filed with the clerk, sealed up, to be exhibited only to the parties to the action or some one interested, on order of the court.

ARTICLE III.

SEPARATION.

A. Grounds for separation.

1. Civil Practice Act, § 1161. Action for separation; when maintainable.

In either of the cases specified in the next section, an action may be maintained by a husband or wife against the other party to the marriage to procure a judgment separating the parties from bed and board, forever, or for a limited time, for either of the following causes:

13. *Turney v. Turney*, 4 Edw. Ch. 566.

14. *Van Aernam v. Van Aernam*, 1 Barb. Ch. 375.

1. The cruel and inhuman treatment of the plaintiff by the defendant.
2. Such conduct on the part of the defendant towards the plaintiff as may render it unsafe and improper for the former to cohabit with the latter.
3. The abandonment of the plaintiff by the defendant.
4. Where the wife is plaintiff, the neglect or refusal of the defendant to provide for her.

2. No jurisdiction except under statute.

The courts of this state have no common law jurisdiction over the subject of divorce, and can grant a separation only in those cases provided for by the statute.¹⁵

The Supreme Court has no inherent power to grant divorces or decrees of separation and can exercise only such authority on that subject as is conferred by the Legislature.¹⁶

3. Statutory grounds in general.

The several subdivisions of section 1161 are alternative in their provisions, and the several causes prescribed therein for a separation are independent in their character.¹⁷ A single act of sufficiently aggravated character will suffice.¹⁸ Incompatibility of temper leading to domestic quarrels is not a ground for a separation.¹⁹ The fact that the parties cannot live together in harmony is not sufficient to warrant a judicial separation.²⁰ Mere incompatibility of temperament, capricious or arbitrary conduct, and certainly mere difference of views as to domestic economy, for the conduct of daily life in respect to attendance upon places of entertainment, do not constitute legal grounds for a separation.²¹ Demeanor calculated to provoke annoyance, discontent and disgust is alone not sufficient to authorize judgment of separation, especially where such conduct was practiced by both parties.²² Meanness, disagreeable conduct or the use of vile language affords no ground for a separation.²³

15. Walker v. Walker, 155 N. Y. 77; Unbach v. Unbach, 183 App. Div. 495, 171 N. Y. Supp. 138; Palmer v. Palmer, 1 Paige, 276.

16. Davis v. Davis, 75 N. Y. 221; Atwater v. Atwater, 53 Barb. 621; Wood v. Wood, 61 App. Div. 96, 70 N. Y. Supp. 72.

17. Fowler v. Fowler, 33 St. Rep. 746, 19 Civ. Pro. 282, 11 N. Y. Supp. 419.

18. Uhlmann v. Uhlmann, 17 Abb. N. C. 236.

19. Umbach v. Umbach, 183 App. Div. 495, 171 N. Y. Supp. 138; Otton

v. Otton, 196 App. Div. 403, 188 N. Y. Supp. 255.

20. Donohue v. Donohue, 180 App. Div. 561, 167 N. Y. Supp. 715; Averett v. Averett, 189 App. Div. 250, 178 N. Y. Supp. 405.

21. Kinsey v. Kinsey, 124 N. Y. Supp. 30.

22. Conklin v. Conklin, 17 Abb. Pr. 20, n.; Klein v. Klein, 42 How. Pr. 166.

23. McBride v. McBride, 31 St. Rep. 631, 9 N. Y. Supp. 827. See s. c., 5 N. Y. Supp. 388, on former appeal.

4. Relief by husband.

The grounds upon which legal separation may be obtained, with the exception of non-support, apply to men and women alike.²⁴ But, it must be a strong case to authorize a limited divorce of the husband from his wife, as in such case the wife would have no claim on the husband for support.²⁵ It does not afford ground for a decree of separation at the instance of the husband that his wife had been in the practice of forging his name, as well as that of others, to notes which she negotiated, and that she pledged his credit for supplies for herself and household, in addition to receiving an allowance sufficient therefor, made to her by him.²⁶

B. Cruel and inhuman treatment.

1. In general.

There is no exact criterion of cruel and inhuman treatment entitling a wife to a decree of separation. Conduct on the part of the husband may or may not be cruel and inhuman, depending on the temperament, breeding, condition of life and a variety of special circumstances.²⁷ The social position of the parties may make a difference in the treatment due from the husband to the wife, in the way of providing for the mode of life, but not in the obligation of kindness.²⁸ The cruelty which entitles the injured party to a decree of separation is that kind of conduct which endangers the life or health of the complainant and renders cohabitation unsafe.²⁹ Cruelty involves the idea of wantonness; that an act is done willfully and for the purpose of inflicting suffering; and mere impulsive acts at long intervals, especially when perpetrated by an hysterical woman, are not ordinarily understood as constituting what the law knows as cruelty and inhuman treatment.³⁰ A husband's refusal to permit a wife to attend a church of which she is a member is not ground for separation.³¹ A refusal to allow the wife to name a child is not cruel

24. *Morris v. Morris*, 108 Misc. 228, 177 N. Y. Supp. 600.

25. *Palmer v. Palmer*, 1 Paige, 276. See *Perry v. Perry*, 1 Barb. Ch. 516.

26. *Weaver v. Weaver*, 74 App. Div. 591, 77 N. Y. Supp. 568; *aff'd* without opinion, 178 N. Y. 621.

27. *Tower v. Tower*, 134 App. Div. 670, 119 N. Y. Supp. 506.

Abortion.—It seems, that where a husband, being a physician, induces his wife to allow him to perform operations resulting in abortions by falsely stating that the abortions were

necessary because of her inability to bear children, he is guilty of cruel and inhuman treatment, which will entitle the wife to a decree of separation. *Sheldon v. Sheldon*, 146 App. Div. 430, 131 N. Y. Supp. 291.

28. *Aumann v. Aumann*, 3 Law Bull. 17.

29. *Perry v. Perry*, 2 Paige, 501.

30. *Rebstock v. Rebstock*, 144 N. Y. Supp. 289.

31. *Lawrence v. Lawrence*, 3 Paige, 267.

treatment.³² Causing the wife to be committed to an insane asylum with cause and in good faith, affords no ground for an action of separation to be maintained by her.³³ Throwing down a tea cup and other like acts do not constitute cruel and inhuman conduct, justifying a wife in deserting her husband.³⁴

A finding that the defendant was guilty of cruel and inhuman treatment may be based upon the facts that when the plaintiff was mentally and physically incapacitated by childbirth, the defendant confessed to her his love for another woman, proposed to sever marital relations with her, and later caused her to be committed to an asylum for the insane by proceedings which he knew to be defective.³⁵

2. Assault.

Physical pain inflicted by the husband on the wife may well afford ground for a separation.³⁶ A complaint for limited divorce which alleges that the defendant beat the plaintiff, that he had absented himself from home and failed to furnish her with the necessaries of life, that his whole course of conduct had been so brutal as to undermine her health is sufficient.³⁷ Where, in an action for separation, the sole claim of violence of the defendant toward the plaintiff and the only specific act of misconduct alleged is that the defendant threw a pair of shoes at his wife, which however, did not strike her, a decree of separation should not be granted even though such allegation be not denied.³⁸

3. Mental agony.

There are many expressions in the reported decisions that mental agony produced by the conduct of the defendant is not a sufficient ground for separation, but that there must be actual violence of the threat thereof in order to constitute

32. *Appleby v. Appleby*, 2 McCarty, 422.

33. *Kuster v. Kuster*, 37 Misc. 136, 74 N. Y. Supp. 853.

34. *Blair v. Blair*, 160 App. Div. 781, 145 N. Y. Supp. 976.

35. *Beebe v. Beebe*, 174 App. Div. 408, 160 N. Y. Supp. 967.

36. Evidence sufficient.—Where the husband laid violent hands on his wife, led her to the door, threatened to knock her down and struck at her twice, and on another occasion when she fell to the floor from sickness, said, "It is

a pity you ever got up," and again, "I will be glad when you draw your last breath," frequently calling her opprobrious names and accused her of infidelity, naming various men with whom he charged her with having improper intercourse; *held*, the facts justified a finding of cruel and inhuman treatment. *Waltermire v. Waltermire*, 110 N. Y. 183.

37. *Itzkowitz v. Itzkowitz*, 33 App. Div. 244, 53 N. Y. Supp. 356.

38. *DeVide v. DeVide*, 186 App. Div. 814, 174 N. Y. Supp. 774.

cruel and inhuman treatment.³⁹ But there are decisions holding to the contrary.⁴⁰ Cruel and inhuman treatment does not necessarily imply such treatment as places a wife in physical fear of her husband.⁴¹ The conduct of the husband may produce such mental agony in the wife as to be even more cruel and inhuman than if mere physical pain had been inflicted; and, where the conduct of the husband has been of such a character, the court is justified in freeing her from the necessity of submitting to such treatment.⁴² A threat of violence does not justify the relief, unless the circumstances thereof reasonably give rise to an apprehension that the threat will be executed.⁴³

4. Violent language.

Angry, contumelious and degrading reproaches by a husband, made continuously maliciously and without provocation, may constitute cruel and inhuman treatment which will justify a decree of separation.⁴⁴ But occasional sallies of passion do not amount to legal cruelty, so long as they do not threaten bodily harm.⁴⁵ Mere angry outbursts of the defendant incident to a war of words with his wife, unaccompanied by any act of physical violence, are not sufficient to justify a decree of separation.⁴⁶

5. Charges of infidelity.

The conduct of a husband impugning the chastity of his wife in presence of his children or others, is cruel and inhuman treatment, in itself entitling her to a decree for a

39. *Gray v. Gray*, 85 Misc. 584, 148 N. Y. Supp. 1064; *Walton v. Walton*, 32 Barb. 203; *Paisley v. Paisley*, 2 Law Bull. 6; *Whispell v. Whispell*, 4 Barb. 217; *Mason v. Mason*, 1 Edw. 278; *Davis v. Davis*, 1 Hun, 444.

40. *Morris v. Morris*, 108 Misc. 228, 177 N. Y. Supp. 600.

41. *Atherton v. Atherton*, 82 Hun, 179, 31 N. Y. Supp. 977; *aff'd*, 155 N. Y. 129; *rev'd*, 181 U. S. 155; *Lutz v. Lutz*, 9 N. Y. Supp. 858, 31 St. Rep. 718.

42. *Morris v. Morris*, 108 Misc. 228, 177 N. Y. Supp. 600; *Atherton v. Atherton*, 82 Hun, 179, 31 N. Y. Supp. 977; *aff'd*, 155 N. Y. 129; *rev'd*, 181 U. S. 155; *Kinsey v. Kinsey*, 124 N. Y. Supp. 30.

43. *Donohue v. Donohue*, 180 App. Div. 561, 167 N. Y. Supp. 715; *DeVide v. DeVide*, 186 App. Div. 814, 174 N. Y. Supp. 774; *Wheeler v. Wheeler*, 17 Abb. N. C. 231.

44. *Fitzpatrick v. Fitzpatrick*, 21 Misc. 378, 47 N. Y. Supp. 737. See, also, *Murray v. Murray*, 16 N. Y. Supp. 363, 41 St. Rep. 428.

45. *Reese v. Reese*, 194 App. Div. 907, 185 N. Y. Supp. 110; *Otton v. Otton*, 196 App. Div. 403, 188 N. Y. Supp. 255; *Wheeler v. Wheeler*, 17 Abb. N. C. 231.

46. *Donohue v. Donohue*, 180 App. Div. 561, 167 N. Y. Supp. 715; *Reese v. Reese*, 194 App. Div. 907, 185 N. Y. Supp. 110.

separation.⁴⁷ A false charge of adultery made by the husband to several persons, a statement that he had discovered the wife in the act and had a written statement from her paramour, the fact that he made persistent efforts to trap her into a confession of guilt and that the effect of this treatment was to twice bring plaintiff to a condition of nervous prostration, when she attempted to take her own life, justifies a decree for separation.⁴⁸ But if a husband has reason to suspect his wife of infidelity, it is neither cruel nor inhuman to charge her with it, although personal violence is not justifiable.⁴⁹

6. Intemperance.

Occasional and even frequent intoxication is of itself not sufficient ground for separation.⁵⁰ But where there is proof that the husband was in the three years next succeeding his marriage an inmate of four different institutions for the cure of drunkenness and during the greater part of the time he lived with his wife he was in a state of intoxication and on three different occasions he struck her, the court is justified in decreeing a separation.⁵¹

7. Adultery.

A mere allegation of adultery does not state a cause of action for separation under section 1161 of the Civil Practice Act.⁵² A complaint which alleges a cause of action for a divorce on the ground of adultery, but demands judgment merely for a separation, cannot be sustained, for the mere allegation of adultery does not constitute an allegation of cruel and inhuman treatment or of such conduct as to render it unsafe for the plaintiff to cohabit with the defendant.⁵³ And, if the defendant has procured a divorce in another state, the validity of which is not recognized in this state, and

47. *Smith v. Smith*, 92 App. Div. 442, 87 N. Y. Supp. 137; *Straus v. Straus*, 67 Hun, 491, 22 N. Y. Supp. 567, 50 St. Rep. 845; *Lutz v. Lutz*, 31 St. Rep. 718, 9 N. Y. Supp. 858.

Charges of infidelity and illicit relations with various women, constituting cruel and inhuman treatment, held not sustained. *Kamman v. Kamman*, 151 N. Y. Supp. 226.

48. *Fowler v. Fowler*, 11 N. Y. Supp. 419.

49. *Gray v. Gray*, 85 Misc. 584, 586, 148 N. Y. Supp. 1064; *Kennedy v.*

Kennedy, 73 N. Y. 369; *De Meli v. De Meli*, 5 Civ. Pro. 306.

50. *Kissam v. Kissam*, 21 App. Div. 142, 47 N. Y. Supp. 270; *Douglas v. Douglas*, 5 Hun, 140; *Mason v. Mason*, 1 Edw. 278. See, also, *O'Neill v. O'Neill*, 163 N. Y. Supp. 250.

51. *Kissam v. Kissam*, 21 App. Div. 142, 47 N. Y. Supp. 270.

52. *Allen v. Allen*, 125 App. Div. 838, 110 N. Y. Supp. 303.

53. *Hofman v. Hofman*, 195 App. Div. 597, 187 N. Y. Supp. 141.

remarries, the cohabitation with the second spouse, although adulterous, does not constitute cruel and inhuman treatment.⁵⁴ The circumstances of a foreign divorce and remarriage may, however, be sufficient to sustain a charge of abandonment.⁵⁵

8. Conspiracy to procure evidence for divorce.

The privity of the wife with a conspiracy to induce the husband to commit adultery or to place him in equivocal relations with a woman not his wife, so as to bring an action for divorce upon the evidence thus obtained, constitutes cruelty sufficient to enable him to maintain his action for separation.⁵⁶

9. Communication of disease to plaintiff.

The communication by the defendant of a venereal disease to the wife, may constitute cruelty so as to justify a separation. A claim that the defendant contracted after marriage a venereal disease, which is denied by him, is not established by the testimony of the plaintiff to an alleged confession of the defendant, when there is no corroboration of the testimony by any of the surrounding circumstances.⁵⁷ Pulmonary consumption in the husband is not ground for a separation where its existence prior to the marriage is not claimed, nor that any false representations as to his health were made, and where the plaintiff had ample opportunities before marriage for making inquiries as to the defendant's health.⁵⁸

10. The mother-in-law proposition.

Where in a wife's action for a separation she testifies that she is willing to live with her husband apart from his mother, but insists that his acquiescence without objection or protest in the treatment she has received at the hands of his mother, together with his failure or refusal to take any steps to relieve her from it or its effects, entitles her to the decree sought, and the evidence amply sustains her version of the things of which she complains, she is entitled to judgment though from her appearance and her manner of testifying it is apparent that she is not altogether lacking in temper.⁵⁹

54. *Crouch v. Crouch*, 193 App. Div. 221, 183 N. Y. Supp. 657; *Hofman v. Hofman*, 195 App. Div. 597, 187 N. Y. Supp. 141.

55. *Crouch v. Crouch*, 193 App. Div. 221, 183 N. Y. Supp. 657.

56. *Uhlmann v. Uhlmann*, 17 Abb.

N. C. 236.

57. *Donohue v. Donohue*, 180 App. Div. 561, 167 N. Y. Supp. 715.

58. *Abramowitz v. Abramowitz*, 140 N. Y. Supp. 275.

59. *Snyder v. Snyder*, 98 Misc. 431, 162 N. Y. Supp. 607.

11. Treatment justified by plaintiff's conduct.

The conduct of the plaintiff may justify the defendant's conduct so that the separation will be denied, although otherwise the grounds might be thought sufficient. It is not the rule that a husband is bound to keep under his roof a wife, no matter what her conduct may be, nor is he bound to leave his house or submit to her conduct.⁶⁰ The hasty words and violent deeds of a husband which might otherwise form the basis of an action for a divorce on the ground of cruel and inhuman treatment do not necessarily afford such a basis when committed by the husband in consequence of the wife having tantalized him into a temper, nor where the wife has been guilty of like words and deeds.⁶¹ A decree of separation should be denied where whatever physical violence had been used by the defendant had been provoked by the plaintiff herself, she being in all instances the provoking party and the aggressor. Physical violence which a wife herself invites will not avail her as grounds for a separation.⁶² Where the alleged cruel treatment was the result of a discovery of the wife's adultery, a limited divorce may not be decreed.⁶³ It is not cruelty for a husband, having reason to suspect his wife of infidelity, to charge her with it; but personal violence is not justifiable.⁶⁴ The act of the husband in angrily expelling his wife from home, on the ground of her unfaithfulness, is not sufficient ground for granting a limited divorce.⁶⁵

C. Conduct rendering cohabitation unsafe.

Cruel and inhuman treatment, and such conduct of a defendant as may render cohabitation unsafe and improper, mean substantially the same thing.⁶⁶ Conduct which renders cohabitation unsafe and improper within the meaning of the statute implies actual violence committed with danger to life, limb or health, or a reasonable apprehension of such violence.⁶⁷ The word "unsafe," as used in the statute, has reference to bodily personal injury or violence, as distinguished from mental suffering or wounded sensibilities.⁶⁸

60. *Rose v. Rose*, 22 St. Rep. 526, 4 N. Y. Supp. 856, 52 Hun, 154.

61. *Robinson v. Robinson*, 69 Misc. 438, 125 N. Y. Supp. 1064; rev'd on other grounds, 146 App. Div. 533, 131 N. Y. Supp. 260.

62. *Barber v. Barber*, 168 App. Div. 212, 153 N. Y. Supp. 256.

63. *Doe v. Doe*, 23 Hun, 19.

64. *DeMeli v. DeMeli*, 5 Civ. Pro.

306.

65. *Barlow v. Barlow*, 2 Abb. (N. S.) 259. Compare *Davies v. Davies*, 55 Barb. 130.

66. *Donohue v. Donohue*, 180 App. Div. 561, 167 N. Y. Supp. 715.

67. *Barber v. Barber*, 168 App. Div. 212, 153 N. Y. Supp. 256.

68. *Walton v. Walton*, 32 Barb. 203.

Where it appeared from the evidence that defendant made false charges of adultery against plaintiff and persistent efforts to entrap her into a confession of guilt, and that generally by his course of conduct she was kept in ill-health and had attempted to commit suicide, a case is made out for separation under subdivision 2 of section 1161.⁶⁹

D. Abandonment or non-support.

1. In general.

Subdivision 3 of section 1161 of the Civil Practice Act authorizes a decree of separation for the abandonment of the plaintiff by the defendant.⁷⁰ The term "abandonment" contemplates the voluntary separation of one party from the other without justification and with the intention of not returning.⁷¹ To constitute abandonment, the cessation of cohabitation must be without consent of the other party and with the intention not to resume it.⁷² The intent is to be determined as of the time of the departure; and the circumstances and manner of the departure may be considered on the question of intent.⁷³ A husband's refusal to live with or support his wife entitles her to a judgment of separation from bed and board forever.⁷⁴ The fact that a wife is so temperamentally constituted as to be nervous and hysterical, that under the stress of emotion she may have attempted irrational acts, are reasons for care and commiseration rather than for abandonment.⁷⁵ A decree of separation predicated upon abandonment should not be granted except upon very satisfactory proof of the fact.⁷⁶

In an action for separation by a wife on the ground of abandonment, her evidence that she did not now want her husband to come back, that she was satisfied when he left the house, that she would not go back to him, etc., does not show a consent to the abandonment which prevents a decree of separation when the evidence as a whole shows that when the

69. *Fowler v. Fowler*, 33 St. Rep. 746, 19 Civ. Pro. 282, 11 N. Y. Supp. 419.

70. *Gilbert v. Gilbert*, 5 Misc. 555, 26 N. Y. Supp. 30.

71. *Simon v. Simon*, 6 App. Div. 469, 39 N. Y. Supp. 573; *aff'd*, 159 N. Y. 549.

72. *Williams v. Williams*, 130 N. Y. 193, 41 St. Rep. 280; *Domb v. Domb*, 195 App. Div. 526, 186 N. Y.

Supp. 306; *Dignan v. Dignan*, 17 Misc. 268, 40 N. Y. Supp. 320.

73. *Uhlmann v. Uhlmann*, 17 Abb. N. C. 273.

74. *Uhler v. Uhler*, 128 N. Y. Supp. 963.

75. *Gray v. Gray*, 85 Misc. 584, 148 N. Y. Supp. 1064.

76. *Simon v. Simon*, 6 App. Div. 469, 39 N. Y. Supp. 573; *aff'd*, 159 N. Y. 549.

husband announced his intention to go, she asked him to support her.⁷⁷

2. Agreement of separation.

Where the parties have voluntarily separated under an agreement of separation, neither can procure a judicial separation on the ground of abandonment.⁷⁸ Where husband and wife are living apart under a separation agreement which contains a provision for the wife's support, a counsel fee and alimony should not be allowed in an action for limited divorce on the ground of abandonment, as such an action cannot be maintained where the separation is with the wife's consent.⁷⁹ Where a wife, in pursuance of an agreement for separation, and for a consideration paid by the husband and accepted by her, has voluntarily left and lived apart from him, and she does not offer to return or to restore the consideration, she cannot have a limited divorce on the ground of abandonment and refusal to support her.⁸⁰ Where the parties entered into an ante-nuptial agreement by which the woman released the man from all claims or demands for her support or that of her child, and they did not at the time expect to have a common home, but to continue living separately, it was held that the wife could not after marriage maintain an action for separation on the ground of abandonment until some effort was made on her part to require her husband to live with her.⁸¹

3. Offer of reconciliation.

The intent of a husband or wife at the time of departure determines whether there has been an abandonment. If the desertion is complete, a subsequent offer to return will not be a defense.⁸² If, however, the wife is driven away by the imposition of a harsh condition, and she subsequently offers to return unconditionally, an abandonment may exist if he refuses to receive her.⁸³ An alternative tender by the wife, either of separation with support or of cohabitation with an independent provision, is not such an offer of reconciliation that its rejection will convict the husband of abandonment.⁸⁴

⁷⁷ *Curtin v. Curtin*, 111 App. Div. 447, 97 N. Y. Supp. 771.

⁷⁸ *Brody v. Brody*, 190 App. Div. 806, 180 N. Y. Supp. 364; *Adams v. Adams*, 49 St. Rep. 641, 20 N. Y. Supp. 765.

⁷⁹ *Powers v. Powers*, 33 App. Div. 126, 53 N. Y. Supp. 346.

⁸⁰ *Desborough v. Desborough*, 29

Hun, 592.

⁸¹ *Dennison v. Dennison*, 52 Misc. 37, 102 N. Y. Supp. 621.

⁸² *Uhlmann v. Uhlmann*, 17 Abb. N. C. 273.

⁸³ *Williams v. Williams*, 130 N. Y. 193, 41 St. Rep. 280.

⁸⁴ *Dignan v. Dignan*, 17 Misc. 268, 40 N. Y. Supp. 320.

Where an unconditional offer by the wife to return to her husband's bed and board was refused by him, and both before and after that time he refused to contribute to her support, it was held that the facts constituted both abandonment and neglect or refusal to support, and justified a decree of separation.⁸⁵

4. Refusal to live with father or mother-in-law.

That the husband declines to reside with his wife in the same house with her father is no abandonment, if he offer her a support and a home, which she declines to accept.⁸⁶

Where a wife's control and management of the home is made unpleasant by the interference of her mother-in-law, she is justified in leaving her husband and requiring him to support her elsewhere, and his complaint in an action for separation on the ground of abandonment will be dismissed.⁸⁷ A husband who drives his wife from his home merely because she will not promise to go near her parents is guilty of legal abandonment.⁸⁸ Where a husband agreed to live with his wife only on condition she would never again see her mother, it was held that it was an abandonment on the part of the husband, and his expressed willingness to live with his wife on the condition named was no answer to a suit for separation.⁸⁹

5. Failure to support wife.

Under the Revised Statutes, an abandonment of the wife was not sufficient grounds for a separation, unless he also failed to support her.⁹⁰ But, under the Code of Civil Procedure and under the Civil Practice Act, the grounds of abandonment and non-support are independent. Under the present statute there may be an abandonment, though the husband continues to provide for the wife's support.⁹¹ A husband who refuses to live with his wife, although he supports her, may be guilty of deserting her.⁹² The fact that the husband has contributed toward the wife's support after

85. *Gilbert v. Gilbert*, 5 Misc. 555, 26 N. Y. Supp. 30, distinguishing *Galusha v. Galusha*, 138 N. Y. 272.

86. *Appleby v. Appleby*, 2 McCarty, 422.

87. *Field v. Field*, 79 Misc. 557, 139 N. Y. Supp. 673.

88. *Gloster v. Gloster*, 23 App. Div. 336, 48 N. Y. Supp. 160.

89. *Williams v. Williams*, 17 Civ. Pro. 297; s. c., 6 N. Y. Supp. 645, 25

St. Rep. 183.

90. *Atwater v. Atwater*, 53 Barb. 621; *Ahrenfeldt v. Ahrenfeldt*, Hoff. Ch. 47; *Ruckman v. Ruckman*, 58 How. Pr. 278.

91. *Brokaw v. Brokaw*, 66 Misc. 307, 123 N. Y. Supp. 17; *aff'd*, 147 App. Div. 906, 131 N. Y. Supp. 1106; *Tabor v. Tabor*, 140 N. Y. Supp. 313.

92. *Clearman v. Clearman*, 15 Civ. Pro. 313.

he has ceased to live with her, with a fixed determination not to resume his marital life with her, is no reason for denying a separation on the ground of abandonment.⁹³

E. Residence of plaintiff within state.

1. Civil Practice Act, § 1162. Action for separation; conditions attached to maintenance.

Such an action may be maintained in either of the following cases:

1. Where both parties are residents of the State when the action is commenced.
2. Where the parties were married within the State and the plaintiff is a resident thereof when the action is commenced.
3. Where the parties, having been married without the State, have become residents of the State, and have continued to be residents thereof at least one year; and the plaintiff is such a resident when the action is commenced.

2. Construction of section.

One cannot have a separation in this state, if the parties were married outside of the state and the plaintiff is not a resident of the state at the time of the commencement of the action.⁹⁴ The Supreme Court of this State has no jurisdiction of an action brought for a separation by the wife of the consul for the republic of Peru in the city of New York.⁹⁵ But where both parties are residents of the State when the action is commenced, an action for separation may be maintained without reference to the length of the residence of either, or the place of marriage.⁹⁶ A woman may maintain an action for separation in this State if though the parties married without the State, they afterwards became residents, continued to be such for a year, and the plaintiff is a resident when the action is commenced.⁹⁷

Where a husband and wife who were married in a foreign country became residents of this State and reside here for many years and then go to a foreign State where a cause of action for a separation arises in favor of the wife, whereupon the wife, acting within her rights, returns to this State and acquires an independent and separate domicile here, she cannot maintain an action against her husband for a separation in this State, although she obtains personal service of process upon him here.⁹⁸

93. *Gray v. Gray*, 85 Misc. 584, 587, 148 N. Y. Supp. 1064.

94. *Wacker v. Wacker*, 154 App. Div. 495, 139 N. Y. Supp. 78; *Ramsden v. Ramsden*, 28 Hun. 285; *aff'd*, 91 N. Y. 281.

95. *Higginson v. Higginson*, 96 Misc.

457, 158 N. Y. Supp. 92.

96. *Bierstadt v. Bierstadt*, 29 App. Div. 210, 51 N. Y. Supp. 862.

97. *Barber v. Barber*, 137 App. Div. 665, 122 N. Y. Supp. 452.

98. *Elwell v. Elwell*, 70 Misc. 61, 128 N. Y. Supp. 495.

Where a husband, having failed to obtain a divorce, went to another State to seek the aid of its courts for such purpose, an action for separation commenced by the wife thereafter was properly brought in the court of the original domicile.⁹⁹

Where the complaint in an action for separation against a non-resident defendant states facts giving jurisdiction to the court, an order for service by publication will not be set aside on the defendant's affidavits alleging that the parties never acquired a matrimonial domicile in this State. The jurisdictional questions should be determined upon trial, not by affidavit.¹

The residence spoken of in section 1162 is an actual residence of the wife, which is presumed to follow that of the husband.² Within the meaning of section 1162, prescribing when an action for separation between husband and wife may be maintained, the place of which the parties are residents is that of the permanent abode, and the word "residence" is used as synonymous with inhabitation or domicile and as distinguished from the place of their temporary residence. A court has no extra-territorial jurisdiction, and a person not domiciled in the State or country cannot be charged *in personam* by its adjudication unless he is personally served with notice or process within it or voluntarily submits himself to the jurisdiction of the court by appearing in some manner in the action or proceeding.³

Where the parties were married in Pennsylvania and resided there, and the husband subsequently came to New York, but the wife refused to follow him, it was held that the residence of the husband in New York did not confer jurisdiction.⁴

F. Complaint.

1. Rules of Civil Practice, Rule 280. Complaint in action for separation.

The complaint in an action for separation must specify particularly the nature and circumstances of the defendant's misconduct and set forth the time and place of each act complained of with reasonable certainty

2. Contents of complaint

The complaint in separation is required to specify particularly the nature and circumstances of the defendant's mis-

99. Woolworth v. Woolworth, 115 App. Div. 405, 100 N. Y. Supp. 865.

1. Barber v. Barber, 137 App. Div. 665, 122 N. Y. Supp. 452.

2. Hewes v. Hewes, 40 St. Rep. 680,

16 N. Y. Supp. 119.

3. De Meli v. De Meli, 120 N. Y. 485.

4. Toosey v. Toosey, 14 Daly, 537, 3 N. Y. Supp. 951.

conduct.⁵ Mere general allegations characterizing the relations between the parties, are insufficient.⁶ The requirement may open the door to the pleading of evidentiary or redundant matter to a greater extent than in other actions.⁷ Allegations of fraud and deceit may be material on the question of defendant's improper conduct and alimony, and do not make the complaint defective as stating more than one cause of action.⁸ It is proper to allege acts of misconduct and violence by the wife toward his children, visitors and servants.⁹ But charges of adultery on the part of defendant generally have no place in a complaint which prays for a separation, and will be stricken out on motion.¹⁰ Where the allegations in the complaint charged the defendant with scandalous, licentious and indecent conduct with other women than the plaintiff, it has been held such allegations may be stricken out as immaterial.¹¹

Although the acts constituting cruel and inhuman treatment must be specified in a complaint for separation, particulars will not be ordered where the defendant, in a defense to an action for divorce, has alleged acts upon which she bases her charge of cruel and inhuman treatment with reasonable certainty within the information which she possesses.¹²

Where, in an action by a wife against her husband for separation on the ground of abandonment a copy of the decision in a prior action for abandonment, brought by her against her husband is annexed to and made a part of the complaint, and according to the findings in such decision the plaintiff abandoned the defendant voluntarily, without cause, and with the intention not to return, she having acquiesced in such finding, is bound thereby.¹³

3. Amendment of complaint.

Where a complaint in an action for separation fails to show that the court has jurisdiction by omitting to allege that the marriage was performed in this State, the court may allow the defect to be cured by amendment. Such an amendment

5. See *Mossa v. Mossa*, 123 App. Div. 400, 107 N. Y. Supp. 1044; *Otton v. Otton*, 196 App. Div. 403, 188 N. Y. Supp. 255; *Rebstock v. Rebstock*, 144 N. Y. Supp. 289.

6. *Otton v. Otton*, 196 App. Div. 403, 188 N. Y. Supp. 255.

7. *Zimmerman v. Zimmerman*, 2 Bradb. 66.

8. *Hodecker v. Hodecker*, 20 Misc.

641, 46 N. Y. Supp. 1073; *aff'd*, 25 App. Div. 632, 50 N. Y. Supp. 1128.

9. *Perry v. Perry*, 1 Barb. Ch. 516.

10. *Allen v. Allen*, 19 Wkly. Dig. 219.

11. *Klein v. Klein*, 42 How. Pr. 166.

12. *Geimer v. Geimer*, 161 N. Y. Supp. 415.

13. *Silberstein v. Silberstein*, 156 App. Div. 689, 141 N. Y. Supp. 376.

merely corrects the defective pleading and does not bring the cause of action into being.¹⁴ But an order made seven years after action brought, which changes an action for separation into one for divorce, without personal service on defendant, though his whereabouts are known, is unauthorized.¹⁵

4. Supplemental complaint.

Although in an action for absolute divorce, the plaintiff is not permitted to serve a supplemental complaint setting up acts of adultery committed by the defendant after the commencement of the action, a wife who has brought an action to obtain a separation from her husband may be allowed to serve a supplemental complaint, alleging acts of cruelty and inhuman treatment subsequent to the commencement of the action. Such acts are not necessarily constituting a new and independent cause of action, but are in aid of the cause of action stated in the original complaint.¹⁶

5. Variance.

Acts of cruelty not alleged in the complaint will not ordinarily be considered on the trial of the action.¹⁷ In an action on the sole ground of cruel and inhuman treatment, a judgment cannot be supported by evidence of defendant's failure to properly provide for the plaintiff, received over defendant's objection.¹⁸

6. Form of complaint on ground of cruelty.

(Title of action.)

The complaint of the plaintiff herein respectfully shows to this court:

1. That on the day of, 19.., at, in the county of, and State of New York, the said plaintiff was married to the defendant.

2. That, at the time this action was commenced, the said plaintiff and defendant were and still are residents of this State. (*Or state such other jurisdictional facts as are required by section 1162 of the Civil Practice Act.*)

3. That since the said marriage the defendant has treated the plaintiff in a cruel and inhuman manner, and his conduct has been such as to render it improper and unsafe for her to cohabit with him, and, since the year, he has repeatedly committed acts of violence upon the plaintiff and her children, in particular, as follows:

14. *Dulso v. Dulso*, 170 App. Div. 67, 156 N. Y. Supp. 90.

15. *Robertson v. Robertson*, 9 Daly 44.

16. *Smith v. Smith*, 99 App. Div. 283, 90 N. Y. Supp. 927. See, also,

Cornwall v. Cornwall, 30 Hun, 573.

17. *Pollitzer v. Pollitzer*, 188 App. Div. 861, 177 N. Y. Supp. 516.

18. *Wirth v. Wirth*, 184 App. Div. 643, 172 N. Y. Supp. 309.

I. On or about the day of, 19.., at and also at her place of residence in the said city of, the defendant, without cause or provocation, falsely accused the plaintiff of soliciting the attention of men in an improper, lascivious and unchaste manner.

II. That on or about the day of 19.., the defendant, without cause or provocation, falsely accused the plaintiff of carnal intimacy with one, who is a relative of the plaintiff.

III. That on or about the day of, 19.., at the city of, aforesaid, the defendant, without cause or provocation, violently assaulted the plaintiff and threatened to kill her.

IV. (*Specify particularly, in successive paragraphs, the nature and circumstances of the defendant's misconduct, and set forth the time and place of each act complained of with reasonable certainty.*)

4. That since the marriage of the parties hereto, the plaintiff has given birth to the following children, who are now living with the plaintiff and who are the issue of said marriage, viz.: (*insert names and ages of children*); that the defendant herein is an unfit and improper person to have the care, custody, training and education of such children.

5. That as the plaintiff is informed and believes, the defendant is seized and possessed of real estate in the city of, county of, State of, of the value of dollars, and that he is possessed and is the owner of personal property at said city of the value of dollars; that the plaintiff has no means for her support and maintenance, but she and her children are now being supported by her father, with whom she resides.

WHEREFORE, The plaintiff demands judgment for a separation from the bed and board of the defendant, and that the custody of said children be awarded to the plaintiff, and that a reasonable provision for the support of the plaintiff and her children and for the training and education of said children be made out of the property of the said defendant, and for the costs of this action and such other and further relief as to the court may seem just and proper.

7. Form of complaint on ground of abandonment.

(Title of action.)

The complaint of the plaintiff herein respectfully shows to this court:

1. (*Allegation as to marriage.*)

2. (*Allegation as to residence of parties as required by section 1162 of Civil Practice Act.*)

3. That, although the said plaintiff has always conducted himself toward the defendant as a faithful and loving husband, the said defendant disregarded her duties as a wife, and on the day of, 19.., at which time the said plaintiff was seventy years old and in feeble condition of health and entirely alone, and without just cause or provocation, abandoned plaintiff and left and has been ever since willfully absent from the said plaintiff's bed and board, although the said plaintiff has repeatedly requested the said defendant to return.

4. That the issue of said marriage of the plaintiff and defendant are (*state names and dates of birth, and also allege as to the unfitness of defendant to have the care and custody of such children, if they are minors*).

WHEREFORE, The plaintiff demands judgment that a decree of separation may be made by this court ordering, directing and decreeing that said plaintiff and defendant live separate and apart forever (*and where the children are minors ask judgment for their care and custody*), besides the costs of this action, and such other and further relief as to this court may seem just and proper.

8. Another form of complaint for abandonment.

SUPREME COURT.

MAY WILLIAMS	} 130 N. Y. 193.
<i>agst.</i>	
CORNELIUS WILLIAMS.	

The plaintiff complaining of the defendant avers:

1. That on or about the 3d day of June, 1900, the plaintiff and defendant were married at the city of New York.

2. That the plaintiff is an inhabitant of the city and county of New York and that the defendant resides at St. Paul, in the State of Minnesota, but is at present sojourning in the State of New York.

3. That in or about the month of August, 1903, the defendant abandoned the plaintiff and refused to permit her to return to him, and still does so refuse.

4. That but one child was born to the plaintiff and defendant.

5. That said child is a boy and was born on the 5th day of April, 1902, and has always resided with the plaintiff herein and does still so reside.

6. That after the date of the abandonment aforesaid, August, 1903, and to and including the month of February, 1905, the defendant contributed toward the maintenance of the child of the parties hereto, but since said date has contributed nothing toward the support of the said child.

7. That since the date of the abandonment aforesaid, August, 1903, the defendant has utterly neglected and refused to provide for the plaintiff.

WHEREFORE, The plaintiff prays for a judgment separating the parties hereto from bed and board forever, and that the defendant may be compelled to provide suitably for the education and maintenance of the child of the marriage aforesaid, and for the support of the plaintiff, and that the custody of the child aforesaid may be awarded to the plaintiff, and for such other and further relief as the plaintiff may be entitled to in the premises, together with the costs of this action.

ELLIOTT AND S. SIDNEY SMITH,
Plaintiff's Attorneys.

G. Defenses.

1. Civil Practice Act, § 1163. Defense in action for separation.

The defendant in an action for separation from bed and board may set up, in justification, the misconduct of the plaintiff; and if that defence is established to the satisfaction of the court, the defendant is entitled to judgment.

2. Misconduct of plaintiff.

The plaintiff's misconduct, sufficient to entitle the defendant to relief, is a complete defense to the action,¹⁹ and may be set up in the answer.²⁰ Thus, adultery of the plaintiff will bar the action,²¹ although for jurisdictional reasons the court will not be able to give the defendant affirmative relief on the allegation of the plaintiff's adultery.²² The licentious conduct of the wife, before the alleged acts of cruel treatment, will bar her claim for maintenance.²³ The defendant's misconduct is a defense, although it is not the cause of cruelty complained of,²⁴ and although it occurred subsequent to the acts of cruelty charged in the complaint.²⁵ The fact that the wife, in an action for divorce brought by the husband on account of such adultery, has successfully interposed the defense that the husband had been guilty of like misconduct does not change the rule. That the court refused to give the husband relief in that action is not inconsistent with his right to urge the same wrongful act as a defense in the separation action by the wife. In the separation action the right of action is based upon and limited by the statutory provision.²⁶ And, although adultery is not established, the defendant may justify his conduct by reason of the misconduct of the plaintiff.²⁷

Where a wife brings action against her husband for separation upon the ground that it is unsafe and improper for her to cohabit with him, and after denying the charges he

19. *Doe v. Roe*, 23 Hun, 19; *Palmer v. Palmer*, 1 Sheld. 89.

20. *Hopper v. Hopper*, 11 Paige, 46.

Early rule.—Early decisions can be found which hold that the plaintiff's adultery is not a defense to an action for separation based on cruelty. *Henry v. Henry*, 17 Abb. Pr. 411; *McIntosh v. McIntosh*, 12 How. Pr. 289.

21. *Hawkins v. Hawkins*, 193 N. Y. 409; *Olenick v. Olenick*, 185 App. Div. 609, 174 N. Y. Supp. 140; *Crouch v. Crouch*, 193 App. Div. 221, 183 N. Y.

Supp. 657; *Doe v. Roe*, 23 Hun, 19.

22. *Crouch v. Crouch*, 193 App. Div. 221, 183 N. Y. Supp. 657.

23. *Bedell v. Bedell*, 1 Johns. Ch. 604.

24. *Hopper v. Hopper*, 11 Paige, 46; *Doe v. Roe*, 23 Hun, 19.

25. *Powers v. Powers*, 84 App. Div. 588, 82 N. Y. Supp. 1022.

26. *Hawkins v. Hawkins*, 193 N. Y. 409.

27. *Deisler v. Deisler*, 59 App. Div. 207, 69 N. Y. Supp. 326.

recriminates by alleging the plaintiff's adultery as a counter-claim, and the court finds both parties at fault, it is proper to dismiss the complaint.²⁸

3. Necessity of pleading defenses in answer.

If the husband wishes to show misconduct on the part of the plaintiff, or condonation of his offenses, he must set up these defenses in his answer.²⁹

4. Supplemental answer.

The defendant in an action for a separation on the ground of cruel and inhuman treatment may be allowed to serve a supplemental answer alleging acts of adultery committed by plaintiff prior to and since the commencement of the action.³⁰

5. Statute of limitations or laches.

Under section 53 of the Civil Practice Act, an action for a separation must be commenced within ten years after the cause of action accrues.³¹

6. Validity of marriage.

A marriage between the parties is essential to an action of separation.³² A decree of separation must be founded upon a marriage that is valid under the laws of the country where it is celebrated.³³ Where parties who were married under a belief that the wife's first husband, who had been absent five years, was dead, agree, upon learning of his subsequent death, to continue to live together in the marriage relation and do so continue for a number of years, a valid, though non-ceremonial, marriage is established which entitles the wife to maintain an action for separation on the ground of abandonment.³⁴ An answer which denies knowledge or information sufficient to form a belief as to the marriage, cannot be

28. *Kamman v. Kamman*, 167 App. Div. 423, 152 N. Y. Supp. 579.

29. *Roe v. Roe*, 14 Hun, 612.

30. *Ames v. Ames*, 109 Misc. 161, 178 N. Y. Supp. 177.

31. *Sturm v. Sturm*, 80 Misc. 277, 141 N. Y. Supp. 61. Compare *Burr v. Burr*, 20 Paige, 20; aff'd, 7 Hill, 207.

32. *Dietrich v. Dietrich*, 128 App. Div. 564, 112 N. Y. Supp. 968.

33. *Kresh v. Kresh*, 58 Misc. 461, 111 N. Y. Supp. 437.

Negating exceptions.—An answer averring that at the time of the marriage "the plaintiff was a married woman, the wife of one A., then living, from whom she had never been divorced, which facts were unknown to the defendant," is sufficient; it need not negative the exceptions in the statute. *Clark v. Clark*, 5 Hun, 340.

34. *Taylor v. Taylor*, 25 Misc. 566, 55 N. Y. Supp. 1052, 28 Civ. Pro. 323; aff'd, 68 App. Div. 638, 74 N. Y. Supp. 1148.

stricken out as frivolous where it appears by affidavit that defendant knows of no such marriage, and that if ever entered into it was at a time when he was either drugged or so intoxicated as to be unable to understand that he was contracting a marital relation.³⁵

But, if the marriage is merely voidable and not void, it does not constitute a defense to an action of separation.³⁶

In an action for a separation, where defendant sets up as a separate defense but not as a counterclaim that at the time of the marriage of the parties the plaintiff had a husband living and that her marriage with him was then in force, the court cannot grant a judgment annulling the marriage of the parties.³⁷

A reply in an action for divorce which impeaches a previous divorce set up in the answer as void for collusion and want of jurisdiction is not so obviously insufficient as to authorize the granting of judgment thereon as frivolous.³⁸

7. Condonation.

The forgiveness by the plaintiff of the acts set forth in the complaint is a defense to the action. Voluntary cohabitation will bar a suit for a limited divorce on the ground of cruelty.³⁹ But condonation of an offense is always subject to the condition that the husband will thereafter treat the wife with conjugal kindness.⁴⁰ And the cruelty of the husband which has been condoned will be revived by subsequent acts of cruelty, although the latter acts may not be of themselves sufficient to justify a decree of separation.⁴¹

Evidence of cruelty which has been subsequently given, is admissible in an action for separation for subsequent cruelty as showing the character of the subsequent acts, and that they arose from a permanent mode of acting. Cohabitation is not of itself condonation of previous acts of cruelty.⁴²

35. *Allen v. Allen*, 125 App. Div. 838, 110 N. Y. Supp. 303.

36. *Ostro v. Ostro*, 169 App. Div. 790, 155 N. Y. Supp. 681.

37. *Johannessen v. Johannessen*, 70 Misc. 361, 128 N. Y. Supp. 892.

38. *Lloyd v. Ballantine*, 20 Misc. 141, 45 N. Y. Supp. 809.

39. *Davies v. Davies*, 55 Barb. 130.

40. *Atherton v. Atherton*, 82 Hun, 179, 31 N. Y. Supp. 977; aff'd, 155 N. Y. 129; rev'd on other grounds,

181 U. S. 155.

41. *Straus v. Straus*, 67 Hun, 491, 50 St. Rep. 845, 22 N. Y. Supp. 567; *Atherton v. Atherton*, 82 Hun, 179, 31 N. Y. Supp. 977; aff'd, 155 N. Y. 129; rev'd on other grounds, 181 U. S. 155; *Burr v. Burr*, 10 Paige, 20; aff'd, 7 Hill, 207; *Whispell v. Whispell*, 4 Barb. 217.

42. *Doe v. Doe*, 5 N. Y. Supp. 514; s. c., 24 St. Rep. 364, 52 Hun, 405.

An offer to return and cohabit made under an order of the court, or which is not accepted, or made upon conditions not accepted, is no condonation of the husband's cruelty and abandonment.⁴³

H. Trial by jury.

The provisions of the Civil Practice Act relating to the jury trial of issues in matrimonial actions refer to actions brought for the annulment of a marriage, or for an absolute divorce, and do not apply to an action for separation, and a party is not entitled as a matter of right, to have the issues of fact in an action for a separation tried by jury, although the validity of the marriage is involved.⁴⁴ Where a husband, sued for a separation on the ground of cruel and inhuman treatment, alleges the adultery of the plaintiff, not as a counterclaim for absolute divorce as affirmative relief, but merely as a defense to the action for separation, he is not entitled to a jury trial on the issue of adultery.⁴⁵ Where, in an action for separation, defendant counterclaims for an absolute divorce and his motion for a preference on the calendar as matter of right is granted, plaintiff's request that the trial be deferred until a day certain is not a waiver of her right to have the issues raised by the counterclaim and her reply thereto framed for a jury trial.⁴⁶

ARTICLE IV.

RESIDENCE OF WIFE IN DIVORCE OR SEPARATION.

A. Civil Practice Act, § 1166. Residence of married women in action for divorce or separation.

If a married woman dwells within the State when she commences an action against her husband for divorce or separation, she is deemed a resident thereof, although her husband resides elsewhere.

43. Betz v. Betz, 19 Abb. Pr. 90.

44. Packard v. Packard, 88 App. Div. 339, 84 N. Y. Supp. 1090.

Preference.—A preference given by subdivision 18 of section 138 of the Civil Practice Act, to actions for divorce does not apply to an action for separation as the distinction between actions for divorce and actions for separation is preserved consistently in the Code, showing that the ancient distinction between divorce *a vinculo* and divorce *a mensa et thoro* was kept in

mind. The words "separation from bed and board" are the substantial equivalent of the ancient divorce *a mensa et thoro* sometimes designated a limited divorce in contradistinction from divorce *a vinculo*, otherwise denominated an absolute divorce. Seligman v. Seligman, 52 App. Div. 9, 100 N. Y. Supp. 770.

45. Wise v. Wise, 159 App. Div. 575, 144 N. Y. Supp. 649.

46. Haff v. Haff, 64 Misc. 122, 118 N. Y. Supp. 52.

B. Effect of statute.

The domicile of the husband is *prima facie* that of the wife; but she may acquire a separate domicile wherever it is necessary for her to do so, as where the parties are living apart under a judicial decree of separation, or where the conduct of the husband has been such as to entitle her to a divorce, absolute or limited.⁴⁷ Although, *prima facie*, the domicile of the wife is the same as that of the husband, the law recognizes an exception to the rule where the husband begins an action to dissolve the marriage contract. In such case the theoretical identity of person and interest ceases to exist, and the jurisdiction of the court depends upon the actual existing facts.⁴⁸ The rule is now well established that a wife may acquire a domicile separate from that of her husband, whenever it is necessary for her to do so; and, when they have agreed to live apart, the wife's domicile cannot be drawn to that of her husband without her consent.⁴⁹ A married woman may have a domicile in a jurisdiction other than that of her husband when the conduct of the husband has been such as to entitle the wife to an absolute or limited divorce. She may acquire a separate domicile whenever it is necessary for her to do so, but the right to do so springs from the necessity of its exercise.⁵⁰ The domicile of a wife does not follow that of a husband where his conduct has been such as to entitle her to an absolute divorce and she comes to or remains in this State and begins an action for divorce.⁵¹ The domicile of the husband is, *prima facie*, that of the wife; but if separated by a decree of a competent court, and the wife remains in the same place, that presumption is rebutted.⁵² A denial in the answer of the allegation in the complaint, that the plaintiff was a resident of the State, does not take from the court the power to make allowances. It is an issue in the cause.⁵³

47. *Hunt v. Hunt*, 72 N. Y. 217.

48. *Mellen v. Mellen*, 10 Abb. N. C. 333.

49. *Round v. Van Inwegen*, 9 Civ. Pro. 328.

50. *Atherton v. Atherton*, 82 Hun, 179, 31 N. Y. Supp. 977; *aff'd*, 155 N. Y. 129; *rev'd* on other grounds, 181

U. S. 155.

51. *Gebhard v. Gebhard*, 25 Misc. 1, 54 N. Y. Supp. 406.

52. *Vischer v. Vischer*, 12 Barb. 640; *Glinsmann v. Glinsmann*, 12 How. Pr. 32.

53. *Brinkley v. Brinkley*, 50 N. Y. 184.

ARTICLE V.**PROCESS AND SERVICE THEREOF.****A. Civil Practice Act, § 1167. Notice of nature of matrimonial action when required and proof thereof.**

In an action to annul a marriage or for divorce or for separation, a judgment shall not be rendered in favor of the plaintiff upon the defendant's default in appearing or pleading, unless either the summons and a copy of the complaint were personally served upon the defendant, or the copy of the summons delivered to the defendant, upon personal service of the summons, or delivered to him without the State, or published, pursuant to an order for that purpose, contains the following words, or words to the same effect, legibly written or printed upon the face thereof, to wit: "Action to annul a marriage;" "Action for a divorce;" or "Action for a separation;" as the case may be.

B. Rules of Civil Practice, Rule 47. Notice with summons in matrimonial actions.

In an action to annul a marriage or for a divorce or for separation, if the complaint be not personally served with the summons, the summons shall have legibly written or printed on the face thereof, the words: "Action to annul a marriage", "Action for a divorce", "Action for a separation", as the case may be.

C. Rules of Civil Practice, Rule 53, subs. 9, 10. Affidavit of service.

9. In matrimonial actions, the affidavit, in addition to the above requirements, shall state what knowledge the affiant had of the identity of the person served with the defendant named and how he acquired such knowledge. The court may require the affiant to appear in court and be examined in respect thereto and, when service has been made by the sheriff, the court may require the officer who made the service to appear and be examined in like manner, and must require him so to appear unless there shall be presented with the certificate of service the affidavit of such officer that he knew the person served to be the same person named as defendant in the summons and shall also state the source of his knowledge.

10. In matrimonial actions, if the summons be personally served, but a copy of the complaint be not served therewith or if a copy of the summons and a copy of the complaint be delivered to the defendant without the State, the certificate or affidavit proving service shall state affirmatively in the body thereof that the required notice was written or printed on the face of the copy of the summons delivered to the defendant.

D. Indorsement on summons.

Where the summons and complaint in a matrimonial action in this State are personally served upon the defendant therein final judgment on default may be entered if the proof is otherwise sufficient, whether or not the inscription provided for in other cases appears upon the face of the summons. Where the attention of the court was called to the fact that the sum-

mons filed with the complaint in the clerk's office did not bear the inscription "Action for a divorce" in conformity with the rules and practice, an order made and entered permitting plaintiff to discontinue the action without prejudice to a new one will be vacated and the case restored to the calendar where the proof of service shows that defendant was personally and duly served with the summons and complaint together.⁵⁴

The intention of the legislature in providing that the summons in an action should have upon the face thereof the words "action to annul a marriage," "action for a divorce" or "action for a separation," where the action is brought for any one of these three causes and a copy of the complaint is not served with the summons, was to prevent fraud and imposition upon parties and by parties upon the court; whenever this purpose is accomplished and the court can see in a given case that what was designed has been done, it should, if possible, give effect to the action even though the form be transgressed, if the substance remain intact. Where in an action for separation the summons is indorsed by the words "action for divorce," the words were equivalent to the words "action for a separation."⁵⁵

The omission to indorse on the summons, in an action for divorce served without the complaint, what the action is brought for, does not render the summons a nullity, but may be cured by amendment.⁵⁶

E. Sufficiency of service.

The service of the summons must be such as fairly to advise the defendant of the commencement of the action, otherwise it will be regarded as a fraudulent or unfair use of the process of the court, and judgment on such service will be set aside on motion.⁵⁷ But where there is a voluntary general appearance, either in person or by attorney, it is equivalent to personal service of process.⁵⁸ Where, in a divorce action the summons and complaint were not legally served, but defendant appears by attorney and answers, the court has jurisdiction. The provision of Rule 281 of the Rules of Civil Practice that in a divorce action the court shall not

54. *Braham v. Braham*, 91 Misc. 151, 154 N. Y. Supp. 1044.

55. *Rudolph v. Rudolph*, 19 Civ. Pro. 424, 34 St. Rep. 1, 12 N. Y. Supp. 81.

56. *Sears v. Sears*, 9 Civ. Pro. 432.

57. *Bulkley v. Bulkley*, 6 Abb. Pr. 307.

58. *Freeman v. Freeman*, 57 Misc. 400, 109 N. Y. Supp. 705; rev'd, 126 App. Div. 601, 110 N. Y. Supp. 686.

order a reference without proof, by affidavit, of service of the summons and complaint, and that notice of appearance and retainer shall not be sufficient to excuse such proof, only applies to cases of default and the plaintiff is not confined to proof by affidavit to show jurisdiction of the defendant.⁵⁹

F. Substituted service.

Service by publication is authorized by section 232 of the Civil Practice Act, in an action where the complaint demands judgment annulling a marriage, or for a divorce, or a separation.⁶⁰ But sections 230 and 231 relative to service other than personal service in certain cases have no application to an action of divorce.⁶¹ No jurisdiction is acquired by personal service of the process of a court, on persons residing out of a State, unless such service is expressly authorized by statute.⁶² Where a judgment has been rendered in the State of New York annulling a marriage, the courts of such State may entertain a suit to set it aside on the ground of fraud, and a summons therein may be served by publication upon the non-resident husband.⁶³

The courts of this State do not recognize the binding force of a foreign decree of divorce, where the process is served by publication, and the decree is not rendered in the State which is the matrimonial domicile of the parties.⁶⁴ To be consistent, the courts in this State should not direct a service by publication when this State is not the matrimonial domicile of the parties.⁶⁵

G. Affidavit of service.

In some districts it is the invariable practice for the court to require the person who serves a complaint in a matrimonial action to appear in court and be examined in respect to his knowledge as to the identity of the defendant, so that the court may have assurance that the service has been properly made by one having knowledge of the parties. The facts to be stated in an affidavit of the service of a complaint in a matrimonial action must not be hearsay or statements, or declarations of the person upon whom service is made,

59. *Freeman v. Freeman*, 126 App. Div. 601, 110 N. Y. Supp. 686.

60. *Brooks v. Brooks*, 190 App. Div. 564, 180 N. Y. Supp. 371.

61. *Purvis v. Purvis*, 167 App. Div. 717, 153 N. Y. Supp. 269; *Maiello v. Maiello*, 42 Misc. 266, 86 N. Y. Supp. 543.

62. *Burton v. Burton*, 45 Hun, 68.

63. *Everett v. Everett*, 22 App. Div. 473, 47 N. Y. Supp. 994.

64. See Art. XVIII, Foreign divorces.

65. See *Dixon v. Dixon*, 107 Misc. 666, 177 N. Y. Supp. 63.

but there must be a statement of facts from which the court may say that the affiant knows the person served to be the husband or the wife of the plaintiff.⁶⁶

Where the brother of the plaintiff served the summons in action for absolute divorce upon the defendant wife, although he swore in his affidavit of service that he was the brother of plaintiff and knew the defendant very well because of the close relation to the plaintiff, it was said that he should have been called as a witness and examined on the subject.⁶⁷

Where the defendant is identified only through her photograph, the evidence should be clear and conclusive that the exhibit is her photograph.⁶⁸ Where the server of a summons identified defendant from a photograph, and the person served admitted his name to be the same as defendant's and the server was told by a third person who was present at the service that the person served was defendant, the identification may be insufficient.⁶⁹

H. Form of summons.

STATE OF NEW YORK — SUPREME COURT, COUNTY OF:

<p>....., PLAINTIFF,</p> <p style="text-align: center;"><i>agst.</i></p> <p>....., DEFENDANT.</p>	}	<p>(“<i>Action for a Divorce</i>” or “<i>Action to Annul a Marriage</i>” or “<i>Action for a Separation</i>” as the case may be.)</p>
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To the Above-named Defendant:

YOU ARE HEREBY SUMMONED to answer the complaint in this action, and to serve a copy of your answer or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Trial desired in the county of

Dated,

.....
Plaintiff's Attorney.

Office and Post Office Address,

<p>66. Freeman v. Freeman, 57 Misc. 400, 109 N. Y. Supp. 705; rev'd, 126 App. Div. 601, 110 N. Y. Supp. 686.</p> <p>67. Fawcett v. Fawcett, 29 Misc. 673, 61 N. Y. Supp. 108.</p>	<p>68. Rowe v. Rowe, 24 Misc. 113, 52 N. Y. Supp. 418.</p> <p>69. Randall v. Randall, 29 Misc. 423, 60 N. Y. Supp. 718.</p>
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I. Affidavit of personal service.

(Title.)

(Venue.)

....., being duly sworn, deposes and says: That he is a resident of the city of, county of, State of New York, and is, and that on the day of, he personally served the annexed summons on, the above-named defendant, at (*stating place where service was made, describing it with some particularity*), by delivering to and leaving with him a copy of said summons; that at the time of such service deponent was more than twenty-one years of age:

That there was written (*or printed*) upon the face of the copy of the summons so delivered to the above-named defendant the inscription, "Action for a divorce" (*or "Action to annul a marriage" or "Action for a separation," as the case may be*);

That he knew the person so served to be the person mentioned and described in such summons as the defendant herein; that his knowledge that the person so served was the defendant and the proper person to be served is derived from his personal acquaintance with the said defendant for a period of years, and from the fact that he has known that the plaintiff and the defendant herein resided together as husband and wife for a period of years at street, in the city of (*or village*) of, N. Y. (*Or state such other facts known to deponent as will show that deponent knew personally the defendant served by him. Where deponent did not know personally the defendant so served, he must state in detail the method used by him in ascertaining the identity of the defendant.*)

Subscribed and sworn to before me }
 this day of, 19.. }

.....

.....

ARTICLE VI.**COUNTERCLAIMS.****A. Civil Practice Act, § 1168. Counterclaim in action for divorce or separation.**

Where an action for divorce or separation is brought by either husband or wife, a cause of action for divorce or separation against the plaintiff and in favor of the defendant may be interposed in connection with a denial of the material allegations of the complaint, as a counterclaim.

B. Right of counterclaim in general.

In an action for divorce, the adultery of the plaintiff is a defense;⁷⁰ and in an action of separation, the misconduct of the plaintiff is a defense.⁷¹ Moreover, by virtue of section 1168 of the Civil Practice Act, such matters may be pleaded

⁷⁰ See *supra*, Art. II-C-9, Plaintiff guilty of adultery.

⁷¹ See *supra*, Art. III-C-2, Misconduct of plaintiff.

as a counterclaim, in an action either of divorce or separation, and affirmative relief may be granted to the defendant.⁷² The defendant may set up as a counterclaim causes of action both for a divorce and for a separation.⁷³

Before the enactment of the statute permitting the counterclaim it was held, that, in an action for divorce, the defendant could not set up a counterclaim asking for a separation,⁷⁴ and that, in an action for a separation, the adultery of the plaintiff could not be made a counterclaim.⁷⁵

In an action for divorce, affirmative relief can be granted only when the plaintiff's case is proved, for, if both parties are guilty of adultery, the courts grant a divorce to neither.

It is not obligatory that the defendant in an action for divorce interpose a counterclaim which he or she may have for divorce in the same suit; but he or she may maintain a separate action against the other party for divorce.⁷⁶

In an action for a divorce, if it is found that the adultery of the plaintiff was committed by the procurement or connivance of the plaintiff, the defendant may be entitled to a judgment on a counterclaim for a divorce or separation.⁷⁷

In an action by a husband for an absolute divorce, where the wife interposes a counterclaim for a separation on the ground of abandonment, a jury having found against the plaintiff on the question of defendant's alleged adultery, he may not to justify his abandonment introduce proof of conduct on the part of defendant after plaintiff's abandonment which he proved before the jury to establish his allegations of defendant's adultery.⁷⁸

Abandonment by the wife is not available as a counterclaim, where such abandonment was caused by the husband's misconduct.⁷⁹ Where a husband sues for divorce on the ground of adultery, and the wife sets up abandonment which

⁷² *Waltermire v. Waltermire*, 110 N. Y. 183; *DeMeli v. DeMeli*, 120 N. Y. 485; *Jayne v. Jayne*, 5 Misc. 307, 25 N. Y. Supp. 810; *Mason v. Mason*, 46 Misc. 361, 94 N. Y. Supp. 868; *McNamara v. McNamara*, 9 Abb. Pr. 18; *Van Benthuyssen v. Van Benthuyssen*, 15 Civ. Pro. 234, 17 St. Rep. 978, 2 N. Y. Supp. 238; *Finn v. Finn*, 62 How. Pr. 83.

⁷³ *Spahn v. Spahn*, 12 Abb. N. C. 169. See, also, *Conrad v. Conrad*, 56 Misc. 376, 107 N. Y. Supp. 655; *aff'd*, 124 App. Div. 780, 109 N. Y. Supp. 387.

⁷⁴ *Diddell v. Diddell*, 3 Abb. Pr. 167; *Griffin v. Griffin*, 23 How. Pr. 183; *Linden v. Linden*, 36 Barb. 61.

⁷⁵ *Henry v. Henry*, 17 Abb. Pr. 411; *Terhune v. Terhune*, 40 How. Pr. 258.

⁷⁶ *Davis v. Davis*, 150 N. Y. Supp. 636.

⁷⁷ *Armstrong v. Armstrong*, 45 Misc. 260, 92 N. Y. Supp. 165; *Bleck v. Bleck*, 27 Hun, 296.

⁷⁸ *Garcia v. Garcia*, 60 Misc. 198, 111 N. Y. Supp. 1017.

⁷⁹ *Fitzpatrick v. Fitzpatrick*, 21 Misc. 378, 47 N. Y. Supp. 737.

the husband in his reply admits, and a jury finds in favor of the defendant on the issue of adultery, she is entitled to a decree of separation for the abandonment.⁸⁰

Where in an action for absolute divorce the court finds against the plaintiff on the issue of the defendant's adultery and thereupon proceeds to try a counterclaim for separation, to which the plaintiff replied by general denial with allegations of the defendant's adultery, the procedure at trial is the same as if there had been a separate action upon the subject-matter with the parties transposed.⁸¹

C. Annulment.

The counterclaim authorized by section 1168 is by implication confined to an action for a divorce or separation and is limited to counterclaims for such relief.⁸² It does not authorize a counterclaim in an action for the annulment of a marriage; nor does it justify a counterclaim for annulment in an action for a divorce or a separation.⁸³

In an action for a separation, a counterclaim by the defendant to annul his marriage to the plaintiff on the ground of his own physical incapacity may not be interposed.⁸⁴ In an action of separation, where the plaintiff fails to prove the cruelty alleged, and the referee finds, under the pleadings, that a former husband of the plaintiff was living at the time of her marriage with defendant, this is not sufficient ground to declare the last marriage void.⁸⁵ In an action brought by a wife against her husband to obtain a separation, the husband is not entitled to set up as a counterclaim that the marriage was procured by fraud and duress, practiced upon him by his wife.⁸⁶ A defendant husband sued for separation is not entitled to examine a witness before trial *de bene esse* for the purpose of preserving testimony that the plaintiff prior to her marriage had fraudulently stated that she was a person of good moral character while as a matter of fact she maintained meretricious relations with another person.⁸⁷

80. *Israel v. Israel*, 38 Misc. 335, 77 N. Y. Supp. 912.

81. *Barila v. Barila*, 153 App. Div. 238, 137 N. Y. Supp. 1038.

82. *Levey v. Levey*, 148 N. Y. Supp. 417.

83. *Durham v. Durham*, 99 App. Div. 450, 91 N. Y. Supp. 295, 44 Civ. Pro. 141; *Murphy v. Murphy*, 194 App. Div. 395, 185 N. Y. Supp. 536; *Taylor v. Taylor*, 25 Misc. 566, 55

N. Y. Supp. 1052; *aff'd*, 68 App. Div. 638, 74 N. Y. Supp. 1148; *Slocum v. Slocum*, 37 Misc. 143, 74 N. Y. Supp. 447.

84. *Levey v. Levey*, 148 N. Y. Supp. 417.

85. *Linden v. Linden*, 36 Barb. 61.

86. *Durham v. Durham*, 99 App. Div. 450, 91 N. Y. Supp. 295.

87. *Gould v. Gould*, 125 App. Div. 375, 109 N. Y. Supp. 910.

In an action by a parent for the annulment of a child's marriage, a counterclaim for divorce cannot be interposed.⁸⁸

The invalidity of the marriage may, however, be set up as a defense to an action of separation or divorce, as a valid marriage is a prerequisite to the plaintiff's right to maintain the action.⁸⁹ But, if the defendant desires affirmative relief for annulment, he must maintain a separate action, and the action of the plaintiff for a divorce or separation may be stayed until the decision of the issues in the action of annulment.⁹⁰

D. Jurisdiction.

The adultery of a plaintiff may be alleged as a defense to an action for divorce, but, if the defendant seeks to interpose the misconduct as a counterclaim and seeks affirmative relief, it must appear that the court has jurisdiction of counterclaim. The defendant to procure affirmative relief must bring his case within the provisions of section 1147 of the Civil Practice Act.⁹¹

E. Pleading and evidence.

An answer must state times, names and places where adultery was committed, as in a complaint where affirmative relief is asked.⁹² And, where recriminating charges are made in an action of divorce, the same evidence is required to sustain them as in an original action.⁹³ In order that plaintiff's adultery may be successfully interposed as a defence, it must be properly pleaded and supported by no less evidence than would be required to establish the charge if made by defendant as the basis of an action against plaintiff for divorce.⁹⁴

A counter-charge of adultery constitutes a counterclaim which requires a reply.⁹⁵

In an action for divorce it is not a fatal objection that the answer did not in express terms, define as a counterclaim the matter set up as such.⁹⁶

88. *Slocum v. Slocum*, 37 Misc. 143, 74 N. Y. Supp. 447.

89. *Durham v. Durham*, 99 App. Div. 450, 91 N. Y. Supp. 295.

90. *Murphy v. Murphy*, 194 App. Div. 395, 185 N. Y. Supp. 536.

91. *Crouch v. Crouch*, 193 App. Div. 221, 183 N. Y. Supp. 657. Compare *Leseuer v. Leseuer*, 31 Barb. 330; *Fullmer v. Fullmer*, 6 Wkly. Dig. 22, 42.

92. *Tim v. Tim*, 47 How. Pr. 253; *Morrell v. Morrell*, 3 Barb. 236; *Mitchell v. Mitchell*, 61 N. Y. 398.

93. *Pollock v. Pollock*, 71 N. Y. 137. *Contra*, *Peck v. Peck*, 44 Hun. 290.

94. *De Marco v. De Marco*, 116 App. Div. 304, 101 N. Y. Supp. 600.

95. *Leslie v. Leslie*, 11 Abb. Pr. (N. S.) 311.

96. *Mason v. Mason*, 46 Misc. 361, 94 N. Y. Supp. 868.

ARTICLE VII.

EVIDENCE.

A. Proof of marriage.

1. In general.

Marriage, so far as its validity in law is concerned, is a civil contract, to which the consent of parties capable in law of making a contract is essential.⁹⁷ The relation of husband and wife rests upon mutual consent.⁹⁸ Cohabitation does not constitute marriage; it is merely evidence of it.⁹⁹ The birth of children may occur without matrimonial cohabitation.¹

An interchange of a mutual present consent by words between the parties in the presence of one who at least held himself out as a minister and performed a marriage ceremony, followed by cohabitation as man and wife for one or two months, is a valid marriage.² An agreement to marry followed by cohabitation makes a valid marriage.³

When the nature of the case admits of no better evidence, a marriage may be proved by hearsay. Such evidence is not conclusive, but is admissible.⁴ In order to make evidence that the alleged husband or wife was reputed to be unmarried admissible, it must be shown that the repute was among persons who knew of the existing cohabitation.⁵ The entry in a register by a person whose duty or authority it is to keep such register, is admissible at common law to prove marriage but not in a case where the keeping of such register was merely optional.⁶

2. Validity of common-law marriages.

Marriages based on the agreement of the parties to cohabit as husband and wife, not resting on a formal solemnization, and known as common-law marriages have always been recognized as valid in this State, except for the period from 1902 to 1907 when they were prohibited by statute.⁷ Where

97. Domestic Relations Law, § 10.

98. *Bollerman v. Blake*, 24 Hun, 187.

99. *Bollerman v. Blake*, 24 Hun, 187; *aff'd*, 94 N. Y. 624.

1. *Bollerman v. Blake*, 24 Hun, 187; *aff'd*, 94 N. Y. 624.

2. *Herz v. Herz*, 34 Misc. 125, 103 St. Rep. 478, 69 N. Y. Supp. 478.

3. *Tracey v. Frey*, 95 App. Div. 579, 88 N. Y. Supp. 874.

4. *Chamberlain v. Chamberlain*, 71 N. Y. 423.

5. *Bartlett v. Misliner*, 28 Hun, 235; *Badger v. Badger*, 88 N. Y. 546.

6. *Maxwell v. Chapman*, 8 Barb. 579; *Jackson v. King*, 5 Cowen, 237; *Bradford v. Bradford*, 51 N. Y. 669.

7. *Herrmann v. Herrmann*, 98 N. Y. Supp. 654. See, also, *Kahn v. Kahn*, 60 Misc. 334, 113 N. Y. Supp. 256.

two parties, there being no legal impediment to the contract of a marriage between them, procure a marriage ceremony to be performed in the State of New Jersey, but fail to secure the proper license, and upon returning to this State cohabit as man and wife and mutually introduce each other as husband and wife to many people, a common-law marriage within this State is effected.⁸ Much stronger evidence will be required to prove a common-law marriage in the case of a loose and licentious woman than in the case of a chaste, delicate and refined woman.⁹

3. Proof of marriage from circumstances.

Proof of actual marriage is not necessary, but the marriage may be shown from cohabitation, reputation, acknowledgment of the parties, reception in the family and other circumstances. Matrimonial cohabitation, acts of recognition of the parties as husband and wife by friends, together with general reputation, will be sufficient to establish the fact of marriage.¹⁰ It is entirely competent to prove marriage by cohabitation, acknowledgment of the marriage by the parties themselves, reception of them as married by their relatives and friends and common reputation.¹¹

It is a sufficient actual marriage, to support an indictment for bigamy, that the parties agree to be husband and wife, and cohabit and recognize each other as such. It is immaterial whether a person who pretended to solemnize the contract was or was not a clergyman or magistrate, or whether either party was deceived by his false representation of that character.¹²

While an agreement between man and woman to assume the relation of husband and wife may be established by the fact of cohabitation and reputation among their friends and neighbors, and of recognition of each other as holding that relation, these facts of themselves do not constitute a marriage, but are simply evidence of it from which, if sufficiently strong, the courts are at liberty to infer that the cohabitation was the result of a previous agreement to become man and

8. *Davidson v. Ream*, 178 App. Div. 362, 164 N. Y. Supp. 1037.

9. *Bell v. Clark*, 45 Misc. 272, 92 N. Y. Supp. 163.

10. *Fenton v. Reed*, 4 Johns. 52; *Jackson v. Claw*, 18 Johns. 346; *Hicks v. Cochran*, 4 Edw. 107; *Clayton v.*

Wardell, 5 Barb. 214; *Matter of Taylor*, 9 Paige, 611.

11. *O'Gara v. Eisenlohr*, 33 N. Y. 296.

12. *Hayes v. People*, 25 N. Y. 390, 24 How. Pr. 452.

wife, and from that fact to infer further that a marriage actually existed between the parties.¹³

4. Cohabitation meretricious in origin.

Mere cohabitation under an agreement therefor does not establish a marriage.¹⁴ Concubinage cannot be transformed into matrimony by evidence which falls short of establishing the fact of an actual contract of marriage.¹⁵

B. Testimony of husband and wife.

1. Civil Practice Act, § 349. Testimony of husband and wife in action or proceeding.

A husband or wife is not competent to testify against the other, upon the trial of an action, or the hearing upon the merits of a special proceeding, founded upon an allegation of adultery, except to prove the marriage or disprove the allegation of adultery. However, if upon such trial or such hearing the party against whom the allegation of adultery is made produces evidence tending to prove any of the defenses thereto mentioned in section eleven hundred and fifty-three of this act, the other party is competent to testify in disproof of any such defense. A husband or wife shall not be compelled, or without consent of the other if living, allowed to disclose a confidential communication made by one to the other during marriage. In an action for criminal conversation, the plaintiff's wife is not a competent witness for the plaintiff, but she is a competent witness for the defendant, as to any matter in controversy; except that she cannot, without the plaintiff's consent, disclose any confidential communication had or made between herself and the plaintiff.

2. Common-law rule.

At common law the husband and wife were incompetent to testify for or against each other in actions of every kind.¹⁶ This disability was removed in 1867, but until 1887, a party was not allowed to testify in a divorce action, except to prove the marriage. In 1887, the statute was amended so as to permit a party to disprove the allegation of adultery.¹⁷

3. Extent of disqualification.

A husband or wife having knowledge of the adultery of the other party cannot testify to it on the trial of an action

13. *Matter of Brush*, 25 App. Div. 610, 49 N. Y. Supp. 803.

14. *Soper v. Halsey*, 85 Hun. 464, 66 St. Rep. 707, 33 N. Y. Supp. 105.

15. *Foster v. Hawley*, 8 Hun. 68.

Where a connection was meretricious in its origin, and it is doubtful whether the woman ever regarded herself as the wife, although the husband assumed the character of hus-

band and the woman that of wife, to the public, the conclusion may be reached that the marriage relation did not exist. *Harbeck v. Harbeck*, 102 N. Y. 714.

16. *Biers v. Biers*, 156 App. Div. 409, 142 N. Y. Supp. 128.

17. *Roe v. Roe*, 40 Super. Ct. 1; *Southwick v. Southwick*, 49 N. Y. 510.

for divorce.¹⁸ A wife's evidence in divorce pointing to her husband's adultery, is incompetent and will not be considered for any purpose, even if received without objection by the defendant.¹⁹ In a husband's action for an absolute divorce he is disqualified not only from testifying to the alleged acts of adultery by defendant, but also from testifying that he never made an admission that he condoned his wife's adultery.²⁰ A husband who admits the alleged marriage with the complainant is not a competent witness to prove the invalidity of the marriage by reason of a prior marriage on his part.²¹ And it has been held error to permit a wife to testify concerning her husband's property and income.²² And, as to matters which the husband is precluded from testifying to, he cannot put in an affidavit filed in opposition to a motion for alimony and counsel fees.²³ In an action for divorce a witness should not be allowed to testify to statements made to him by the plaintiff tending to establish the defendant's adultery. Such evidence is hearsay and is also incompetent under section 349.²⁴

4. Facts disproving adultery.

Since 1887 a party has been permitted to testify to matters disproving the allegation of adultery.²⁵ A wife sued for divorce is not confined to a mere denial of adultery, but may testify to facts and circumstances tending to explain her situation and to show a conspiracy against her.²⁶ Testimony by the defendant that the acts relied upon to show the adultery was performed by him with the privity, procurement, collusion and connivance of plaintiff so that she might secure a divorce, is admissible.²⁷ In an action for absolute divorce, in which counter-charges of adultery are made in the answer, testimony of the plaintiff which is competent upon

18. *Capes v. Capes*, 173 App. Div. 142, 149 N. Y. Supp. 367; *Colwell v. Colwell*, 14 App. Div. 80, 77 St. Rep. 439, 43 N. Y. Supp. 439.

19. *Fanning v. Fanning*, 20 N. Y. Supp. 849.

20. *Biers v. Biers*, 156 App. Div. 409, 142 N. Y. Supp. 128.

21. *Finn v. Finn*, 12 Hun, 339.

22. *Valentine v. Valentine*, 87 App. Div. 156, 84 N. Y. Supp. 37. On the authority of *Colwell v. Colwell*, 14 App. Div. 80, 43 N. Y. Supp. 439; *Dickinson v. Dickinson*, 63 Hun, 516,

18 N. Y. Supp. 485. See *Budd v. Budd*, 55 App. Div. 113, 67 N. Y. Supp. 43; *Reierson v. Reierson*, 32 App. Div. 62, 52 N. Y. Supp. 509.

23. *Stillman v. Stillman*, 115 Misc. 106, 187 N. Y. Supp. 383.

24. *Graham v. Graham*, 157 App. Div. 52, 141 N. Y. Supp. 766.

25. *DeMeli v. DeMeli*, 11 St. Rep. 291.

26. *O'Hara v. O'Hara*, 136 App. Div. 378, 120 N. Y. Supp. 982.

27. *Huntley v. Huntley*, 57 St. Rep. 287, 73 Hun, 261, 26 N. Y. Supp. 266.

the issues presented by the answer is admissible, although incompetent upon the charges made by the complaint.²⁸ Under section 349, a husband or wife is not competent to testify against the other on the trial of an action for a hearing on the merits of a special proceeding founded on the allegation of adultery, except to prove the marriage or to disprove the allegation of adultery, but a husband and his wife under this provision are witnesses, subject to the general rules of evidence, to give all material testimony to show that the allegation of adultery is untrue, and is not confined simply to denying such allegation.²⁹ Upon the trial of an action for divorce in which the defendant has interposed an answer setting up recriminatory charges against the plaintiff, it is not error to permit the plaintiff to testify to matters incompetent as to the issues presented upon the charges in the complaint, but which are competent upon the issues presented by the countercharges in the answer.³⁰

5. Evidence for other spouse.

Section 349 of the Civil Practice Act merely prohibits a party from testifying against the other party. A party may, however, testify in favor of the other party as to matters other than proof of the marriage and disproof of the adultery.³¹ A defending husband has the right to call the plaintiff as his witness and to prove any fact by her in support of his defense of collusion. She would not then be testifying "against" the defendant. The situation is similar to the one that would be created if the plaintiff called the defendant to prove her residence or to admit the adultery charged. Of course, such proof given by a defendant might not be sufficient to satisfy the court, or the defendant might refuse to testify as to the adultery on the ground of incrimination, but it seems plain that the proof otherwise would be admissible.³²

6. Non-access.

A husband, in his action for divorce, is incompetent to testify to non-access by reason of the absence of his wife

28. *McCarthy v. McCarthy*, 143 N. Y. 235.

29. *Irish v. Irish*, 12 Civ. Pro. 181; *Stevens v. Stevens*, 54 Hun, 490, 27 St. Rep. 602, 8 N. Y. Supp. 47; *Stefens v. Stefens*, 16 Daly, 363, 38 St. Rep. 643, 19 Civ. Pro. 267, 11 N. Y. Supp. 424.

30. *McCarthy v. McCarthy*, 143 N. Y. 235, 62 St. Rep. 184.

31. *Perweiler v. Perweiler*, 160 N. Y. Supp. 785; *Bailey v. Bailey*, 41 Hun, 424.

32. *Rosenwasser v. Rosenwasser*, 110 Misc. 38, 197 N. Y. Supp. 617.

from his home for more than the usual period of gestation immediately preceding the birth of a child.³³ A husband suing for divorce is not competent to show non-access by testifying that his wife left him in 1903 and that he did not see her again until 1905, in which year she returned to this State and a child was born to her, and he is not entitled to judgment on such proof, although the answer affirmatively alleges that the defendant obtained a divorce from the plaintiff in a foreign State and remarried there, the issue of adultery being raised by a general denial.³⁴

7. Annulment of marriage.

Although the restriction of section 349 of the Civil Practice Act does not apply to cases of annulment on the ground of fraud or duress, yet, where the plaintiff is the only witness in his behalf, and the defendant is in a distant country, where the ceremony, if any, was performed, the uncorroborated testimony of the plaintiff must be full and convincing.³⁵

8. Privileged communications.

In an action for separation upon the ground that the husband, being a physician, induced his wife to allow him to perform operations resulting in abortions by falsely stating that the abortions were necessary because of her inability to bear children, statements made by the husband to his wife whereby she was induced to believe that it would be dangerous for her to give birth to children are not privileged communications between husband and wife within section 349.³⁶

Defendant's declaration to plaintiff, then his young bride, on the second night after the marriage, that he did not love her, that he made a mistake in marrying her, considered as an act of cruelty and the beginning of a course of treatment, destined to destroy the happiness and to undermine her health, *held*, not a privileged communication, but admissible when testified to by the plaintiff, not as a declaration of the

33. *Timmann v. Timmann*, 142 N. Y. Supp. 298.

34. *Taylor v. Taylor*, 123 App. Div. 220, 108 N. Y. Supp. 428.

35. *Vazakas v. Vazakas*, 109 N. Y. Supp. 568.

36. *Sheldon v. Sheldon*, 146 App. Div. 430, 131 N. Y. Supp. 291.

Physician.—In an action for di-

vorice, a physician testified to certain circumstances and conversations tending to establish the fact of adultery, and stated that he derived his information from the defendant as a patient in professional confidence. *Held*, inadmissible. *Hunn v. Hunn*, 1 T. & C. 499; *Johnson v. Johnson*, 4 Paige, 468.

fact declared but as a fact in itself contributing to constitute plaintiff's cause of action for a limited divorce, for the conduct of the defendant, rendering it unsafe and improper for her to live with him.³⁷

Letters between the husband and wife may be confidential communications, and their contents may not be disclosed unless the privilege is waived. Such a letter will not be considered in opposition to the wife's application for alimony and counsel fees.³⁸

C. Evidence of adultery.

1. Other acts of defendant.

Evidence of lewd conduct with one person is not relevant to establish adultery with another.³⁹ Where the adultery is charged to have been with a certain person, the evidence must be confined to the offense charged.⁴⁰ But in an action brought to obtain an absolute divorce, evidence that the defendant committed adultery with the co-respondent prior to the period covered by the issue, is admissible for the purpose of showing an inclination and lascivious desire on the part of the defendant and the co-respondent, from which the jury may infer that on the subsequent occasions when the parties were together during the period covered by the issues, under circumstances affording an opportunity for the gratification of such inclination and desire, it is probable that they committed adultery.⁴¹ Evidence of the improper relations and conduct of the parties between whom adultery is charged anterior and subsequent to the time charged is competent to show an adulterous intent.⁴²

It is erroneous for the referee to admit evidence, upon the theory that it tended to show the intent with which the defendant visited a house of prostitution kept by the corespondent, tending to show that he had visited such a house kept by another woman and there committed adultery with her.⁴³

37. *Fowler v. Fowler*, 33 St. Rep. 746, 19 Civ. Pro. 282, 11 N. Y. Supp. 419.

38. *Stillman v. Stillman*, 115 Misc. 106, 187 N. Y. Supp. 383.

39. *Budd v. Budd*, 55 App. Div. 113, 67 N. Y. Supp. 43; *Beadleston v. Beadleston*, 2 N. Y. Supp. 809, 20 St. Rep. 21. See, also, *Stevens v. Stevens*, 8 N. Y. Supp. 47.

40. *Germond v. Germond*, 6 Johns. Ch. 347; *Bokel v. Bokel*, 3 Edw. 376; *Kane v. Kane*, 3 Edw. 389; *Klein v.*

Wolfsohn, 1 Abb. N. C. 134.

41. *Roth v. Roth*, 90 App. Div. 87, 85 N. Y. Supp. 640; *aff'd*, 183 N. Y. 520. See, also, *Paul v. Paul*, 11 St. Rep. 71.

42. *Smith v. Smith*, 37 St. Rep. 267, 13 N. Y. Supp. 817.

43. *Goldie v. Goldie*, 39 Misc. 389, 79 N. Y. Supp. 357. Compare *Carpenter v. Carpenter*, 30 St. Rep. 955, 9 N. Y. Supp. 583, distinguishing *Van Epps v. Van Epps*, 6 Barb. 320.

In a suit for divorce for adultery, evidence of cruelty, immediately connected with the adultery charged, may be admitted to show an alienation of the affections and as affording an inference of the adultery, but not as a foundation for a decree of separation.⁴⁴

Evidence that defendant, the wife, while intoxicated used indiscreet language, is inadmissible.^{44a}

Where an action for separation on the ground of cruel treatment is based on charges of adultery made by the husband, and the answer is a justification, the husband is entitled to a commission to take the testimony of non-resident witnesses as to the wife's misconduct with a person who is not named as co-respondent in the answer.⁴⁵

2. Reputation or character of co-respondent.

Testimony that one of the corespondents was a lewd woman more than a year after the alleged adultery, was properly excluded as not corroborative evidence, there being no presumption that the corespondent, a girl fifteen or sixteen years of age, was a lewd woman at the time of the alleged adultery, because she may have been such one or two years later.⁴⁶

3. Possession of salacious letters and photographs.

In an action for divorce a paper containing salacious verses alleged to be in the handwriting of the party proceeded against and found in her private writing desk is admissible in evidence.⁴⁷

But letters and photographs of a salacious character, found in the possession of the plaintiff, are not admissible in evidence against him to show that he would be likely to commit adultery. The evidence is remote and improper, and, therefore, to be excluded.⁴⁸

4. Acts of attorney.

Upon the trial of an action brought by a husband for an absolute divorce, it is erroneous to allow a witness called on his behalf to testify that the attorney for defendant had endeavored by unfair means to induce the witness to testify for the defendant and to impeach the testimony of other

44. *Muloch v. Muloch*, 1 Edw. Ch. 14.

44a. *Franey v. Franey*, 28 App. Div. 50, 50 N. Y. Supp. 918.

45. *Israel v. Israel*, 54 App. Div. 408, 66 N. Y. Supp. 777.

46. *Graham v. Graham*, 173 App. Div. 460, 159 N. Y. Supp. 918.

47. *Woodrick v. Woodrick*, 141 N. Y. 457, 57 St. Rep. 634.

48. *Yates v. Yates*, 211 N. Y. 163.

witnesses, where there is no proof that the defendant knew of or authorized the action of her attorney.⁴⁹ Where in an action for divorce, it is clearly proved that the plaintiff is entitled to a decree, it should not be refused merely because the plaintiff's attorney accompanied and assisted the witnesses who entered the defendant's house and discovered that he was living in open adultery.⁵⁰

5. Birth certificate.

Where the sole issue in an action for absolute divorce is the adultery of the defendant, it is error to admit in evidence from the records of the board of health a birth certificate, setting forth that the defendant and the correspondent were the parents of the child named therein.⁵¹

D. Sufficiency of evidence of adultery.

1. In general.

While an action for divorce is not a criminal action, and hence it is not necessary to prove the guilt of the defendant beyond a reasonable doubt,⁵² yet a finding of adultery must be based upon clear and convincing evidence.⁵³ A divorce will not be decreed upon evidence which leaves the fact of the defendant's guilt in doubt.⁵⁴ Unless the fact of adultery be clearly proved, the presumption of innocence must prevail.⁵⁵ The evidence of adultery must be full and explicit.⁵⁶ A judgment of divorce for adultery should not be granted unless the evidence, after a careful scrutiny, is such as to satisfy the court that the adultery had been committed.⁵⁷ But adultery may be established by such facts as satisfy the mind of the tribunal required to pass upon the question of the truth of the charge; the evidence need not lead the judgment, as a necessary conclusion to the determination that adultery has been actually committed.⁵⁸

49. *Colwell v. Colwell*, 14 App. Div. 80, 43 N. Y. Supp. 439.

50. *Hyman v. Hyman*, 154 App. Div. 469, 139 N. Y. Supp. 65.

51. *Hammerstein v. Hammerstein*, 74 Misc. 567, 134 N. Y. Supp. 473.

52. *Allen v. Allen*, 101 N. Y. 658.

53. *Keville v. Keville*, 122 App. Div. 388, 106 N. Y. Supp. 993; *Smith v. Smith*, 89 Hun, 610, 35 N. Y. Supp. 556.

54. *Ferguson v. Ferguson*, 1 Barb. Ch. 604.

A husband who has abandoned his family for years must present very clear proofs of adultery against his wife, to entitle him to a divorce. *Trust v. Trust*, 11 How. Pr. 523.

55. *Donnelly v. Donnelly*, 63 How. Pr. 481.

56. *Hanks v. Hanks*, 3 Edw. 469; *Turney v. Turney*, 4 Edw. 566.

57. *Schulze v. Schulze*, 83 App. Div. 375, 82 N. Y. Supp. 266.

58. *Allen v. Allen*, 101 N. Y. 658.

The failure to produce as a witness the person with whom adultery is charged, though defendant is able to do so, is a circumstance which creates a strong presumption against defendant though not conclusive.⁵⁹ The failure of a defendant to appear and deny testimony charging him with adultery is entitled to consideration.⁶⁰ And, if there is evidence of the commission of the offense, and neither the defendant or the alleged corespondent denies the act, the divorce should ordinarily be allowed.⁶¹ A decree may be awarded against the testimony of defendant and corespondent in action for absolute divorce.⁶² The abandonment of the plaintiff does not necessarily imply adultery.⁶³

Under the varying circumstances which arise in matrimonial actions, the evidence in particular cases has been held sufficient,⁶⁴ or insufficient.⁶⁵ Evidence to prove adultery where only a single act was charged and but one witness, the mother of the plaintiff, manifestly prejudiced, testified to it, was held insufficient.⁶⁶

59. *Kenyon v. Kenyon*, 88 Hun, 211, 68 St. Rep. 791, 34 N. Y. Supp. 720, citing *Rider v. Miller*, 86 N. Y. 507; *Gordon v. People*, 33 N. Y. 501; *Schwier v. New York Central, etc., R. Co.*, 90 N. Y. 558; *Bleecker v. Johnson*, 69 N. Y. 309; *Crary v. Crary*, 18 N. Y. Supp. 753; *People v. Hovey*, 92 N. Y. 554; *Byrne v. Brooklyn City & Newton R. R. Co.*, 58 St. Rep. 121.

60. *Butler v. Butler*, 134 N. Y. Supp. 108.

61. *Gelbman v. Gelbman*, 194 App. Div. 137, 184 N. Y. Supp. 902.

62. *Uhland v. Uhland*, 59 St. Rep. 655, 27 N. Y. Supp. 647.

63. *Isaacs v. Isaacs*, 29 Misc. 557, 61 N. Y. Supp. 956.

64. *Lampson v. Lampson*, 174 App. Div. 851, 159 N. Y. Supp. 368; *Stoother v. Stoothoff*, 193 App. Div. 220, 183 N. Y. Supp. 698; *Schreiber v. Schreiber*, 3 Misc. 411, 52 St. Rep. 436, 23 N. Y. Supp. 299; *Warren v. Warren*, 8 Misc. 189, 29 N. Y. Supp. 313, 59 St. Rep. 390; *McNeir v. McNeir*, 129 N. Y. Supp. 481; *Auld v. Auld*, 40 St. Rep. 904, 16 N. Y. Supp. 803.

65. *Burch v. Burch*, 80 App. Div. 55, 80 N. Y. Supp. 182; *Keville v. Keville*, 122 App. Div. 388, 106 N. Y. Supp. 993; *Werner v. Werner*, 149 App. Div. 511, 133 N. Y. Supp. 1026; *Hindley v. Hindley*, 150 App. Div. 719, 135 N. Y. Supp. 757; *Davis v. Davis*, 4 Misc. 454, 24 N. Y. Supp. 1151; *aff'd*, 150 N. Y. 571; *Philips v. Philips*, 24 Misc. 334, 52 N. Y. Supp. 489; *Isaacs v. Isaacs*, 29 Misc. 557, 61 N. Y. Supp. 956; *In Pessolano v. Pessolano*, 34 Misc. 16, 69 N. Y. Supp. 449; *Bigelow v. Bigelow*, 34 Misc. 265, 69 N. Y. Supp. 643; *Fries v. Fries*, 34 Misc. 478, 70 N. Y. Supp. 295; *Pettus v. Pettus*, 37 Misc. 315, 75 N. Y. Supp. 462; *Conway v. Conway*, 37 Misc. 414, 75 N. Y. Supp. 760; *Richardson v. Richardson*, 114 N. Y. Supp. 912; *Glamann v. Glamann*, 163 N. Y. Supp. 533; *Welke v. Welke*, 44 St. Rep. 21, 17 N. Y. Supp. 298.

66. *Fanning v. Fanning*, 2 Misc. 90, 49 St. Rep. 234, 20 N. Y. Supp. 849, citing *Lyon v. Lyon*, 62 Barb. 138; *Moller v. Moller*, 115 N. Y. 466; *Pollock v. Pollock*, 71 N. Y. 137.

2. Circumstantial evidence.

As adulterous acts are naturally secret and clandestine, proof thereof may be circumstantial and indirect.⁶⁷ Where all the evidence in an action for absolute divorce leads to the irresistible conclusion that the alleged illicit intercourse has taken place, the court will be justified in so finding, though the defendant was not caught *flagrante delicto*.⁶⁸

While it is not the law that circumstantial evidence as to adultery must be so strong that it admits of no other possible conclusion, when circumstances are as consistent with innocence as with guilt, or are reconcilable with innocence, the offense is not established.⁶⁹ Acts of the defendant, which may appear improper, but are capable of an innocent interpretation, must be construed to be innocent.⁷⁰ But the rule that where the acts of parties are capable of two constructions that in favor of innocence is to prevail, does not apply where a combination of circumstances points to guilt with such potency as to exclude every other hypothesis.⁷¹

In weighing the evidence and considering the facts and circumstances, great care is necessary, on the one hand, not to be misled, by circumstances reasonably capable of two interpretations, into giving them an evil rather than an innocent one, nor on the other by refusing to give them their plain and natural significance, on the theory that a different standard of judgment applies to such cases from that which ordinarily guides the conclusions of intelligent and conscientious men. The circumstance must be considered separately and, also, as a whole. The single threads of circumstances may be weak, but united, they often lead, with assured conviction, to the final fact which is the subject of investigation.⁷²

Where all the acts and conduct of defendant, and the circumstances in connection with his relation to the correspondent, are consistent with the theory that he had illicit inter-

67. *Shaw v. Shaw*, 155 App. Div. 252, 140 N. Y. Supp. 109; *Warren v. Warren*, 8 Misc. 189, 59 St. Rep. 390, 29 N. Y. Supp. 313; *Chase v. Chase*, 44 St. Rep. 766, 19 N. Y. Supp. 268; *Axtell v. Axtell*, 119 N. Y. Supp. 644; *Mulock v. Mulock*, 1 Edw. 14; *Anonymous*, 17 Abb. Pr. 48; *Ferguson v. Ferguson*, 3 Sandf. 307.

68. *McNeir v. McNeir*, 76 Misc. 661, 129 N. Y. Supp. 481; *aff'd*, 151 App. Div. 889, 135 N. Y. Supp. 1126.

69. *Pollock v. Pollock*, 71 N. Y. 137; *Poillon v. Poillon*, 78 App. Div. 127,

79 N. Y. Supp. 545; *Roth v. Roth*, 90 App. Div. 87, 85 N. Y. Supp. 640; *aff'd*, 183 N. Y. 520; *Cottrell v. Cottrell*, 165 App. Div. 693, 151 N. Y. Supp. 289; *Pfeiffer v. Pfeiffer*, 27 St. Rep. 567, 9 N. Y. Supp. 28; *Anonymous*, 17 Abb. Pr. 48; *Ferguson v. Ferguson*, 3 Sandf. 307.

70. *Steffens v. Steffens*, 33 St. Rep. 643, 19 Civ. Pro. 267, 11 N. Y. Supp. 424.

71. *Warren v. Warren*, 8 Misc. 189, 59 St. Rep. 390, 29 N. Y. Supp. 313.

72. *Allen v. Allen*, 101 N. Y. 658.

course with her, and no other reasonable or sensible conclusion could be reached, the plaintiff will be awarded an interlocutory decree.⁷³

Circumstantial evidence of adultery may be rebutted by evidence that the woman was in such ill-health as to negative the idea of criminal disposition.⁷⁴

3. Inclination and opportunity.

It is the rule that, if it is shown that the alleged guilty parties are adulterously inclined and that they have had an opportunity to indulge their passions, the evidence is sufficient to justify a finding of adultery. Proof of mere opportunity to commit the offense is not proof of the offense. There must be, not only opportunity, but evidence of a desire and purpose, something in the conduct of the parties from which it may properly be inferred that, given the opportunity, they will commit the act.⁷⁵ The living alone together of a man and a woman may be one of the elements of an adulterous relation, but is insufficient without proof of a lascivious desire and an improper intimacy.⁷⁶ The evidence as to inclination as well as opportunity must be such as to lead a reasonable man to conclude that the adulterous act has been committed; and mere opportunity, even though prolonged and inviting, cannot, in itself, be a sufficient basis upon which to predicate inclination toward wrongdoing.⁷⁷

Although the evidence discloses association, frequent interviews and intimacy between a defendant and the woman with whom he is charged with having adulterous intercourse, if there was no creditable evidence of improper conduct or familiarities, or of any criminal attachment between them, and the evidence showed the frequent meetings of the parties were for proper and innocent purposes, a charge of adultery cannot be sustained.⁷⁸

4. Communication of venereal disease.

That the husband is infected with syphilis long after marriage, may be sufficient proof of his adultery.⁷⁹ But it is

73. *McNeir v. McNeir*, 76 Misc. 661, 129 N. Y. Supp. 481; *aff'd*, 151 App. Div. 889, 135 N. Y. Supp. 1126.

74. *Anonymous*, 3 Abb. N. C. 161.

75. *Graham v. Graham*, 157 App. Div. 52, 141 N. Y. Supp. 766; *Hart v. Hart*, 2 Edw. 437; *Pollock v. Pollock*, 71 N. Y. 137. See *Platt v. Platt*, 5 Daly, 295.

76. *Axtell v. Axtell*, 119 N. Y. Supp. 644.

77. *Hutchinson v. Hutchinson*, 53 Misc. 438, 104 N. Y. Supp. 1074.

78. *Conger v. Conger*, 82 N. Y. 603.

79. *Johnson v. Johnson*, 1 Edw. 439; 4 Paige, 460, 14 Wend. 637. *Contra*, *Ferguson v. Ferguson*, 1 Barb. Ch. 604, 3 Sandf. 407.

not sufficient proof of the husband's adultery that the wife has a venereal disease.⁸⁰ The adultery of the husband cannot be inferred from the mere fact of the wife's being tainted with a venereal disease, although she herself is not suspected of adultery.⁸¹

5. Subsequent marriage by defendant.

A person who fraudulently procures a divorce in a foreign jurisdiction and then marries and returns to his original domicile, is guilty of adultery notwithstanding the validity of the marriage, so far as the right of the first wife to divorce is concerned.⁸² But, where a successful party to an action for divorce for adultery marries again he is not guilty of adultery by cohabitation with his new wife during a period prior to reversal of the judgment on appeal.⁸³

Proof of cohabitation with a second husband, the first husband still living, is necessary to establish sexual intercourse. Proof of the marriage alone is insufficient.⁸⁴

6. Occupying same room at hotel.

Evidence that the defendant registered and stayed at a hotel with a woman other than his wife is generally sufficient to support a finding of adultery.⁸⁵ Entries on a hotel register

80. *Homburger v. Homburger*, 46 How. Pr. 346.

81. *Moore v. Moore*, 135 N. Y. Supp. 425.

82. *Munson v. Munson*, 14 N. Y. Supp. 692.

83. *Bailey v. Bailey*, 45 Hun, 278; *aff'd*, 142 N. Y. 632.

84. *Taylor v. Taylor*, 123 App. Div. 220, 108 N. Y. Supp. 428.

85. *Harris v. Harris*, 83 App. Div. 123, 82 N. Y. Supp. 568.

Evidence sufficient.—The proof taken before a referee showed that the defendant, together with an unknown woman, had registered at a hotel under a false name, and had been taken together with baggage to the upper portions of the hotel. Evidence examined, and held, that the report of the referee finding the defendant guilty of adultery should have been confirmed, as the action having been defended and the confirmation of the report having been opposed, the parties could not be

charged with collusion. *Davis v. Davis*, 152 App. Div. 830, 137 N. Y. Supp. 749.

Evidence insufficient.—A decree of divorce will be refused on the ground of insufficient proof of adultery where the evidence consists of the testimony of an expert in handwriting that the entry "George Sands and wife," in a certain hotel register, was in the handwriting of the co-respondent, whose name was not George Sands, the hotel register itself showing a number opposite the entry indicating that a room was assigned; the testimony of the plaintiff's brother that he saw the defendant leave the hotel that evening at about 10:30 o'clock; a letter from the defendant written in response to a letter of plaintiff's attorney asking her under what name she registered at the hotel stating "It is impossible for me to say, as I do not know what name was given at hotel," and the testimony of witnesses that on another occasion

made by the alleged paramour and conversations between him and the hotel clerk in the absence of the defendant are not proper evidence against her.⁸⁶

Evidence that a man met a woman not his wife at a railroad station, took her to a hotel where he registered both her and himself under an assumed name as husband and wife, had a room assigned to them upstairs in the hotel, immediately ascended with her in the lift as if to the room, taking their baggage with them, and he was not seen to come down before midnight, is sufficient to justify an interlocutory decree of divorce. Such evidence shows inclination as well as opportunity.⁸⁷

7. Association with prostitutes.

Uncontradicted and unexplained evidence that defendant accompanied a woman to a house of bad character in the evening and remained there about an hour, and the fact that a cabman testified he had carried people to the house he knew did not belong there, will sustain a decree for divorce.⁸⁸ But proof of two or three visits to a brothel by a husband, unaccompanied by a woman, is not sufficient evidence of adultery to authorize a divorce.⁸⁹ A divorce will not be granted on evidence that the husband was in the habit of visiting a house of prostitution, and even went with one of the inmates to her room, it not appearing that he was ever alone in a room with any of the inmates, or with the door shut.⁹⁰

Association with prostitutes and giving secret entertainment to women in the night-time, has been held sufficient to justify a finding of adultery.⁹¹ And proof of illicit intercourse with a notorious prostitute before marriage, and a continuance of the intimacy afterward, together with evidence of defendant's dissolute character and habits, has been sufficient.⁹²

they found the defendant and correspondent seated in an improper position respecting each other at a table in a small room used for drinking purposes in the same hotel, and opening into the hall and a larger drinking room by doors which were used by any one and were not locked at this time. *Conway v. Conway*, 37 Misc. 414, 75 N. Y. Supp. 760.

86. *Mattison v. Mattison*, 203 N. Y. 79.

87. *Kerr v. Kerr*, 134 App. Div. 141, 118 N. Y. Supp. 801.

88. *Van Name v. Van Name*, 49 Hun. 264, 2 N. Y. Supp. 77.

89. *Zorkowski v. Zorkowski*, 27 How. Pr. 37.

90. *Platt v. Platt*, 9 Daly, 295.

91. *Emerson v. Emerson*, 42 St. Rep. 562, 16 N. Y. Supp. 793.

92. *Van Epps v. Van Epps*, 6 Barb. 320; *Smith v. Smith*, 4 Paige, 432.

Plaintiff should not be denied a divorce on clear proof of adultery by defendant, because defendant went with plaintiff's detective to the house of prostitution; defendant testifying that he deliberately committed the adultery, and there being nothing to justify a finding that plaintiff employed the detective to aid or connive at the commission thereof, or that she had any knowledge that he did so, or that she or her attorney was in any way responsible for his acts.⁹³

Where a person testifies positively that a house is a house of ill-fame, he must be presumed on appeal to speak from personal observation.⁹⁴

8. Pregnancy of wife.

When a married woman is pregnant with or gives birth to a child under circumstances negating the possibility of her husband's being the father of it, her adultery is proved.⁹⁵

9. Identity of parties.

Where the defendant in an action for divorce has only been identified by a photograph, the evidence should be clear and conclusive that the exhibit is her photograph, and there should be some corroborative evidence of her residence in the locality or a description of her appearance and age, so that the case will not rest wholly on opinion evidence, especially where she was served only by publication and has made default.⁹⁶ Evidence which fails to identify the man with whom the defendant is alleged to have committed adultery may be insufficient.⁹⁷ It is not sufficient evidence of identity that the person served was pointed out as the defendant by plaintiff.⁹⁸

10. Testimony or admissions of co-respondent.

Proof of adultery made by the person with whom it is alleged to have been committed, is to be received with great reluctance and must be corroborated.⁹⁹ A decree of divorce is not generally warranted solely upon the testimony of the

93. *Tuck v. Tuck*, 117 App. Div. 421, 102 N. Y. Supp. 688.

94. *Carpenter v. Carpenter*, 9 N. Y. Supp. 583.

95. *Timmann v. Timmann*, 142 N. Y. Supp. 298.

96. *Rowe v. Rowe*, 24 Misc. 113, 52 N. Y. Supp. 418.

97. *Mondano v. Mondano*, 122 N. Y. Supp. 731.

98. *Louns v. Louns*, 1 Law Bull. 34.

99. *Delling v. Delling*, 34 Misc. 122, 69 N. Y. Supp. 479; *Glaser v. Glaser*, 36 Misc. 231, 73 N. Y. Supp. 284; *Fowler v. Fowler*, 29 Misc. 670, 61 N. Y. Supp. 109.

defendant's paramour or that of the corespondent.¹ And a divorce cannot be granted upon evidence consisting of the testimony of a man that he had sexual intercourse with the defendant, and the evidence of a half-sister of the plaintiff that on one evening in the month of August, the year not being stated, she followed the defendant and a man, not the plaintiff, into certain woods, where she saw them in sexual intercourse.²

But an absolute divorce may be granted in a litigated action upon the uncorroborated testimony of the corespondent, where there is no fraud or collusion.³ It seems that the requirement of corroboration of a paramour's testimony, was founded mainly on the inability of a party charged with adultery to contradict such testimony in an action between them for divorce on that ground; and that hence by the amendment of the statute, permitting a husband or wife to be a witness to disprove adultery in such an action, the force of the reason requiring corroboration of a paramour's testimony has been considerably weakened, and the sufficiency of such testimony must depend mainly on the degree of the paramour's credibility.⁴

A corespondent in an action for divorce must answer truthfully or decline to answer questions tending to criminate or degrade him; he is not justified in committing perjury to protect the defendant's reputation.⁵

An admission by the corespondent is not evidence.⁶ Where a person with whom the plaintiff is alleged in defendant's answer to have committed adultery, on being called as a witness for the plaintiff, denied such adultery, and on cross-examination stated that he did not at a certain time and place admit to a person named that his relations with plaintiff were illicit the defendant may call such person as a witness to testify that the alleged corespondent did make the admission.⁷ A judgment for divorce against a paramour not a defendant in the action is erroneously received in evidence,

1. Anonymous, 5 Robt. 611; Fawcett v. Fawcett, 29 Misc. 673, 61 N. Y. Supp. 108; Delling v. Delling, 34 Misc. 122, 69 N. Y. Supp. 479; Turney v. Turney, 4 Edw. 566; Banta v. Banta, 3 Edw. 295; Anonymous, 17 Abb. Pr. 48.

2. Delling v. Delling, 34 Misc. 122, 69 N. Y. Supp. 479.

3. Crary v. Crary, 46 St. Rep. 307, 18 N. Y. Supp. 753.

4. Steffens v. Steffens, 33 St. Rep. 643; s. c., 19 Civ. Pro. 267, 11 N. Y. Supp. 424, citing Platt v. Platt, 5 Daly, 295; Anonymous, 17 Abb. Pr. 48; Anonymous, 5 Robt. 611.

5. Uhland v. Uhland, 27 N. Y. Supp. 647, 59 St. Rep. 655.

6. Budd v. Budd, 55 App. Div. 113, 67 N. Y. Supp. 43.

7. Woodrick v. Woodrick, 141 N. Y. 457, 57 St. Rep. 634.

although the court states that it was not admitted as against the actual defendant.⁸

11. Testimony of detectives and prostitutes.

It is the rule that ordinarily a divorce will not be granted upon the uncorroborated evidence of prostitutes or private detectives.⁹ Divorces should not be granted on the evidence of prostitutes and private detectives, and their testimony should always be scrutinized with vigilance and distrust.¹⁰ The uncorroborated evidence of prostitutes and private detectives is insufficient to sustain a charge of adultery in an action for divorce. Where, however, the testimony of such witnesses is corroborated by proofs of facts and circumstances harmonizing therewith, giving such weight and strength to the testimony as to induce belief in its truth, a judgment founded thereon is proper.¹¹

The rule that evidence of detectives or of persons of so wholly debased a character as are prostitutes should receive some corroboration in order to command judicial confidence, is a rule for the guidance of judicial conscience, not a rule of evidence, and however such evidence may be criticized with respect to its character or weight, if it is such as to support the conclusions of the trial judge or referee, and the judgment recovered is subsequently affirmed upon review by the Appellate Division, the controversy will be deemed closed in the Court of Appeals.¹²

The courts regard the uncorroborated evidence of prostitutes and private detectives as insufficient to break the bonds of matrimony but in divorce cases the courts must take such

8. *Mattison v. Mattison*, 203 N. Y. 79.

9. *Cottrell v. Cottrell*, 165 App. Div. 693, 151 N. Y. Supp. 289; *Enders v. Enders*, 83 Misc. 593, 145 N. Y. Supp. 450; *Bentley v. Bentley*, 3 Law Bull. 76.

Sufficient corroboration.—There is sufficient corroboration of evidence of three detectives who were employed to watch the person claimed to be guilty of adultery and report his conduct, and testified in effect that they followed such person; that he was with a woman not his wife; that they went into a certain house in New York city, and that they found him and the woman in a room under circumstances

which would warrant the inference of their illicit relations, where the woman, who had charge of the house in which the party was found by the detective, testified that the latter were in the house on the night in question; that one of them asked to see him; that she took him to his room, rapped on the door and heard him respond and that she "heard some disturbance after that." *Winston v. Winston*, 165 N. Y. 553, 31 Civ. Pro. 283.

10. *Moller v. Moller*, 9 St. Rep. 800.

11. *Moller v. Moller*, 115 N. Y. 466, 26 St. Rep. 207.

12. *Winston v. Winston*, 165 N. Y. 553, aff'g 34 App. Div. 460, 54 N. Y. Supp. 298.

evidence as the nature of the case permits, circumstantial, direct or positive, and must bring to bear upon it the tests of observation and experience in the exercise of good judgment. It is to be weighed with prudence and care, and effect must be given to its preponderance. Where the testimony of prostitutes relative to an act of adultery is corroborated both as to the person with whom the adultery was committed and as to the date of the act, the court will not interfere with the judgment. While it is a general rule that marriage operates as an oblivion of prior improper acts, the rule is not the same where the adultery, which is the basis of the action, is charged to have taken place with the same person with whom the defendant had had illicit relations before his marriage. Circumstances which may be proved to have existed subsequent to the marriage will have a very different complexion if taken standing alone, or if taken in conjunction with an antecedent criminal connection. Where the defendant procures, before the trial, affidavits from prostitutes which are at variance with their testimony upon the trial, the only effect of the affidavits is to intensify the already existing necessity that such witnesses should be corroborated.¹³

Where the husband defendant failed to appear as a witness, it was held that slight corroboration of the testimony of prostitutes against him was required, and that the circumstance surrounding his taking an abandoned woman to his house, where she remained over night, and letters written by him to the corespondent were sufficient.¹⁴

A person who, at the solicitation of the defendant in an action for absolute divorce, undertook for friendship, and without pay or the promise thereof, to obtain evidence against the plaintiff, was not, as matter of law, a private detective, whose testimony, as to acts of adultery on the part of the plaintiff, must be corroborated by other evidence.¹⁵

12. Admissions or confessions of defendant.

The admissions or confessions of a defendant are always received in evidence.¹⁶ But, unless they are corroborated, they are not generally sufficient to justify the granting of a divorce.¹⁷ Were the rule otherwise, the door to collusion

13. *Mott v. Mott*, 3 App. Div. 532, 38 N. Y. Supp. 261.

14. *McCarthy v. McCarthy*, 143 N. Y. 235.

15. *Yates v. Yates*, 211 N. Y. 163.

16. *Mersereau v. Mersereau*, 49 App.

Div. 647, 63 N. Y. Supp. 336; *Monypeny v. Monypeny*, 171 App. Div. 134, 157 N. Y. Supp. 11; *Madge v. Madge*, 42 Hun, 524.

17. *Fowler v. Fowler*, 29 Misc. 670;

61 N. Y. Supp. 109; *Steimer v.*

would be open. When corroboration is shown which removes all suspicion of collusion, a confession may be a sufficient basis for a divorce.¹⁸ But it is not necessary that the corroboration should be sufficient, standing by itself, to prove the fact of adultery.¹⁹ Confessions of adultery corroborated by circumstances and the conduct of the accused, and free from collusion, and where the defendant refused to testify in his own behalf, may be sufficient evidence to sustain a decree of divorce.²⁰

Where the husband defaults in an action against him for divorce and becomes a witness for the wife, a divorce will not be granted without proof of the absence, on her part, of connivance, privity or procurement.²¹

The adultery of the defendant in an action for divorce cannot be established by admissions in the answer; otherwise there would be a way open to litigants to avoid the rule that the offense must be clearly proved.²²

In an action for a divorce the admission in evidence of a letter written by the defendant wife to, but not received by the corespondent, together with extra judicial admissions by the wife before she was called as a witness establishing her adultery with the corespondent constitute reversible error. Such a letter is evidence against the wife, but not against the corespondent.²³

13. Evidence not credited.

Where plaintiff's adultery pleaded as a defence to an action for divorce was testified to by but a single witness, and his evidence was improbable on its face and was categorically denied by plaintiff, it was insufficient to establish a defence.²⁴ Where in an action of divorce the plaintiff's case is directly supported only by the testimony of one who swears that he witnessed four separate and distinct acts of adultery on the

Steimer, 37 Misc. 26, 74 N. Y. Supp. 714; Diederichs v. Diederichs, 74 Misc. 591, 90 N. Y. Supp. 131; Madge v. Madge, 42 Hun, 524; Stetson v. Stetson, 146 N. Y. Supp. 245; Alder v. Alder, 1 Law Bull. 58; Betts v. Betts, 1 Johns. Ch. 197; Van Veghten v. Van Veghten, 4 Johns. Ch. 501; Lyon v. Lyon, 62 Barb. 138.

18. Mersereau v. Mersereau, 49 App. Div. 647, 63 N. Y. Supp. 336; Stewart v. Stewart, 51 App. Div. 629, 65 N. Y. Supp. 927; Monypeny v. Monypeny, 171 App. Div. 134, 157 N. Y. Supp. 11;

Madge v. Madge, 42 Hun, 524.

19. Monypeny v. Monypeny, 171 App. Div. 134, 157 N. Y. Supp. 11.

20. Sigel v. Sigel, 47 St. Rep. 397.

21. Ivison v. Ivison, 29 Misc. 240, 61 N. Y. Supp. 118.

22. Taylor v. Taylor, 123 App. Div. 220, 108 N. Y. Supp. 428. Compare Doeme v. Doeme, 96 App. Div. 284, 89 N. Y. Supp. 215.

23. Scully v. Scully, 179 App. Div. 266, 166 N. Y. Supp. 464.

24. De Marco v. De Marco, 116 App. Div. 304, 101 N. Y. Supp. 600.

part of the defendant with two different woman and that all this happened without his watching the defendant, and that he never mentioned the matter for a period of some twelve or thirteen years, and a number of witnesses testify that they would not believe him under oath, the court was justified in refusing to find in favor of plaintiff as requested, and properly dismissed the complaint on the merits.²⁵ In an action based on the adultery of the defendant with his mother-in-law, the plaintiff's mother, the evidence of the son of the correspondent as to the adultery is not so inherently improbable as to be beyond belief.²⁶

ARTICLE VIII.

TEMPORARY ALIMONY AND COUNSEL FEES.

A. Civil Practice Act, § 1169. Alimony and expenses in action for divorce or separation.

In an action for divorce or separation, the court, in its discretion, during the pendency thereof, from time to time, may make and modify an order or orders requiring the husband to pay any sum or sums of money necessary to enable the wife to carry on or defend the action, or to provide suitably for the education and maintenance of the children of the marriage, or for the support of the wife, having regard to the circumstances of the respective parties.

B. Nature of alimony.

Alimony is the allowance which the husband pays to the wife while living apart from her, by order of the court, for her support or maintenance. There are two distinct kinds of alimony. Alimony may be granted during the pendency of the action and is called temporary alimony or alimony *pendente lite*; or it may be provided in the final judgment, when it is known as permanent alimony. Temporary alimony is treated in this subdivision of this chapter, while permanent alimony is discussed in another subdivision.²⁷

The palpable purpose of section 1169 is to enable the wife to prosecute her suit and save her from starvation or beggary during the process, and, therefore, no antecedent creditor will be allowed to take the alimony by virtue of a judgment.²⁸ The right to alimony does not exist by virtue of a contract, but rests upon public policy recognized in law, which requires a husband to support his wife and children.²⁹ An award of

25. *Graham v. Graham*, 173 App. Div. 460, 159 N. Y. Supp. 918.

26. *Gelbman v. Gelbman*, 194 App. Div. 137, 184 N. Y. Supp. 902.

27. See Article XI.

28. *Romaine v. Chauncey*, 129 N. Y. 566, 39 St. Rep. 480.

29. *Surat v. Surat*, 191 App. Div. 570, 181 N. Y. Supp. 631.

temporary alimony is not in the nature of a judgment, but is merely a temporary or interim provision for the support of the wife, until the termination of the action, subject to modification from time to time.³⁰

The wife's attorney has no lien upon alimony awarded to her; counsel must rely on the costs and counsel fee awarded for compensation. No claim can inure to the benefit of her attorney, although it is transferred to him by an assignment.³¹ An agreement by the wife to compensate her attorney for his services by giving him a percentage of the alimony recovered, is void as against public policy.³²

C. Necessity of marriage.

The existence of the marriage relation is one of the essential elements for an award of alimony. Neither temporary alimony³³ nor counsel fees³⁴ can be awarded in a matrimonial action unless the wife shows the existence of a marriage between the parties. Alimony and counsel fees will not generally be allowed where a marriage in fact is not shown, and the cohabitation was originally illicit.³⁵

But the fact that the husband denies the marriage or its validity does not necessarily forbid an allowance, for it is not confined to cases where both parties admit the marriage to have been legal.³⁶ If the wife makes out a reasonably plain case, she will be allowed alimony, although her claim is denied by her husband.³⁷ It is not necessary that the fact be established as conclusively as on an application for permanent alimony or other ultimate purposes of the action.³⁸ But the marriage must be admitted, or proof must be submitted sufficient to authorize the court to determine that the applicant is the wife of defendant; and when facts are stated showing the contrary, such facts, if uncontroverted, will prevent an allowance. The *onus* is on the applicant for alimony to show the fact of marriage.³⁹

30. *Surat v. Surat*, 191 App. Div. 570, 181 N. Y. Supp. 631.

31. *Branth v. Branth*, 19 Civ. Pro. 28, 10 N. Y. Supp. 638.

32. *Van Vleck v. Van Vleck*, 21 App. Div. 631, 47 N. Y. Supp. 472; *Matter of Brackett*, 114 App. Div. 257, 99 N. Y. Supp. 802.

33. *Brinkley v. Brinkley*, 50 N. Y. 184.

34. *Brinkley v. Brinkley*, 50 N. Y. 184; *Lake v. Lake*, 194 N. Y. 179;

Hopper v. Hopper, 92 Hun, 415, 36 N. Y. Supp. 610.

35. *Humphreys v. Humphreys*, 49 How. Pr. 140.

36. *North v. North*, 1 Barb. Ch. 241; *Smith v. Smith*, 1 Edw. Ch. 255.

37. *Brinkley v. Brinkley*, 50 N. Y. 184.

38. *Brinkley v. Brinkley*, 50 N. Y. 184.

39. *Collins v. Collins*, 71 N. Y. 269.

Where, at the time of the alleged marriage, the plaintiff believed herself competent to marry, but in fact was under a disability which subsequently ceased, proof of cohabitation without any new marriage contract and in reliance of the validity of the original marriage, is not satisfactory proof of a valid marriage for an allowance of alimony.⁴⁰ A plaintiff cannot base her right to alimony upon a common-law marriage where the complaint alleges only a ceremonial marriage and the parties have not been living together for over ten years prior to the action.⁴¹

Where the wife has obtained an absolute divorce in another state on the ground of adultery, and the defendant has since married outside of this State a woman with whom plaintiff now claims he committed adultery, the plaintiff alleging that her divorce was void, she is not entitled to alimony or counsel fees.⁴²

A wife suing for divorce will be denied counsel fees and alimony *pendente lite* where it appears that at the time of the marriage she was prohibited from marrying by a former decree of divorce rendered against her in this State, and the second husband to her knowledge had a wife then living. Under such circumstances the plaintiff's marriage was void *ab initio*, and a valid marriage is the basis of an order for alimony *pendente lite*.⁴³ In an action for a judicial separation where defendant committed bigamy by marrying plaintiff, a motion for alimony and counsel fee cannot be granted, as no marital relation exists between the parties.⁴⁴ Alimony was refused where it appeared that the wife had had a prior husband and had obtained a limited divorce from him shortly before her marriage with plaintiff, although she swore she had not heard of him for nine years.⁴⁵

Where the adultery charged is cohabitation with a person whom the wife married after procuring a foreign divorce, the fact that she asserts the validity of such divorce furnishes no ground for denying her application for counsel fee and support of child.⁴⁶ In an action by a wife for separation in which the husband denies the validity of their marriage upon the

40. Collins v. Collins, 71 N. Y. 269.

41. Dye v. Dye, 140 App. Div. 309, 125 N. Y. Supp. 242.

42. Ober v. Ober, 28 St. Rep. 32, 7 N. Y. Supp. 843.

43. Dye v. Dye, 140 App. Div. 309, 125 N. Y. Supp. 242.

44. Blinks v. Blinks, 5 Misc. 193, 25 N. Y. Supp. 768.

45. Kinzey v. Kinzey, 7 Daly, 460.

46. Dean v. Dean, 48 Misc. 149, 96 N. Y. Supp. 472; Bailie v. Bailie, 53 N. Y. Supp. 866; Starkweather v. Starkweather, 29 Hun, 488.

ground of a prior marriage of the wife, alimony and counsel fees may be allowed.⁴⁷ Where a husband sued for a separation because of cruel and inhuman treatment and abandonment admits the marriage and the abandonment, and while denying the cruel and inhuman treatment, alleges that at the time of the marriage the plaintiff was bound to a living husband by a common-law marriage, which she denies, the alleged former husband having since died, the defendant should be required to pay alimony *pendente lite*, together with a counsel fee.⁴⁸

A woman who intervenes in an action for divorce, claiming to be the lawful wife, may be allowed alimony and counsel fees. The alimony ceases when she is dismissed from the case as a party, but she may be allowed a counsel fee to prosecute an appeal.⁴⁹

D. Divorce.

Pending a suit by a wife for a divorce, the court will make an order for maintenance *pendente lite*, and also a sum to defray her expenses of suit.⁵⁰ She will be allowed alimony and counsel fees, unless it is apparent that she has no case.⁵¹ An allowance may be granted to enable a wife to sue for divorce, although her husband has an action pending in another state, it not appearing that in that state the defendant could have affirmative relief.⁵² But a motion for alimony, in an action for absolute divorce, cannot be granted where an order for alimony, granted in a previous action for a limited divorce remains in force, and if an increase is desired it should be moved for in the former action. A reasonable award for counsel fees may be made, however.⁵³

E. Separation.

Temporary alimony and counsel fees are allowed the wife in an action of separation.⁵⁴ The allowance may be made although the complaint, as a part of the relief sought, asks to have a separation agreement between the parties set aside on

47. *Lau v. Lau*, 140 N. Y. Supp. 310.

48. *Unger v. Unger*, 152 App. Div. 328, 137 N. Y. Supp. 730.

49. Anonymous, 15 Abb. Pr. (N. S.) 307.

50. *Denton v. Denton*, 1 Johns. Ch. 364; *Osgood v. Osgood*, 2 Paige, 621; *Collins v. Collins*, 2 Paige, 9.

51. *Miles v. Miles*, 6 Wkly. Dig. 559.

52. *Whitney v. Whitney*, 22 How. Pr. 175.

53. *Schmalholz v. Schmalholz*, 111 App. Div. 543, 98 N. Y. Supp. 510.

54. *Mossa v. Mossa*, 123 App. Div. 400, 107 N. Y. Supp. 1044; *De Llamosas v. De Llamosas*, 2 Hun, 280; appeal dism'd, 62 N. Y. 618; *Kirsch v. Kirsch*, 45 St. Rep. 287, 18 N. Y. Supp. 447.

the ground of fraud and inadequacy of consideration.⁵⁵ Since a husband's obligation to support his wife inheres in the marriage obligation, she is entitled to alimony and counsel fee pending an action for separation, unless the husband is relieved therefrom by agreement with the wife through a trustee, or by some act of misconduct on her part.⁵⁶

Decisions may be found where the relief was denied on the ground that the wife can secure an ample remedy in a police court to compel the husband to support her;⁵⁷ but the existence of such a remedy should not bar a proper allowance.⁵⁸

An order for temporary alimony made in an action for separation pending in New York State will not be vacated on the ground that a judgment of divorce in New Mexico between the same parties is a bar to the prosecution of the separation action where the latter court did not have jurisdiction of the person of the defendant.⁵⁹ In a wife's suit for separation on the ground of abandonment a motion for alimony and counsel fee may be granted, although in opposition defendant makes affidavit that he was induced to marry plaintiff upon his father-in-law's agreement to convey to him certain real estate, it appearing that he has brought an action against his father-in-law for breach of the contract to convey.⁶⁰

F. Annulment.

1. Action by wife.

An action of annulment generally denies the existence of the marriage relation, and hence alimony and counsel fees are not generally allowed in such an action.⁶¹ As a general rule, one who elects to rescind a contract can claim nothing under it. Thus, if the wife brings an action to annul her marriage, she will not be granted alimony or counsel fees.⁶²

55. *Kaufman v. Kaufman*, 2 Bradb. 519.

56. *Hawley v. Hawley*, 95 App. Div. 274, 88 N. Y. Supp. 606.

57. *LeBowski v. LeBowski*, 27 Misc. 759, 59 N. Y. Supp. 499.

58. *Weigand v. Weigand*, 103 App. Div. 42, 92 N. Y. Supp. 679, 34 Civ. Pro. 186; *Miers v. Miers*, 35 Misc. 476, 71 N. Y. Supp. 1058; mod'f'd, 65 App. Div. 615, 73 N. Y. Supp. 1141.

59. *Weaver v. Weaver*, 96 Misc. 476, 160 N. Y. Supp. 642.

60. *Peckerman v. Peckerman*, 91 Misc. 114, 154 N. Y. Supp. 297.

61. *Griffin v. Griffin*, 47 N. Y. 134.

62. *Jones v. Brinsmade*, 183 N. Y. 258; *Herron v. Herron*, 28 Misc. 323, 59 N. Y. Supp. 861; *People ex rel. Heinle v. Heinle*, 115 Misc. 469; *Isaacsohn v. Isaacsohn*, 3 Month. L. Bull. 73; *Bloodgood v. Bloodgood*, 59 How. Pr. 42.

Criminal proceedings for support of wife.—Where though a motion for alimony and counsel fee in a wife's action for an annulment of her marriage to defendant has been denied, defendant's motion to vacate an order theretofore made in a proceeding in the Domestic Relations Court directing him to pay her a certain sum per

In an action brought by a wife against the husband to annul the marriage on the ground of fraud, the court has no power to grant alimony and counsel fees *pendente lite* to the plaintiff.⁶³ And, in an action by the wife to annul the marriage on the ground of the husband's insanity, an allowance cannot be made.⁶⁴ The same rule should prevail in an action by the wife on the ground of the husband's impotency.⁶⁵

2. Action by husband.

If an action of annulment is brought by the husband, an allowance of temporary alimony and counsel fees may be justified.⁶⁶ If the wife on oath denies the illegality of the marriage, she is entitled to alimony and counsel fees.⁶⁷ If however, the wife does not deny the illegality of the marriage, an allowance should not be made.⁶⁸ Although there is no statutory authority for an allowance in an action of annulment, the power to grant alimony and counsel fees in a proper case is said to be one of the inherent powers of the court.⁶⁹ Thus, an allowance may be made in an action by the husband to annul the marriage on the ground that the wife had a former husband living;⁷⁰ or that she was incapable of entering into the marriage state.⁷¹

Where a husband sues for the annulment of a second marriage upon the ground that a former wife is still living the marriage to whom has not been annulled or dissolved, the defendant is entitled to alimony and counsel fees *pendente lite*, because she is entitled to have the status of the plaintiff

week toward her support is properly denied upon the ground that until the entry of a decree of nullity the marriage is valid, and the husband must keep his wife from the likelihood to becoming a public charge. *People ex rel. Heinle v. Heinle*, 115 Misc. 469.

63. *Meo v. Meo*, 22 Abb. N. C. 58, 18 St. Rep. 270, 2 N. Y. Supp. 569, 15 Civ. Pro. 308.

64. *Jones v. Brinsmade*, 183 N. Y. 258, rev'g 104 App. Div. 619, 93 N. Y. Supp. 674.

65. See *Gore v. Gore*, 103 App. Div. 74, 92 N. Y. Supp. 634; overruled in 183 N. Y. 258. See, also, *Allen v. Allen*, 8 Abb. N. C. 175.

66. *Brand v. Brand*, 178 App. Div. 822, 166 N. Y. Supp. 90; *Sinn v. Sinn*, 3 Misc. 598, 23 N. Y. Supp. 339, 52 St. Rep. 855; aff'd without opinion,

140 N. Y. 636; *O'Dea v. O'Dea*, 31 Hun, 441; aff'd, 95 N. Y. 667; *Isaacsohn v. Isaacsohn*, 3 Month. L. Bull. 73.

67. *Oppenheimer v. Oppenheimer*, 153 App. Div. 636, 138 N. Y. Supp. 643; *North v. North*, 1 Barb. Ch. 241.

68. *Appleton v. Warner*, 51 Barb. 270.

69. *Higgins v. Sharp*, 164 N. Y. 4, aff'g 51 App. Div. 611, 64 N. Y. Supp. 1137; *Lee v. Lee*, 66 How. Pr. 207; *O'Dea v. O'Dea*, 31 Hun, 441; aff'd, 95 N. Y. 667.

70. *Wabberson v. Wabberson*, 27 Misc. 125, 57 N. Y. Supp. 405, 29 Civ. Pro. 227.

71. *Oppenheimer v. Oppenheimer*, 153 App. Div. 636, 138 N. Y. Supp. 643.

as to his competency to contract the second marriage established, and because even if he were incompetent she is entitled to have the legitimacy of her children established.⁷²

3. Action by third person.

A mother who brings an action to procure the annulment of a marriage contracted by her son when under eighteen years cannot be compelled to pay out of her own means alimony for the support of the wife, or a counsel fee for the wife's attorney.⁷³ And, in an action by the relative of a lunatic to annul the marriage, the plaintiff is not required to furnish the defendant with means to defend the action.⁷⁴

G. Pending appeal.

If the wife is successful on the trial of the action, but an appeal is taken by the husband, the alimony will generally be continued during the pendency of the appeal, and the wife will be allowed additional counsel fees to defend the appeal.⁷⁵ If the Special Term has denied the application, the Appellate Division may make such order on appeal as is proper.⁷⁶ The allowance may be made pending the determination of the United States Supreme Court upon a writ of error to that court.⁷⁷ Upon an application for alimony pending appeal, the wife must show her inability to support herself during the appeal and her husband's ability to pay.⁷⁸

If the wife instead of the husband is the appellant, it is only in strong cases that counsel fees and alimony will be granted.⁷⁹ Nevertheless, it is within the power of the court to continue alimony pending her appeal.⁸⁰ A husband should be relieved from his obligation to pay alimony based entirely upon the order directing payment *pendente lite*, after the entry of an interlocutory judgment in his favor, unless facts be presented from which the court can see that there is a reasonable ground for believing that the judgment is erroneous and will be reversed upon appeal.⁸¹ Every pre-

72. *Erlanger v. Erlanger*, 173 App. Div. 767, 159 N. Y. Supp. 353.

73. *Stivers v. Wise*, 18 App. Div. 316, 46 N. Y. Supp. 9.

74. *Farnham v. Farnham*, 227 N. Y. 155.

75. *Miller v. Miller*, 158 App. Div. 766, 144 N. Y. Supp. 278; *McBride v. McBride*, 55 Hun, 401, 8 N. Y. Supp. 448, 29 St. Rep. 256.

76. *Haddock v. Haddock*, 75 App. Div. 565, 78 N. Y. Supp. 304.

77. *Haddock v. Haddock*, 109 App. Div. 502, 96 N. Y. Supp. 522.

78. *Poillon v. Poillon*, 75 App. Div. 536, 78 N. Y. Supp. 323.

79. *Tiedeman v. Tiedeman*, 174 App. Div. 913, 160 N. Y. Supp. 537; *Moncrief v. Moncrief*, 15 Abb. Pr. 187.

80. *Halstead v. Halstead*, 11 Misc. 592, 32 N. Y. Supp. 1080.

81. *Poss v. Poss*, 164 App. Div. 213, 149 N. Y. Supp. 587.

sumption is in favor of the validity of the divorce granted against her, and an allowance will not be made unless strong reasons are shown for believing that the appeal will be successful.⁸² Alimony and counsel fees will be denied where the wife at trial offered no evidence, did not even deny the adultery, but relied solely upon the weakness of the plaintiff's case.⁸³ The court doubtless has jurisdiction to award alimony, as well as counsel fees and printing expenses, to a wife pending appeal from a judgment either in her favor or against her in an action for a divorce, but, when she is appellant, it must be made to appear that the appeal had been taken in good faith and that there is reasonable ground to believe that it will be successful. The motion therefor, however, should be made on a case, and the court should not attempt to determine the question as to whether there be any merit in the appeal on affidavits.⁸⁴ The motion may be denied until the settlement of case on appeal.⁸⁵

A wife whose action has been dismissed is not entitled to counsel fees to enable her to appeal from an order denying a motion for an adjournment, as such order is not appealable.⁸⁶

The court will not make an allowance to pay the expenses of an appeal by the wife from a judgment of divorce and alimony in her own favor, unless meritorious reason is presented to justify claim therefor.⁸⁷

H. Effect of separation agreement.

If the parties are living apart under a valid separation agreement providing for the support of the wife, she is not generally in a position to ask the court for alimony *pendente lite*.⁸⁸ Especially is this true, when she does not offer to surrender her rights under the separation agreement.⁸⁹ The question of the validity of the separation agreement should

82. *Berger v. Berger*, 141 App. Div. 455, 126 N. Y. Supp. 284.

83. *Berger v. Berger*, 141 App. Div. 455, 126 N. Y. Supp. 284.

84. *Greenberg v. Greenberg*, 134 App. Div. 419, 421, 119 N. Y. Supp. 227.

85. *Gansz v. Gansz*, 59 N. Y. Supp. 955.

86. *Hayes v. Hayes*, 141 App. Div. 35, 125 N. Y. Supp. 652.

87. *Winkemeier v. Winkemeier*, 11 App. Div. 201, 42 N. Y. Supp. 586.

88. *Grube v. Grube*, 65 App. Div.

239, 72 N. Y. Supp. 529; *Davis v. Davis*, 195 N. Y. 430, 186 N. Y. Supp. 805; *Taylor v. Taylor*, 32 Misc. 312, 66 N. Y. Supp. 561; *Randolph v. Field*, 84 Misc. 403, 146 N. Y. Supp. 247; *modf'd*, 165 App. Div. 279, 150 N. Y. Supp. 822; *Atherton v. Atherton*, 82 Hun, 179, 31 N. Y. Supp. 977, 64 St. Rep. 798; *aff'd*, 155 N. Y. 129 *rev'd* on other grounds, 181 U. S. 155.

89. *Grube v. Grube*, 65 App. Div. 239, 72 N. Y. Supp. 529.

not be tried on affidavits.⁹⁰ But, if the husband commences an action against her, she may be allowed a counsel fee, although she is not entitled to alimony.⁹¹ And in an action by her for an absolute divorce, counsel fees may be allowed.⁹² Where a wife brought an action against her husband, while they were living apart under an agreement of voluntary separation, and demanded a judgment for a separation on the ground of cruel and inhuman treatment and of abandonment, and that the agreement for separation be set aside, it was held she was not entitled to alimony.⁹³

A judgment of separation in favor of a wife against a husband, in which a gross allowance is made and declared to be in full of alimony, is a bar to alimony in a husband's subsequent action for adultery, but she may have a counsel fee.⁹⁴

The separation agreement affords no answer to the application, if the husband has defaulted in the performance of the conditions thereof.⁹⁵ If the separation agreement provides that upon default an order for alimony at the same amount may be granted in an action for divorce, after default, alimony may be granted in such amount.⁹⁶ Where an action for separation is discontinued upon an agreement by defendant to pay a certain sum for support and counsel fee, which also provides that in case of default in payment the action may be recommenced and motion for alimony made, an order

90. *Davis v. Davis*, 195 App. Div. 430, 186 N. Y. Supp. 805.

91. *Miller v. Miller*, 43 How. Pr. 125.

92. *Collins v. Collins*, 80 N. Y. 1.

93. *Curtis v. Curtis*, 29 Misc. 257, 61 N. Y. Supp. 59.

94. *McDonough v. McDonough*, 26 How. Pr. 193.

95. *Scheinkman v. Scheinkman*, 64 Misc. 443, 118 N. Y. Supp. 775. See, also, *Landes v. Landes*, 172 App. Div. 758, 159 N. Y. Supp. 230.

Allowance not granted.—Where, in an action for a separation the plaintiff alleges that she had previously entered into an agreement of separation with the defendant providing that the plaintiff should have the custody of and should maintain and educate their daughter, that the defendant should pay the plaintiff forty dollars per month which should be reduced to twenty dollars per month upon the child becoming self-supporting or ceas-

ing to live with plaintiff, that the plaintiff has elected to consider the agreement canceled and abrogated by reason of defendant's failure to pay for the support of the child since her employment at eight dollars and fifty cents per week, and it appears that the defendant agreed to pay the additional twenty dollars per month in order that his child might remain in school, that the child now receives all that is needed for a person in her station, that there is no allegation by the plaintiff of fraud or that she is not in good health, and the defendant alleges that he now requires constant medical treatment, an order directing payment of alimony and counsel fees should be reversed and the motion denied. *Craver v. Craver*, 186 App. Div. 847, 175 N. Y. Supp. 26.

96. *Thrall v. Thrall*, 83 Hun, 188, 31 N. Y. Supp. 591, 64 St. Rep. 145.

granting alimony and counsel fee at the same rate specified in the agreement will not be disturbed.⁹⁷

Where plaintiff does not appeal to the court to grant her a separation from her husband, but brings an action in which she stands on the agreement of separation voluntarily executed by the parties and under which they have already lived for several years, it is not a matrimonial action under section 1169 of the Civil Practice Act.⁹⁸ Although action may be maintained in equity to set aside a separation agreement as procured by fraud and duress upon facts authorizing such relief, the court has no power to allow counsel fees therein *pendente lite*.⁹⁹

I. Discretion of court.

1. In general.

In agreement with the express provisions of section 1169 of the Civil Practice Act, it is held that the allowance of temporary alimony or counsel fees is within the discretion of the court.¹ The exercise of the discretion may be reviewed by the Appellate Division,² but will not be interfered with unless it clearly appears that the discretion has been abused.³

The court, in granting alimony *pendente lite*, should consider that the party directed to pay money may be right in the end and should provide as far as possible for such a contingency.⁴ The allowance should be considered from the standpoint that the issues in the case are yet to be tried, and the husband is entitled to the presumption of innocence rather than of guilt.⁵

In making an allowance it is not proper to provide for the transfer of household furniture to the wife and daughter of the guilty party. It should compel the husband to support them by supplying their needs.⁶ While the court cannot

97. *Van Giesen v. Van Giesen*, 26 App. Div. 347, 49 N. Y. Supp. 781.

98. *Johnson v. Johnson*, 206 N. Y. 561.

99. *Johnson v. Johnson*, 206 N. Y. 561, rev'g 151 App. Div. 545, 136 N. Y. Supp. 249.

1. *Starkweather v. Starkweather*, 29 Hun, 488; *McDonough v. McDonough*, 26 How. Pr. 193; *Miller v. Miller*, 43 How. 125; *Douglas v. Douglas*, 13 Abb. Pr. (N. S.) 291; *Gilbert v. Gilbert*, 15 St. Rep. 822; *Galusha v. Galusha*, 43 Hun, 181; *Jones v. Jones*, 2 Barb. Ch. 146.

2. *Patterson v. Patterson*, 4 App.

Div. 146, 38 N. Y. Supp. 637; *Lowenthal v. Lowenthal*, 68 Hun, 366, 22 N. Y. Supp. 858, 51 St. Rep. 883; *Percival v. Percival*, 35 St. Rep. 340.

3. *Weigand v. Weigand*, 103 App. Div. 42, 92 N. Y. Supp. 679; *Gilenger v. Gilenger*, 4 Lans. 473; *Forrest v. Forrest*, 25 N. Y. 501; *Aldrich v. Aldrich*, 74 Hun, 638, 56 St. Rep. 345, 26 N. Y. Supp. 344.

4. *Uhlmann v. Uhlmann*, 17 Wkly. Dig. 282.

5. *Conklin v. Conklin*, 196 App. Div. 607, 186 N. Y. Supp. 191.

6. *Doe v. Doe*, 52 Hun, 405, 5 N. Y. Supp. 514, 24 St. Rep. 364.

direct the plaintiff in an action of separation to have the use of the residence, *pendente lite*, it can make an order for temporary alimony on the basis of such use being conceded, and the defendant will be considered to have consented thereto, not having moved to resettle the order.⁷

An award of alimony *pendente lite* should not embrace an allowance for the support and maintenance of the defendant's child by a former marriage; nor has the court, on a motion for temporary alimony and counsel fees, authority to award the custody of the child to its grandfather, who was not a party to the proceeding.⁸

2. Imposition of conditions on order.

Alimony and counsel fees should never be given to the wife merely to punish a husband because he refuses to consent to a reference of the action, or because he is an unworthy person. An order doubling the amount of alimony and counsel fees, in case the husband refuses to consent to a reference, is entirely unwarranted.⁹ And, similarly, in an action by the wife, an allowance will not be made conditioned upon her waiver of her right to a jury trial.¹⁰

When an order has been made granting alimony to defendant, the court may make an order discontinuing the same unless the defendant shall consent to appear upon the trial for the purpose of identification by plaintiff's witnesses.¹¹

Although the court in an action for separation has denied alimony *pendente lite*, upon condition that the defendant serve upon the plaintiff's attorney within ten days a written offer to provide a suitable home for the plaintiff and her child, it is without authority to make a further order compelling the plaintiff to accept the defendant's offer to provide a suitable home.¹² Where, in an action brought for a separation, it appeared that the wife was living at the husband's home and was being adequately provided for there by him, the court refused to award the wife alimony *pendente lite* conditional upon her election to quit her husband's residence. It was held that counsel fees might, however, be awarded *pendente lite*.¹³

7. *Bresette v. Bressette*, 95 App. Div. 167, 88 N. Y. Supp. 580.

8. *Wood v. Wood*, 61 App. Div. 96, 70 N. Y. Supp. 72.

9. *Patterson v. Patterson*, 4 App. Div. 146, 38 N. Y. Supp. 637.

10. *Lowenthal v. Lowenthal*, 68 Hun, 366, 51 St. Rep. 883, 22 N. Y. Supp.

858. See, also, *Ulbricht v. Ulbricht*, 89 Hun, 479, 35 N. Y. Supp. 324.

11. *Jacobson v. Jacobson*, 12 Civ. Pro. 198.

12. *Mossa v. Mossa*, No. 2, 123 App. Div. 403, 107 N. Y. Supp. 1046.

13. *Smith v. Smith*, 92 App. Div. 442, 87 N. Y. Supp. 137.

J. Anticipated success of wife to be shown.**1. In general.**

On an application for temporary alimony or counsel fees, the court will not assume to pass upon the merits of the action.¹⁴ Yet the wife must show that she has reasonable prospects of success in the action.¹⁵ She is required to present evidence tending to show that she has a meritorious cause of action or defense.¹⁶ The facts and circumstances presented upon the motion should with a reasonable degree of certainty point to a successful termination of the litigation in favor of the wife.¹⁷ If there is no probability that she will succeed, alimony and counsel fees will be denied.¹⁸

A motion for alimony and counsel fees pending the trial of an action for absolute divorce should not be granted where the only proof of the defendant's adultery showing the plaintiff's probability of success is an allegation of the complaint made on the plaintiffs' personal knowledge.¹⁹

2. Allegations on information and belief.

When all the allegations of a complaint for absolute divorce are upon information and belief, and the defendant denies the adultery under oath, the plaintiff is not entitled to alimony *pendente lite* unless she discloses the sources of her information, or the grounds of her belief, so as to establish a reasonable ground for the action and reasonable probability of success.²⁰ Where the evidence shows that the wife, being plaintiff, is in fault and is not without means, alimony will be denied.²¹ If there is no competent evidence of adultery offered, and the defendant denies committing it, alimony and counsel fees should not be awarded plaintiff.²² But alimony *pendente lite* will generally be allowed in an

14. *Greenberg v. Greenberg*, 134 App. Div. 419, 119 N. Y. Supp. 227.

15. *DeVide v. DeVide*, 186 App. Div. 814, 174 N. Y. Supp. 774; *Domb v. Domb*, 195 App. Div. 526, 186 N. Y. Supp. 306; *Winton v. Winton*, 161 N. Y. Supp. 405; *Jones v. Jones*, 2 Barb. Ch. 146; *Bissell v. Bissell*, 1 Barb. 430; *Browne v. Browne*, 9 Civ. Pro. 180.

16. *Greenberg v. Greenberg*, 134 App. Div. 419, 421, 119 N. Y. Supp. 227.

17. *DeVide v. DeVide*, 186 App. Div. 814, 174 N. Y. Supp. 774.

18. *Strong v. Strong*, 1 Abb. Pr. (N. S.) 358; *Coddington v. Coddington*, 10 Abb. Pr. 450; *Jones v. Jones*,

2 Barb. Ch. 146; *Worden v. Worden*, 3 Edw. Ch. 387; *Desbrough v. Desbrough*, 29 Hun, 592.

19. *Capes v. Capes*, 173 App. Div. 142, 149 N. Y. Supp. 367.

20. *Downing v. Downing*, 23 App. Div. 559, 48 N. Y. Supp. 727; *Schweig v. Schweig*, No. 1, 122 App. Div. 786, 107 N. Y. Supp. 904; *Winton v. Winton*, 161 N. Y. Supp. 405; *Moriarty v. Moriarty*, 32 St. Rep. 115, 10 N. Y. Supp. 228; *Monk v. Monk*, 7 Robt. 153.

21. *Harrison v. Harrison*, 2 Month. Law Bull. 56.

22. *Hodge v. Hodge*, 90 App. Div. 611, 85 N. Y. Supp. 1133.

action for divorce where there is some competent evidence of the defendant's guilt.²³

3. Absence of jurisdiction.

Where the moving papers do not show that the action is one of which the courts of this State assume jurisdiction, the application should be denied.²⁴ Thus, if it is not shown that an action of separation by the wife is within the provisions of section 1162 of the Civil Practice Act, alimony and counsel fees will be denied.²⁵ But a denial in the answer of an allegation in the complaint that the plaintiff was at the time of the commencement of the action an actual resident of this State does not take from the court the power to award temporary alimony and expenses.²⁶

4. Insufficient allegations in action for separation.

To entitle a wife to alimony *pendente lite*, in an action for separation, she must present to the court evidence tending to show that she had reasonable grounds to commence the action, and that there is reasonable probability that she will succeed.²⁷ The papers should show sufficient grounds to justify a decree of limited divorce.²⁸ Alimony and counsel fees should not be granted in an action by a wife for separation where there is grave doubt as to the merits of her case.²⁹ General allegations of abandonment and of neglect to support are insufficient.³⁰ Alimony should be denied in an action for separation on the ground of cruel and inhuman treatment, where the only ground of cruelty consists of an allegation that the defendant insisted that his mother should live at the home provided for the plaintiff and the defendant.³¹

23. *Gray v. Gray*, 78 Hun, 610, 60 St. Rep. 225, 28 N. Y. Supp. 856.

24. **Demurrer to answer.**—Where the complaint and affidavits show a cause of action for divorce within the jurisdiction of the courts of this State, and that plaintiff is a resident, and defendant was served in this State and has appeared, the court has power to award alimony to the plaintiff, although she has demurred to the answer, alleging that both parties were residents of another State at the commencement of the action and that the court had no jurisdiction. *Gray v. Gray*, 143 N. Y. 354.

25. *Conrad v. Conrad*, 123 App. Div. 384, 107 N. Y. Supp. 1093.

26. *Brinkley v. Brinkley*, 50 N. Y. 184.

27. *Heyman v. Heyman*, 119 App. Div. 182, 104 N. Y. Supp. 227; *Sturm v. Sturm*, 80 Misc. 277, 141 N. Y. Supp. 61.

28. *Kennedy v. Kennedy*, 73 N. Y. 369.

29. *Dimond v. Dimond*, 124 N. Y. Supp. 493; *Ramsden v. Ramsden*, 28 Hun, 285; on appeal, 91 N. Y. 281.

30. *Bouton v. Bouton*, 3 Robt. 715.

31. *Beck v. Beck*, 2 Bradb. 498.

A single instance of cruelty with vague charges of others is not sufficient.³² But conduct which could be called only thoughtless or unkind to a wife in good health may be cruel to one who is ill and warrant the granting of alimony pending an action for separation.³³

Alimony should not be granted when it appears that the wife left her home after one night's absence by her husband, necessitated by his business, and that the abandonment alleged occurred after such departure by the wife.³⁴ An application for alimony may be denied where it appears that the alleged abandonment consists in the wife's refusal to live elsewhere than in a residence of her own selection.³⁵ In an action for limited divorce, on ground of abandonment, the fact that the wife has voluntarily left the husband and does not intend to return, is an answer to an application for alimony.³⁶

Licentious conduct on the part of the wife would greatly diminish her claim for maintenance and wholly destroy it if it existed before the first cruel treatment.³⁷ In an action for a separation on the ground of cruel and inhuman treatment, where no distinct acts are stated nor time and place specified, and the answering affidavits deny the general charges and show adultery on the part of plaintiff, an allowance of alimony and counsel fee is improper.³⁸

5. Wife defending divorce action.

A wife defending an action of divorce will ordinarily be allowed temporary alimony and counsel fees, if she denies under oath the commission of the acts of adultery in question,³⁹ unless the evidence of her guilt is so preponderating and convincing as to render it most improbable that she will succeed at the trial.⁴⁰ Where, in an action for divorce the

32. *Hollerman v. Hollerman*, 1 Barb. 64; *Solomon v. Solomon*, 28 How. Pr. 218; *Worden v. Worden*, 3 Edw. 387; *Bertschy v. Bertschy*, 14 Wkly. Dig. 111.

33. *Hobbs v. Hobbs*, 2 Bradb. 517.

34. *Heyman v. Heyman*, 119 App. Div. 182, 104 N. Y. Supp. 227.

35. *Bethune v. Bethune*, 5 Law Bull. 71.

36. *Desbrough v. Desbrough*, 29 Hun, 592.

37. *Bedell v. Bedell*, 1 Johns. Ch. 604. See *Peckford v. Peckford*, 1 Paige, 274.

38. *Mackintosh v. Mackintosh*, 44 App. Div. 118, 60 N. Y. Supp. 679.

39. *Boesenbergh v. Boesenbergh*, 50 App. Div. 622, 63 N. Y. Supp. 770; *Walsh v. Walsh*, 4 Misc. 448, 24 N. Y. Supp. 335, 54 St. Rep. 158; *Rublinsky v. Rublinsky*, 24 N. Y. Supp. 920; *Strong v. Strong*, 1 Abb. (N. S.) 358; *Clark v. Clark*, 7 Robt. 284; *Ford v. Ford*, 10 Abb. (N. S.) 74; *Leslie v. Leslie*, 10 Abb. (N. S.) 64.

40. *Stearns v. Stearns*, 33 App. Div. 630, 53 N. Y. Supp. 348; *Frickel v. Frickel*, 4 Misc. 382, 24 N. Y. Supp. 483; *Glaser v. Glaser*, 36 Misc. 231,

adultery charged by the husband is denied under oath, and he reads affidavits of others supporting his charge, the wife is not to be denied alimony *pendente lite* and counsel fees unless the case thus presented is cogent and convincing to the last degree.⁴¹ But, if she does not deny the adultery under oath, she will not be allowed alimony.⁴² And alimony and counsel fees should not be allowed, where the answer does not establish a defense.⁴³ She must disclose the nature of her defense before she will be given an allowance.⁴⁴

The disagreement of a jury, on a trial, shows reasonable ground for defense and authorizes alimony.⁴⁵

The rule that alimony will be awarded to the wife where she denies her alleged guilt under oath does not apply to cases which are dishonestly contested, and where the denial is merely formal and general, leaving the actual facts which establish guilt undenied and unexplained.⁴⁶

When a wife is sued for divorce, in her answer either denies her guilt or sets up affirmative defenses, such as forgiveness or recrimination, counsel fee and alimony will be allowed her unless the court is satisfied that she is altogether in the wrong or has no reasonable ground of defense.⁴⁷ Alimony and counsel fees may be allowed to a defendant wife in an action for divorce, even though her answer to the charge of her husband is merely a general denial, where she sets up affirmative defenses charging him with adultery and cruel and inhuman treatment and demands affirmative judgment.⁴⁸

Where the counter-charges of the defendant against the plaintiff are absolutely denied by her and the affidavits present a debatable issue as to the actual residence of the parties, to be left to the trial of the action for determination, a reasonable allowance for alimony and counsel fee should be granted.⁴⁹ Where the answer in an action by a wife for absolute divorce sets up counter-charges of adultery, the investigation of which involves long and expensive litigation,

73 N. Y. Supp. 284; Koch v. Koch, 42 Barb. 515.

41. Eisenbrock v. Eisenbrock, 187 App. Div. 85, 175 N. Y. Supp. 67.

42. Miller v. Miller, 27 Misc. 758, 59 N. Y. Supp. 473.

43. Bailie v. Bailie, 30 App. Div. 461, 52 N. Y. Supp. 228.

44. Lewis v. Lewis, 3 Johns. Ch. 519.

45. Strong v. Strong, 1 Abb. Pr. (N.

S.) 358.

46. Stearns v. Stearns, 33 App. Div. 630, 53 N. Y. Supp. 348.

47. Strong v. Strong, 1 Abb. (N. S.) 358.

48. Fishbaugh v. Fishbaugh, 161 N. Y. Supp. 446.

49. Ensign v. Ensign, 54 Misc. 289, 104 N. Y. Supp. 917; aff'd, 120 App. Div. 882, 105 N. Y. Supp. 1114.

an allowance to meet the expenses thereof will be granted, although she is not entitled to the alimony.⁵⁰

Where in an action for divorce the wife's answer presents a *prima facie* defense she may be allowed temporary alimony, and the court on motion therefor will not prejudge the case in advance of the trial, nor too carefully scrutinize the merits, unless the proof on the affidavits submitted is so clear against the wife's innocence as practically to exclude any probability of her prevailing in her defense.⁵¹

K. Means of wife.

When the wife in a matrimonial action asks the court for an allowance for counsel fees, the burden is upon her to establish the facts which entitle her thereto. If the wife has money under her control, which she is entitled to use, sufficient to carry on or defend such an action, the court will not direct the husband to pay her any further sum for that purpose.⁵² An order for temporary alimony and expenses will not be made where it is reasonably certain that the wife has ample resources of her own.⁵³ Where a wife has the husband's property in her hands, he will not be called upon to pay until that is exhausted.⁵⁴ If the husband has already given one-half of his estate to his wife, she should not receive alimony.⁵⁵

Where the wife is in receipt of an income from her personal earnings sufficient for her support and has funds sufficient to defray the expenses of the action, which funds, or her services which produced them, belonged to the defendant, or had been given by him to the plaintiff, temporary alimony and counsel fees will be refused.⁵⁶

While the fact that a wife has means is to be considered, it does not bar her rights or deprive her of alimony, where it appears that an allowance is necessary,⁵⁷ and cases may be found where a wife with more or less means of her own has been granted an allowance.⁵⁸

50. *Shaw v. Shaw*, 26 N. Y. Supp. 715.

51. *Brown v. Brown*, 83 Misc. 597, 145 N. Y. Supp. 471.

52. *Lake v. Lake*, 194 N. Y. 179.

53. *Collins v. Collins*, 80 N. Y. 1; *Greene v. Greene*, 59 App. Div. 621, 69 N. Y. Supp. 1135; *Poillon v. Poillon*, 75 App. Div. 536, 78 N. Y. Supp. 323; *Brand v. Brand*, 178 App. Div. 822, 166 N. Y. Supp. 90; *Klesper v. Klesper*, 191 App. Div. 915, 181 N. Y. Supp.

941; *Brown v. Brown*, 83 Misc. 597, 145 N. Y. Supp. 471; *Sawyer v. Sawyer*, 108 Misc. 447, 178 N. Y. Supp. 472; *Maxwell v. Maxwell*, 28 Hun, 566.

54. *Osgood v. Osgood*, 2 Paige, 621.

55. *Hodge v. Hodge*, 90 App. Div. 611, 85 N. Y. Supp. 1133.

56. *Richardson v. Richardson*, 94 N. Y. Supp. 582.

57. *Merritt v. Merritt*, 99 N. Y. 643.

58. *Graves v. Graves*, 143 App. Div. 923, 128 N. Y. Supp. 499; *Waterman*

L. Means of husband.

The poverty of the husband is not a sufficient ground for the denial of alimony and counsel fees;⁵⁹ but his means are important in determining the amount to be awarded. Poverty of the husband, although taken into account in fixing the amount, will not furnish ground for the denial of any alimony.⁶⁰ The motion papers on an application for alimony should set forth the facts relating to the husband's income, from which the court can determine the amount of the husband's income.⁶¹

M. Commencement and termination of payments.

Alimony *pendente lite* should only be granted for future support and should commence from the time of the application therefor.⁶² Where only a short time intervenes between the application and the order for temporary alimony, it may be ordered paid from the date of application, but where a number of years have intervened, it should be directed only from date of the order.⁶³ But, in some cases, the court may in its discretion direct the payment of permanent alimony, from the commencement of the action.⁶⁴

A husband is bound to comply with an order granting temporary alimony until the final judgment is entered.⁶⁵ He is not released from the obligation by the filing of a referee's report in his favor.⁶⁶ The wife is entitled to alimony up to the final decree, though there be a verdict against her.⁶⁷ But the order for alimony is superseded by the judgment.⁶⁸ And the order loses its force on the death of the husband and cannot thereafter be enforced.⁶⁹

v. Waterman, 147 App. Div. 464, 131 N. Y. Supp. 741; Sinn v. Sinn, 3 Misc. 598, 52 St. Rep. 855, 23 N. Y. Supp. 339; *aff'd* without opinion, 140 N. Y. 636.

59. Cohen v. Cohen, 11 Misc. 704, 32 N. Y. Supp. 1082, 66 St. Rep. 336; Purcell v. Purcell, 3 Edw. 194; Hallock v. Hallock, 4 How. Pr. 160.

60. Rublinsky v. Rublinsky, 24 N. Y. Supp. 920; Walsh v. Walsh, 4 Misc. 448, 54 St. Rep. 158, 24 N. Y. Supp. 335.

61. Miller v. Miller, 27 Misc. 758, 59 N. Y. Supp. 473; Randall v. Randall, 29 Misc. 423, 60 N. Y. Supp. 718,

7 N. Y. Anno. Cases, 45.

62. Thrall v. Thrall, 83 Hun, 188, 31 N. Y. Supp. 591, 64 St. Rep. 145.

63. Collins v. Collins, 10 Hun, 272; *rev'd* on other grounds, 71 N. Y. 269.

64. McCarthy v. McCarthy, 143 N. Y. 235.

65. Dietz v. Dietz, 136 N. Y. Supp. 341.

66. Beadleston v. Beadleston, 23 Wkly. Dig. 365.

67. Stanford v. Stanford, 1 Edw. 317.

68. Wood v. Wood, 7 Lans. 204.

69. Kellogg v. Stoddard, 89 App. Div. 137, 84 N. Y. Supp. 1015.

Temporary alimony may be given, pending a reference as to permanent alimony, though no order was made before the decree.⁷⁰

After the discontinuance of the action for separation the wife cannot enforce a claim for alimony alleged to have accrued during its pendency, against an assignee of the husband for the benefit of creditors.⁷¹

If there is unreasonable delay in prosecuting the suit, it is ground for the discontinuance of alimony.⁷² Where plaintiff in divorce has obtained an order for alimony, and subsequently brings an action for the same cause in another State, the order should be stayed until the abandonment of the latter action.⁷³

Where the wife sued for a divorce and the husband counterclaimed for a separation, an award of counsel fee was made to her, and the decree denied the divorce without the counterclaim being adjudicated upon, it was held that a motion for the return of the counsel fee should be denied.⁷⁴

N. Amount of temporary alimony.

There is no fixed rule as to the amount of temporary alimony to be allowed the wife. It may, if necessary, include a sufficient sum to enable the wife to spend the winter in a tropical climate for the benefit of her health.⁷⁵ It is smaller than the permanent alimony, for the uncertainties of the litigation are to be considered on the application.⁷⁶ The amount of temporary alimony must be regulated by the wife's necessities and husband's ability.⁷⁷ It is dependent upon the financial situation of the parties.⁷⁸ The rule is to allow only such alimony as the husband is able to pay and is sufficient to properly support the wife and enable her to try the action, taking into consideration the nature of the husband's means and the situation of the parties in society.⁷⁹ In

70. *Forrest v. Forrest*, 5 Bosw. 672.

71. *Matter of Thrall*, 12 App. Div. 235, 42 N. Y. Supp. 439; *aff'd*, 153 N. Y. 644.

72. *Fowler v. Fowler*, 4 Abb. Pr. 411.

73. *Nichols v. Nichols*, 12 Hun, 428.

74. *Grauer v. Grauer*, 2 Misc. 98, 49 St. Rep. 354, 20 N. Y. Supp. 854.

75. *Lynde v. Lynde*, 4 Sandf. Ch. 373; *s. c.*, 2 Barb. Ch. 72.

76. *Simmons v. Simmons*, 2 Robt. 212; *Leslie v. Leslie*, 6 Abb. Pr. (N. S.) 193.

77. *DeLlamosas v. DeLlamosas*, 2

Hun, 380; *Saunders v. Saunders*, 2 Edw. 491; *Germond v. Germond*, 4 Paige, 643; *Morrell v. Morrell*, 2 Barb. 280.

Affidavits are admitted for the purpose of fixing the amount. *Leslie v. Leslie*, 6 Abb. Pr. (N. S.) 193; *Wright v. Wright*, 1 Edw. 62; *Hammond v. Hammond*, Clarke, 151; *Hallock v. Hallock*, 4 How. Pr. 160.

78. *Brown v. Brown*, 83 Misc. 597, 145 N. Y. Supp. 471.

79. *Wells v. Wells*, 10 St. Rep. 248; *Gilbert v. Gilbert*, 15 St. Rep. 822; *Hallock v. Hallock*, 4 How. Pr. 160.

fixing the amount of alimony the court should take into consideration the nature of the action, whether or not the wife has a good cause of action, the probable difficulty in proving her case, the strength of the case she is required to meet, the probable expense of carrying on the litigation and the means of the husband, including his expenditures and his apparent condition.⁸⁰ The conduct and acts of the parties, their circumstances, and condition during marriage are to be considered in determining the amount to be awarded, but their acts prior to marriage cannot be scrutinized either for the purpose of increasing or diminishing the allowance.⁸¹

No rule has ever been adopted by the courts that she is entitled to one-third of her husband's income, irrespective of its relation to reasonable expenditures, nor to any particular fraction of such income.⁸² Alimony is not based on a definite part of the husband's estate or his yearly income but should be fixed with due regard to the station in life of the parties and the circumstances of their separation.⁸³

Where the husband's income is many times excessive of all reasonable needs for the maintenance of a family in lavish abundance, and he has voluntarily contributed at the rate of \$25,000 a year to his wife's support, the court will not hold that such provision is inadequate for the purpose nor make an order awarding alimony at a greater rate.⁸⁴

Nothing but money can be ordered as temporary alimony; the court cannot order the use of horses and a carriage.⁸⁵

Where the affidavits disclose sufficient facts upon which the court can act advisedly to fix the amount of alimony, it is not necessary to involve the defendant in the costs of a reference as to his property.⁸⁶ On a reference as to temporary alimony, the wife need not prove her case on the merits.⁸⁷

O. Increase or decrease in amount.

Temporary alimony may be increased or decreased during the pendency of the action.⁸⁸ It may be increased in accordance with the wife's necessities and the husband's

80. *Patterson v. Patterson*, 4 App. Div. 146, 38 N. Y. Supp. 637.

81. *Gould v. Gould*, 125 App. Div. 375, 109 N. Y. Supp. 910.

82. *Gould v. Gould*, 61 Misc. 120, 114 N. Y. Supp. 331.

83. *Brokaw v. Brokaw*, 66 Misc. 307, 123 N. Y. Supp. 17; *aff'd*, 147 App. Div. 906, 131 N. Y. Supp. 1106.

84. *Gould v. Gould*, 61 Misc. 120, 114 N. Y. Supp. 331.

85. *Simmons v. Simmons*, 2 Robt. 712.

86. *Tabor v. Tabor*, 140 N. Y. Supp. 313.

87. *Fowler v. Fowler*, 4 Abb. Pr. 411; *Herforth v. Herforth*, 2 Abb. Pr. 483.

88. *Leslie v. Leslie*, 11 Abb. Pr. (N. S.) 311; *Forrest v. Forrest*, 5 Bosw. 672.

ability.⁸⁹ But it should not be increased if, with voluntary payments by the husband, it seems sufficient.⁹⁰ The amount of alimony can at any time be increased by consent of the husband.⁹¹ A reasonable allowance of alimony will not be modified on the ground that the husband lost his situation through the efforts of the wife.⁹²

While the court has power to increase alimony, such increase should not be granted unless new facts are shown which did not exist or were not known to the applicant when the former order was made.⁹³ After an order has been granted and an allowance made for counsel fees and expenses, but refusing alimony, she cannot on the same grounds move at another Special Term for an additional allowance without showing a different state of facts.⁹⁴

Where the amount is reduced on the application of the husband, he is not entitled to receive back from his wife by way of restitution the excess paid under the original order, especially where it appears that the wife has spent the moneys received and has no means by which to make restoration.⁹⁵

Where, after an allowance of alimony with counsel fees pending an action for divorce, a motion to reduce the allowance is made before another justice by mutual consent of parties, the motion will be treated as one for a reargument which might have been entertained by the justice granting the original order.⁹⁶

A statement of the amount of the husband's annual income should be plainly denied in order to reduce the amount of alimony.⁹⁷

P. Allowance of counsel fees.

1. In general.

The authority of the court to allow counsel fees and expenses of the suit depends on section 1169 of the Civil Practice Act. The court does not have inherent jurisdiction to grant counsel fees as an incident to its general jurisdiction

89. *Forrest v. Forrest*, 5 Bosw. 672.

90. *Morrell v. Morrell*, 2 Barb. 480.

91. *Stahl v. Stahl*, 12 N. Y. Supp. 854.

92. *Kunze v. Kunze*, 53 N. Y. Supp. 938.

93. *Straus v. Straus*, 38 St. Rep. 478, 14 N. Y. Supp. 671.

94. *Simonds v. Simonds*, 10 N. Y.

Supp. 606, 32 St. Rep. 127, 57 Hun, 290.

95. *Surat v. Surat*, 191 App. Div. 570, 181 N. Y. Supp. 631.

96. *Horn v. Horn*, 142 App. Div. 848, 127 N. Y. Supp. 448.

97. *Lloyd v. Lloyd*, 18 Wkly. Dig. 364.

in matrimonial actions.⁹⁸ An allowance of counsel fees may be made under such section, where the action is pending and the allowance is necessary for the further prosecution or defense of the action.⁹⁹ The power to make the allowance is dependent on the necessity therefor,¹ the wife being entitled only to such sums as are "reasonably" necessary.² But counsel fees are sometimes granted in cases where temporary alimony is denied.³ A husband who brings an action for divorce is generally bound to furnish his wife with means to defend it and to pay a counsel fee.⁴ A counsel fee may be granted in a suit for limited divorce where plaintiff's statement makes out a *prima facie* case and her income is not sufficient to support her and to bear the expense of a suit, although alimony is refused.⁵ Counsel fees will not be allowed a plaintiff who, five years after she has procured a decree of divorce in another State, brings another action for divorce against the same man, alleging that the judgment in the former action is void.⁶

2. Past expenses.

An allowance to the wife of counsel fees or means to prosecute or defend her suit looks to the future. She cannot be allowed a sum to pay expenses already incurred.⁷ The court ordinarily has no power to grant an allowance to pay for past services, even though the party's counsel is unwilling to act in the future unless paid for such services.⁸ The power of the court is limited to the allowance of such sums *pendente lite* as will enable her to carry on or defend the action. If she has carried on the suit on her own credit, she may not have an order compelling her husband to reimburse

98. Lake v. Lake, 194 N. Y. 179.

99. Cohen v. Cohen, 11 Misc. 704, 32 N. Y. Supp. 1082, 66 St. Rep. 336; Cipro v. Cipro, 161 N. Y. Supp. 408.

1. Lake v. Lake, 194 N. Y. 179; Tranter v. Tranter, 189 App. Div. 714, 178 N. Y. Supp. 521.

2. Conklin v. Conklin, 196 App. Div. 607, 186 N. Y. Supp. 191.

3. Collins v. Collins, 80 N. Y. 1; Masey v. Masey, 58 App. Div. 619, 68 N. Y. Supp. 994; Douglas v. Douglas, 13 Abb. (N. S.) 291; Carpenter v. Carpenter, 19 How. Pr. 539.

4. Kunze v. Kunze, 53 N. Y. Supp. 938.

5. Browne v. Browne, 9 Civ. Pro. 180; Bertschy v. Bertschy, 14 Wkly.

Dig. 111.

6. Ober v. Ober, 7 N. Y. Supp. 843.

7. Beadleston v. Beadleston, 103 N. Y. 402; McCarthy v. McCarthy, 137 N. Y. 500; Winkemeier v. Winkemeier, 11 App. Div. 199, 42 N. Y. Supp. 586; Conklin v. Conklin, 196 App. Div. 607, 186 N. Y. Supp. 191; Schroter v. Schroter, 57 Misc. 199, 107 N. Y. Supp. 1065; Straus v. Straus, 67 Hun, 491, 22 N. Y. Supp. 491; Straus v. Straus, 50 St. Rep. 845, 22 N. Y. Supp. 567; Emerson v. Emerson, 26 N. Y. Supp. 292; Cipro v. Cipro, 161 N. Y. Supp. 408.

8. Emerson v. Emerson, 26 N. Y. Supp. 292.

her for such expenses.⁹ After the trial an allowance of counsel fees will not ordinarily be made,¹⁰ unless some reason is shown why counsel fees are necessary for the further litigation of the wife's claims. Hence, an application for counsel fees and costs made upon the application for the confirmation of the referee's report will generally be denied.¹¹ After a jury trial resulting in a disagreement, an allowance of counsel fees may be made for the further prosecution of the action.¹² The final judgment will not make any provision for the expenses of the wife's suit, except as to taxable costs.¹³ But it has been thought that an allowance for past expenses may be made, if it is shown to be necessary to make such payment in order that the suit may be further continued.¹⁴

3. Requiring husband to pay particular items of costs.

An order may be made requiring the husband to pay a sum to be used for a specific purpose in the suit, such as the payment of referee's fees,¹⁵ the expenses of printing the

9. *Beadleston v. Beadleston*, 103 N. Y. 402; *Hauser v. Hauser*, 154 N. Y. Supp. 1072.

10. *McCarthy v. McCarthy*, 137 N. Y. 500; *Winkemeier v. Winkemeier*, 11 App. Div. 199, 42 N. Y. Supp. 586; *Poillon v. Poillon*, 75 App. Div. 536, 78 N. Y. Supp. 323.

When granted after trial.—An additional allowance of counsel fees is proper, although not made until the entry of the decree and after the services had been rendered, where counsel for the plaintiff at the time he was preparing the case for trial suggested to defendant's counsel that he would have to make a motion for an additional allowance, and upon the suggestion of defendant's counsel agreed with him not to make the motion until the trial, at which time there was a stipulation in open court that the question should be settled by the trial justice upon the settlement of the decree, as the actual making of the allowance, under such circumstances, relates back to the time of the making of the agreement. *Page v. Page*, 124 App. Div. 421, 108 N. Y. Supp. 864; *aff'd*, 195 N. Y. 540.

After an appeal has been taken from

a judgment in favor of a wife in her action for divorce, an order cannot be made requiring the defendant to pay for services rendered by the plaintiff's attorney before the entry of judgment, nor can an order be made requiring defendant to pay an amount for expenses to which she may be subjected on the appeal, the power of the court to make such allowance being confined to the pendency of the action. *Winton v. Winton*, 31 Hun, 290, *rev'd* 12 Abb. N. C. 259, and *overruling Anonymous*, 15 Abb. (N. S.) 307.

11. *Tranter v. Tranter*, 189 App. Div. 714, 178 N. Y. Supp. 521.

12. *Hermann v. Hermann*, 88 App. Div. 76, 84 N. Y. Supp. 736.

13. *Straus v. Straus*, 67 Hun, 491, 22 N. Y. Supp. 567; *Atherton v. Atherton*, 82 Hun, 179, 31 N. Y. Supp. 977, 64 St. Rep. 798; *aff'd*, 155 N. Y. 129; *rev'd* on other grounds, 191 U. S. 155.

14. *Beadleston v. Beadleston*, 103 N. Y. 402; *McCarthy v. McCarthy*, 137 N. Y. 500.

15. *McQuien v. McQuien*, 61 How. Pr. 280; *Schloemer v. Schloemer*, 49 N. Y. 82; *Beadleston v. Beadleston*, 9 Civ. Pro. 440.

record on appeal,¹⁶ or the cost of a transcript of the minutes of a trial for the use of the trial justice, who has requested that he be furnished with such transcript.¹⁷ But the husband should not be required to pay the expenses of the stenographer's fees on a mistrial, they not being necessary.¹⁸

4. Second allowance.

A married woman who has received an allowance under section 1169 is not entitled to a further allowance, unless it appears that such allowance is necessary to enable her to carry on the litigation.¹⁹ Where the referee has found for the wife but the court has refused to confirm his report, and a new referee has been appointed, the wife will be granted a further allowance for counsel fees.²⁰ Where it was stipulated that no application for further counsel fees or alimony should be made "until the result of this action is reached," it was held that the stipulation was not a bar to an application for payment by the husband of the wife's expenses at the next trial.²¹

5. Proceedings after judgment.

The court has no power to grant a counsel fee after a final judgment dissolving the marriage.²² A decree of divorce, with alimony, absolutely dissolves the marital relation, and the husband cannot thereafter be compelled to furnish money to pay the costs of a new litigation to enforce payment of alimony.²³ Nor can a counsel fee be allowed on a motion for an increase of permanent alimony.²⁴

6. Amount allowed.

The allowance for alimony and expenses in an action for divorce is within the jurisdiction of the court of original jurisdiction and, unless so gross and excessive as to show an abuse of judicial discretion, is not reviewable by the Court of Appeals. Proof of the amount of labor, or the value of the services of counsel, is not necessary to sustain an allowance for counsel fees; the court may determine from its own

16. *Sternberger v. Sternberger*, 98 N. Y. Supp. 946.

17. *Hock v. Hock*, 149 N. Y. Supp. 1027.

18. *Hermann v. Hermann*, 88 App. Div. 76, 84 N. Y. Supp. 736.

19. *Stampfer v. Stampfer*, 11 N. Y. Supp. 588.

20. *Bauer v. Bauer*, 42 Misc. 557,

87 N. Y. Supp. 607.

21. *Van Wormer v. Van Wormer*, 11 N. Y. Supp. 247.

22. *Bishop v. Bishop*, 165 App. Div. 954, 150 N. Y. Supp. 660.

23. *McQuien v. McQuien*, 61 How. Pr. 280.

24. *Parker v. Parker*, 189 App. Div. 603, 179 N. Y. Supp. 51.

experience, and from the facts and circumstances of the case as disclosed by the papers, what is a reasonable fee.²⁵ In making an allowance for counsel fees in action for divorce, an allowance for two counsel ought not to be made unless it is shown that two counsel are necessary to protect the rights of the parties.²⁶

7. Discontinuance of action.

Upon the discontinuance of an action brought against the wife for a divorce, she is not entitled to an allowance for counsel fee.²⁷ An order for counsel fees may be reversed, where the parties have settled their differences and returned to cohabitation.²⁸

8. Liability of husband for expenses of wife.

If an allowance of counsel fees is made in an action of divorce, it limits the liability of the husband for the services of her attorney.²⁹ The awarding of costs and counsel fees to enable a wife to defend or to maintain a divorce action fixes the compensation, not only of the attorney of record, but also of counsel, and a further legal liability cannot be imposed upon a husband who has paid the sums thus directed by the court. Nor can the husband be sued under an alleged common-law liability for the value of counsel services over and above the stated counsel fees and costs, as taxed.³⁰

The voluntary return of a wife to her husband before the trial of an action for a separation effectually terminates the action and authorizes the attorney for the wife, where the

25. *De Llamosas v. De Llamosas*, 62 N. Y. 618, dismissing appeal from 2 Hun, 380.

An allowance of \$400 as counsel fee is excessive, where the defendant is a taxicab chauffeur working for a salary of \$12 a week, while the plaintiff, a telephone operator, earns approximately \$25 a week, and the amount should be reduced to \$200. *LeRoy v. LeRoy*, 175 App. Div. 120, 161 N. Y. Supp. 503.

26. *Uhlman v. Uhlman*, 51 Supér. Ct. 361.

27. *Moore v. Moore*, 22 N. Y. Supp. 450, 51 St. Rep. 911, appeal dismissed, 138 N. Y. 679. *Contra*, *Green v. Green*, 40 How. Pr. 465.

28. *Chase v. Chase*, 29 Hun, 527. *Contra*, *Louden v. Louden*, 65 How. Pr.

411.

29. *Turner v. Woolworth*, 153 App. Div. 293, 137 N. Y. Supp. 1071. See, also, *Turner v. Woolworth*, 221 N. Y. 425.

Increase of alimony.—The husband may be liable to an attorney for services rendered to the wife in securing an increase of alimony. But where the wife has paid her attorney for services rendered in securing an increase of alimony out of her allowance of alimony she cannot recover from her husband the amount paid. *Hauser v. Hauser*, 154 N. Y. Supp. 1072.

30. *Turner v. Woolworth*, 165 App. Div. 70, 151 N. Y. Supp. 93; mod'd, 221 N. Y. 425.

court has awarded no counsel fees or alimony, to institute an action against the husband to recover the value of his services rendered.³¹

Q. Procedure.

A plaintiff moving for counsel fees and alimony *pendente lite* is under the burden of showing the facts which entitle her thereto.³² The application may be upon motion and affidavits which should contain a full and specific statement of facts, and show a reasonable expectation that the wife will succeed; and if the wife is the defendant, the defense should be disclosed by the answer.³³

Motion papers may be served on the attorney and not upon the party.³⁴ A reference is not necessary where the facts appear sufficiently.³⁵

Affidavits in opposition to a wife's motion for alimony will not be suppressed on her application where they bear upon her general conduct and are in the nature of a reply to portions of her own affidavits as to the cause of the estrangement.³⁶

An order directing the defendant in a matrimonial action to pay additional counsel fees should in terms make them payable to the wife, not to her attorney in person.³⁷

R. Form of notice of motion for alimony and counsel fees.

(Title.)

PLEASE TAKE NOTICE, That upon the annexed affidavits of, verified the day of, 19.., and of, verified the day of, 19.., and upon the pleadings herein, a motion will be made at a Special Term of this court, to be held at, in, of, on the day of, 19.., at the opening of court on that day or as soon thereafter as counsel can be heard, for an order directing the defendant herein,, to pay the plaintiff the sum of dollars per week for the support and maintenance of herself and the issue of the marriage, during the pendency of this action, and also the sum of dollars counsel fee for her attorney, to enable

31. *Naumer v. Gray*, 41 App. Div. 361, 58 N. Y. Supp. 476.

32. *Dye v. Dye*, 140 App. Div. 309, 125 N. Y. Supp. 242.

33. *Osgood v. Osgood*, 2 Paige, 621.

34. *Brinkley v. Brinkley*, 47 N. Y. 40.

35. *Hammond v. Hammond*, Clarke, 151; *Hoffman v. Hoffman*, 55 Barb. 269.

36. *Sanford v. Sanford*, 94 N. Y. Supp. 1096, 35 Civ. Pro. 65.

37. *Kellogg v. Stoddard*, 89 App. Div. 137, 84 N. Y. Supp. 1015; *Kamman v. Kamman*, 167 App. Div. 423; 152 N. Y. Supp. 579; *Kamman v. Kamman*, 167 App. Div. 426, 152 N. Y. Supp. 581. See, also, *Pountney v. Pountney*, 32 St. Rep. 335, 10 N. Y. Supp. 192.

her to defray the costs and expenses of this action, and for such other or further relief as may be just.

Answering affidavits must be served at least one day before the return day thereof.

Dated,

.....

Attorney for Plaintiff.

S. Form of affidavit for alimony and counsel fees.

(Title of action.)

(Venue.)

....., being duly sworn, deposes and says:

1. That she is the plaintiff herein and has brought this action against the defendant, her husband, for a limited divorce or judgment of separation between them upon the ground of cruel and inhuman treatment, and of such conduct, on the part of the defendant, toward the plaintiff, as renders it unsafe and improper for her to cohabit with him, as more fully appears by the complaint hereto annexed.

2. That this action was commenced by the service upon the defendant on the day of, 19.., of a summons and complaint, as appears by the affidavit of, hereto annexed; that she will be able to substantiate all the allegations of the complaint by proof on the trial, and that she has a good cause of action thereon, as she is advised by her counsel,, who resides and has his office at, county of, State of New York, and as she verily believes.

3. That since said marriage, the defendant has treated the plaintiff in a cruel and inhuman manner, and since the year he has repeatedly committed acts of cruelty and violence upon her and upon her children, as follows, to wit: (*Here set forth the facts fully.*)

4. That your deponent is wholly destitute of the means of supporting herself or her children pending this action or of carrying on the same and defraying the costs and expenses thereof.

5. (*State facts as to business and income of husband.*)

6. That the issue of the marriage of the parties hereto, now living with the plaintiff, are as follows: (*state names and dates of birth of children*); and the plaintiff alleges that the defendant is an unfit and improper person to have the care, custody, training and education of such children.

WHEREFORE, Deponent asks that the said defendant may, by an order of this court, be required to pay to deponent a reasonable sum for her support and maintenance of her children during the pendency of this action, and such sums as may be necessary to enable deponent to carry on this action, and to defray the necessary costs and expenses thereof, and for such other and further order as may be just.

Sworn to before me, this day }
of, 19... }

.....

.....

Notary Public.

(NOTE: Attach affidavits corroborating statements as to cruelty and defendant's earnings, etc.)

T. Form of order of reference to determine alimony.

(Title of action and caption.)

On reading and filing the affidavit of the plaintiff herein, verified the day of, 19.., and upon the affidavits accompanying the same, with due proof of the service thereof, and upon reading the affidavits of, in opposition thereto, and on motion of, of counsel for the plaintiff, and after hearing, of counsel for the defendant, in opposition thereto, it is hereby

ORDERED, That it be referred to, attorney-at-law, of, to inquire what would be a reasonable sum to be allowed to the said plaintiff for her support and maintenance, and for the support, maintenance and education of the children of the marriage of plaintiff and defendant and to report the same to the court; and it is hereby further

ORDERED, That such referee make inquiry and report what would be a reasonable sum to be allowed the said plaintiff for the purpose of enabling her to prosecute this action and to defray the necessary costs and expenses thereof; and that such referee report also the time and place and under what conditions the payment of such sums should be made.

Enter:

.....

.....

U. Form of report of referee.

(Title of action.)

To the Supreme Court:

In pursuance of the order of this court, made and entered in the above-entitled action on the day of, 19.., by which it was referred to me, to inquire (*here state substance of the order*), I do respectfully report:

That I have been attended by the parties and their counsel, and have heard their proofs and allegations, and after due deliberation I find as matters of fact:

1. That the defendant is seized and possessed of the following real property, to wit: (*insert in accordance with facts*).

2. That he is also possessed of the following personal property: (*State and briefly describe personal property possessed by the defendant.*)

3. (*State as to business and income of husband.*)

4. That the following children were born of the marriage of the plaintiff and the defendant in this action (*state names and dates of birth of children*), and that of such children, the following reside with the plaintiff and are in her care, custody and control.

I also further report that in my opinion the defendant herein should be required to pay to the plaintiff for her support and maintenance, and for the support, maintenance and education of the children residing with her, a sum of dollars per month during the pendency of this action; and that such sum should be paid to her on the first day of each month from the date of the order directing such payment.

And I also further report that in my opinion the sum of dollars would be a proper sum to be allowed the plaintiff for the purpose of enabling her to prosecute this action and to defray the necessary costs and expenses thereof.

All of which is respectfully submitted.

Dated,

.....

Referee.

V. Form of order granting alimony and counsel fees.

(Title of action.)

(Caption.)

On reading the summons, complaint and answer in the above-entitled action, and on reading and filing the notice of motion for this action, with proof of the due service thereof on, attorneys for the defendant, and the affidavit of the plaintiff, verified on the day of, 19.. (*state names of persons making affidavits in opposition*), and after hearing, of counsel for the plaintiff in support of the motion, and, of counsel for the defendant in opposition thereto.

On motion of, attorney for the plaintiff, it is hereby

ORDERED, That the defendant pay to the plaintiff the sum of, counsel fees, within ten days after the service of a certified copy of this order on the attorneys for the defendant; and it is hereby further

ORDERED, That the defendant pay to the plaintiff the sum of dollars, per month, for her support and the education and support of the children of the marriage, during the pendency of this action, from the commencement thereof, to wit: the day of, 19..; and make such payments as follows, to wit: For the two months ending on the day of, 19.., within five days after the service of a certified copy of this order on the attorneys for the defendant, and thereafter on the day of each and every month, beginning on the day of, 19..; and it is hereby further

ORDERED, That the defendant make each and all payments above ordered at the office of, attorney for the plaintiff, at, N. Y., between the hours of ten in the morning and three in the afternoon, and if any of the days so above fixed for payment shall fall on a Sunday or other holiday, then said payment shall be made on the next succeeding secular day.

Enter:

.....

J. S. C.

ARTICLE IX.**REFERENCES ON ISSUES.****A. Civil Practice Act, § 465. Reference in discretion of court.**

A reference shall not be made, of course, upon the consent of the parties, in an action to annul a marriage or for a divorce or a separation; or an action against a corporation, to obtain a dissolution thereof, the appointment of a receiver of its property, or the distribution of its property, unless it is brought by the attorney-general; or an action wherein a defendant to be affected by the result of the trial is an infant. In a case specified in this section, where the parties consent to a reference, the court, in its discretion, may grant or refuse a reference; and, where a reference is granted, the court must designate the referee. If the referee thus designated refuses to serve, or if a new trial of an action tried by a referee so designated is granted, the court, upon the application of either party, must appoint another referee.

B. Civil Practice Act, § 1174. Judgment in matrimonial action must be rendered by court.

In an action to annul a marriage or for a divorce or separation, judgment cannot be taken, of course, upon a referee's report. Where a reference is made in such an action, the testimony and the other proceedings upon the reference must be certified to the court by the referee with his report; and judgment must be rendered by the court.

C. Rules of Civil Practice, Rule 281. Reference in matrimonial action.

In an action to annul a marriage or for divorce or separation the court shall not order a reference to a referee nominated by either party or agreed on by the parties, nor without proof by affidavit of the service of the summons and complaint in conformity with the rules. Notice of appearance and retainer shall not be sufficient to excuse such proof.

D. Rules of Civil Practice, Rule 282. Reference on default not permitted in action to annul a marriage or for divorce or separation.

In an action for a divorce, or separation, or to annul a marriage, where the defendant fails to answer, no reference shall be granted to take proof of the facts stated in the complaint. Before a judgment shall be granted, the proof of such facts must be made in open court and a copy of the evidence taken before the court shall be written out and filed with the judgment-roll.

E. Referee suggested by counsel.

It is improper to appoint a referee who has been agreed upon by the parties; but some difficulty may be experienced in determining the effect of a violation of the rule. It has been held that public policy, as well as the statute and rules, forbid the reference to a referee agreed upon by the parties; and that a disregard of the rule is not a mere irregularity, but

that the proceedings are void.³⁸ But where the wife has been the recipient of temporary alimony and counsel fees for a considerable period, and the trial before the referee has been strongly contested, she is not in position to object to the entry of judgment after the husband succeeds before the referee.³⁹ And although the order of reference is irregular in this respect, such irregularity does not require a vacation of the entire order where the original consent to refer was general and the designation was afterward made by the court.⁴⁰ In the absence of collusion or fraud, a designation as referee in a contested action for divorce, of a person named by a party, is at most an irregularity which can be waived, and it is waived by the party accepting the benefit of the order in putting the case over the term.⁴¹

The parties to an action for divorce cannot agree upon a referee to take testimony to be used upon the reference ordered by the court upon application for judgment.⁴²

F. Nature of reference.

The reference allowed in matrimonial actions is not strictly a reference to hear and determine the issues, for the court is responsible for the judgment, and the reference may be said to be one to inform the conscience of the court.⁴³ Nor is the reference one to take proof of the facts and report with opinion, for such a reference is not allowed in matrimonial actions.⁴⁴ An order of reference with power to take the testimony and report the same with his findings of fact to the court is an order of reference to hear and determine.⁴⁵

G. Vacating order of reference.

Where an order of reference was entered by consent, and after one hearing plaintiff moved to vacate the order and asked for a jury trial, it was a matter of discretion and not of right and not reviewable in Court of Appeals.⁴⁶ One judge

38. *Pratt v. Pratt*, 2 App. Div. 534, 38 N. Y. Supp. 26. See, also, *Fallon v. Egberts Woolen Mill Co.*, 24 Misc. 304, 53 N. Y. Supp. 672.

39. *Young v. Young*, 38 Misc. 109, 77 N. Y. Supp. 94.

40. *Ives v. Ives*, 80 Hun, 136, 61 St. Rep. 657, 29 N. Y. Supp. 1053.

41. *Ives v. Ives*, 7 Misc. 328, 28 N. Y. Supp. 170; mod'd, 80 Hun, 136, 29 N. Y. Supp. 1053.

42. *White v. White*, 66 Misc. 592,

123 N. Y. Supp. 1082.

43. *Perkins v. Perkins*, 130 App. Div. 193, 114 N. Y. Supp. 960.

44. *Harper v. Harper*, 5 Wkly. Dig. 460; *Sullivan v. Sullivan*, 41 Super. Ct. 519; *McCleary v. McCleary*, 30 Hun, 154.

45. *McCleary v. McCleary*, 30 Hun. 154; *Matthews v. Matthews*, 53 Hun, 244, 6 N. Y. Supp. 589.

46. *Winans v. Winans*, 124 N. Y. 140.

cannot vacate an order of reference made by a court held by another judge.⁴⁷

H. Report of referee.

The referee must find not only as to the fact of adultery, but as to all the material facts.⁴⁸ If the misconduct of the plaintiff is alleged in the answer, the report must contain a finding on this issue.⁴⁹ It is error for the referee to make no finding as to recrimination alleged in the answer.⁵⁰ The court will not assume that a conclusion of law found by the referee to the effect that the plaintiff is entitled to judgment is a finding in the negative on the issue of the plaintiff's guilt.⁵¹

The referee is bound to find only on the issues raised by the pleadings. If the referee finds that the parties are guilty of collusion when no such issue was raised by the pleadings, the court may render judgment for the plaintiff if the other findings support such a judgment.⁵²

Where the answer contained specific recriminating charges of adultery, a finding that plaintiff is "guilty as charged in the answer" is a sufficient finding.⁵³

I. Confirmation of report.

Under section 1174 of the Civil Practice Act, judgment is not to be rendered, as of course, upon a referee's report in a matrimonial action. The testimony and the proceedings are certified to the court, and judgment is rendered by the court. Judgment on the report dismissing the complaint cannot be entered without application to the court.⁵⁴ Although the referee has found the issues in favor of the plaintiff, the court may refuse to enter judgment, if the evidence does not sustain the conclusions.⁵⁵ And the court may refuse to grant the judgment on the ground that the circumstances indicate collusion between the parties.⁵⁶ Though the judgment in

47. *Willard v. Willard*, 194 App. Div. 123, 185 N. Y. Supp. 569.

48. *Dodge v. Dodge*, 7 Paige, 589; *Arbogast v. Arbogast*, 8 How. Pr. 297; *Myers v. Myers*, 41 Barb. 114; *Merrill v. Merrill*, 11 Abb. (N. S.) 74.

49. *Griffin v. Griffin*, 70 Hun, 73, 53 St. Rep. 437, 23 N. Y. Supp. 1070; *Price v. Price*, 9 Abb. Pr. (N. S.) 291.

50. *Griffin v. Griffin*, 70 Hun, 73, 53 St. Rep. 437, 23 N. Y. Supp. 1070.

51. *Church v. Church*, 7 St. Rep.

177; *Paul v. Paul*, 11 St. Rep. 71.

52. *Bowe v. Bowe*, 55 Misc. 403, 106 N. Y. Supp. 361.

53. *Pollock v. Pollock*, 71 N. Y. 137.

54. *Lewellyn v. Lewellyn*, 1 Law Bull. 35.

55. *Gorham v. Gorham*, 49 App. Div. 395, 63 N. Y. Supp. 431; *Galloway v. Galloway*, 92 App. Div. 300, 86 N. Y. Supp. 1078; *Perkins v. Perkins*, 130 App. Div. 193, 114 N. Y. Supp. 960.

56. *Galloway v. Galloway*, 92 App. Div. 300, 86 N. Y. Supp. 1078.

divorce cases is rendered by the court, the decision of the referee should stand as a guide for the court, unless some unjust or inadvertent ruling has been tending to destroy the safeguards around the marriage tie.⁵⁷

Although the court may refuse to render judgment according to the referee's report if convinced that the findings are not sustained by the evidence, it cannot enter judgment contrary to that advised by the referee or dismiss the case on the merits.⁵⁸ If the court refuses to confirm the report, the proper procedure is to grant another trial before another referee appointed by the court.⁵⁹

The court, at Special Term, cannot, without the consent of the parties and for cause shown, refer back the report to the referee to allow plaintiff to introduce further evidence.⁶⁰

Objections to the rulings of the referee in the admission of evidence should be heard on the motion to confirm his report.⁶¹

J. Form of order of reference.

(Title of action.)

(Caption.)

The summons, with a copy of the complaint in this action, having been personally served upon the defendant on the day of, 19.., at, in the city of, county of, State of, and the defendant having duly appeared and answered, and a consent having been entered into between the parties hereto that the issues in this action be referred to a referee to be appointed by the court to hear and determine the same, on motion of, attorney for the plaintiff, it is hereby

ORDERED, That such issues be referred to, attorney-at-law, of, N. Y., to hear the same, and to take proof thereof and report such proof to this court, together with his proceedings thereon, with all convenient speed.

ORDERED, That said referee inquire into the situation and value of the property and income of the defendant, and as to what would be a reasonable and proper sum to be allowed to the plaintiff for alimony

Further proof.—Where a motion to confirm a referee's report was denied on the theory that the circumstances attending the procurement of the evidence and proceedings before the referee raised a suspicion of collusion, an application for leave to submit further proof by plaintiff on such issue should be made at special term. *Galloway v. Galloway*, 92 App. Div. 300, 86 N. Y. Supp. 1078.

57. *Smith v. Smith*, 7 Misc. 305, 58 St. Rep. 552, 23 Civ. Pro. 386, 28 N. Y. Supp. 136.

58. *Perkins v. Perkins*, 130 App.

Div. 193, 114 N. Y. Supp. 960; *White v. White*, 138 App. Div. 272, 122 N. Y. Supp. 885; *Schroelter v. Schroelter*, 23 Hun, 230; *Ross v. Ross*, 31 Hun, 140; *Harding v. Harding*, 43 Super. Ct. 27.

59. *Perkins v. Perkins*, 130 App. Div. 193, 114 N. Y. Supp. 960; *White v. White*, 138 App. Div. 272, 122 N. Y. Supp. 885.

60. *Phillips v. Phillips*, 24 Misc. 334, 52 N. Y. Supp. 489.

61. *Reynolds v. Reynolds*, 33 App. Div. 625, 53 N. Y. Supp. 135.

and for her support and maintenance during her life, and for the support and maintenance and the education of her children, until they shall have arrived at the age of twenty-one years, respectively; and it is further

ORDERED, That said referee inquire and report in regard to the ages and circumstances of said children, and as to who would be the proper person to take the care and custody of such children, with such other facts in regard thereto as the parties claiming the custody of said children shall bring before the said referee and as to him shall seem pertinent and proper.

Enter:

.....
J. S. C.

K. Form of referee's report.

(Title.)

To the Supreme Court:

The undersigned was heretofore appointed referee herein, pursuant to an order entered herein on the day of, 19.., with the following instruction:

ORDERED, That the issues in the above-entitled action be referred to, of, N. Y., to take the proofs offered by the respective parties, and to report with the testimony and his opinion thereon to this court, with all convenient speed; and it is further

ORDERED, That said referee inquire into the situation and value of the property and income of the defendant, and as to what would be a reasonable and proper sum to be allowed to the plaintiff for alimony and for her support and maintenance during her life, and for the support and maintenance and the education of her children, until they shall have arrived at the age of twenty-one years, respectively; and it is further

ORDERED, That said referee inquire and report in regard to the ages and circumstances of said children, and as to who would be the proper person to take the care and custody of such children, with such other facts in regard thereto as the parties claiming the custody of said children shall bring before the said referee and as to him shall seem pertinent and proper.

The referee respectfully reports as follows:

Before proceeding with the matter I took the oath required by law.

The matter was duly brought on before me for a hearing; that the plaintiff,, appeared before me in person, also her counsel The defendant,, appeared before me in person, also his counsel,

That I have heard all the allegations of the parties and have taken and reduced to writing the testimony offered by them, which testimony and my oath are filed with this report, together with certain exhibits offered and received in evidence and after due deliberation thereon, I find as matters of fact and conclusions of law, as follows:

FACTS.

1. That on the day of, 19.., the parties intermarried at, and thereafter and until, 19.., the parties lived together as husband and wife, and that during said time they had two children, namely, and (*give dates of birth*). That the plaintiff separated from her husband,

2. That the plaintiff and defendant are both residents of this State, to wit: The plaintiff residing at, N. Y., and the defendant residing at, N. Y., and the parties at the time of the commission of the adultery hereinafter mentioned, and at the time of the commencement of this action were and still are residents and inhabitants of this State.

3. That the defendant,, during or about the day of, 19 . . ., committed adultery with one known as, at, New York.

4. That the said adultery, so as aforesaid committed by defendant, was without the consent, connivance, privity or procurement of the plaintiff and that five years have not elapsed since said plaintiff discovered the commission of said adultery by defendant, and that since the discovery thereof she has not voluntarily cohabited with said defendant, nor has plaintiff forgiven the same.

5. That there is no judgment or decree in any court of the State of competent jurisdiction against the plaintiff in favor of the defendant for a divorce on the ground of adultery, and that there is no judgment or decree of absolute divorce between the parties hereto rendered by any court, having jurisdiction to grant the same, in any State, Territory or dependency of the United States, or in any foreign country.

6. That the defendant is employed as (*state facts as to business and income*).

7. That the situation in respect to the children is as follows: (*Insert facts.*)

The referee finds as conclusions of law:

1. That a divorce should be decreed in favor of the plaintiff,, and against the defendant,, on the ground of his adultery.

2. That the custody of the children should be awarded as follows:

3. That the defendant pay all of the expenses for the support and education of his respective children.

4. That the defendant should pay the plaintiff the sum of dollars per year for her own support.

5. That there is no evidence before the referee of the amount of counsel fee awarded in this action and the question of costs is respectfully submitted to the court.

Dated the day of, 19 . . .

.....
Referee.

ARTICLE X.

JUDGMENTS IN MATRIMONIAL ACTIONS.

A. Judgment by default.

1. Civil Practice Act, § 1143. Proof required for judgment by default in action to annul a marriage.

In an action brought to annul a marriage, a final judgment annulling the marriage shall not be rendered by default for want of an appearance or pleading, or upon the trial of an issue, without proof of the facts upon which the allegation of nullity is founded. The declaration or confession of either party to the marriage is not alone sufficient as proof, but other satisfactory evidence of the facts must be produced.

2. Civil Practice Act, § 1150. Proof in action for divorce.

If the answer in an action for divorce does not put in issue the allegation of adultery, or if the defendant makes default in appearing or pleading, the plaintiff before he is entitled to judgment must nevertheless satisfactorily prove the material allegations of his complaint and also, by his own testimony or otherwise, that there is no judgment or decree in any court of the state of competent jurisdiction against him in favor of the defendant for a divorce on the ground of adultery.

3. Rules of Civil Practice, Rule 275. Proof required for judgment by default in action for annulment of marriage.

Before judgment by default shall be granted in an action to annul a marriage on any of the grounds stated in section eleven hundred and thirty-three, eleven hundred and thirty-seven, or eleven hundred and thirty-nine of the Civil Practice Act, the plaintiff must prove that there has been no such cohabitation between the parties as by the said sections would bar a judgment for annulment of the marriage, except that in an action under section eleven hundred and thirty-seven the plaintiff may prove instead that the lunacy still continues.

4. Rules of Civil Practice, Rule 277. Proof required on default.

In an action for a divorce, unless it be averred in the complaint, (1) that the adultery charged was committed without the consent, connivance, privity or procurement of the plaintiff; (2) that five years have not elapsed since the discovery of the fact that such adultery had been committed, and that the plaintiff has not voluntarily cohabited with the defendant since such discovery; (3) where, at the time of the offense charged, the defendant was living in adulterous intercourse with the person with whom the offense is alleged to have been committed, that five years have not elapsed since the commencement of such adulterous intercourse was discovered by the plaintiff; and (4) the complaint containing such averments be verified by the oath of the plaintiff; judgment shall not be rendered for the relief demanded until the plaintiff's affidavit be produced stating the above facts.

5. Rules of Civil Practice, Rule 283. Judgment declaring marriage void or granting a divorce not to be by default; judgment to be entered by court.

No judgment annulling a marriage contract, or granting a divorce, or for a separation, shall be made of course by the default of the defendant, or in consequence of any neglect to appear at the hearing of the cause, or by consent.

No judgment in an action for a divorce shall be entered except by special direction of the court.

6. Annulment.

Under section 1143 of the Civil Practice Act, a judgment annulling a marriage cannot be rendered upon defendant's default without proof of the facts upon which the allegation of nullity is founded.⁶² Although an action for annulment is

⁶². *Williams v. Williams*, 71 Misc. 590, 130 N. Y. Supp. 875.

undefended, the court must have proof of the facts upon which the allegations of nullity are founded before it is justified in granting the decree.⁶³ The suit cannot be maintained upon the mere admission of the defendant.⁶⁴ A marriage cannot be annulled upon the confession of the defendant alone and the fact that the plaintiff was permitted to confirm the confession does not alter the rule or corroborate the confession.⁶⁵

A judgment of annulment for fraud in an undefended action in which the only evidence on the merits is that of the plaintiff will be refused and the case will be restored to the trial calendar to enable plaintiff to supply the deficiencies in the proof.⁶⁶

An appeal from a judgment annulling a marriage on the ground that defendant had a husband living at the time it was contracted entered upon a default, after evidence submitted, will not be sustained on the ground that at the time of the trial the court had no evidence before it that defendant's attorney had been served with notice of trial, defendant having appeared and answered, the affidavit of service by mail of the notice of trial not stating that it was inclosed in a wrapper, and the appeal from the judgment not being taken for more than eleven years after it was entered.⁶⁷

7. Divorce.

Judgment of course on default in a divorce action is absolutely prohibited. Judgment can only be granted, where the defendant has defaulted, after the plaintiff has proved the material allegations of his complaint.⁶⁸ The granting of a divorce on the consent of the defendant is absolutely prohibited by Rule 283.⁶⁹ No judgment for divorce, whether after the trial of an issue or otherwise, can be entered except upon the special direction of the court. A default does not, as in other cases, supersede the necessity of proof or lighten the burden of plaintiff in establishing the allegation. Satisfactory proof is required in all cases, not in favor of the party who makes the default or confesses the action, but to

63. *Vazakas v. Vazakas*, 109 N. Y. Supp. 568.

64. *Montgomery v. Montgomery*, 3 Barb. Ch. 132.

65. *Steimer v. Steimer*, 37 Misc. 26, 74 N. Y. Supp. 714.

66. *Bange v. Bange*, 46 Misc. 196, 94 N. Y. Supp. 8. See, also, *Chambers v. Chambers*, 24 Civ. Pro. 187, 32 N.

Y. Supp. 875.

67. *Goodwin v. Goodwin*, 72 App. Div. 529, 76 N. Y. Supp. 661.

68. *McNair v. McNair*, 68 Misc. 570, 125 N. Y. Supp. 191; rev'd, 140 App. Div. 226, 125 N. Y. Supp. 1.

69. *Taylor v. Taylor*, 123 App. Div. 220, 108 N. Y. Supp. 428.

satisfy the conscience of the court that there is no collusion between the parties and that there is legal cause of divorce. The injunction that no divorce shall be granted without satisfactory proof imposes the duty of passing upon the facts, and is inconsistent with the right of the party to enter judgment without an examination by the court and without direction of the court.⁷⁰

Proof must be taken, not only of the adultery, but of all the facts material to the jurisdiction.⁷¹ Parties asking the intervention of the court for relief by way of divorce must prove a full and complete case; nothing is to be taken in favor of the applicant by presumption or intendment as to the facts, even in case of a default or at the hearing.⁷² It is the duty of the court to examine the complaint as well as the proofs to ascertain whether a cause of action is made out as stated in the complaint.⁷³

If a decree has been fraudulently obtained on default, it is a nullity.⁷⁴

8. Negating defenses to action for divorce.

Unless the complaint is verified by the plaintiff and contains the allegations referred to in Rule 277, judgment by default will not be granted until the affidavit of the plaintiff is produced stating such matters.⁷⁵ If, however, the complaint is so verified and contains the statements required by the rule, the plaintiff need not show the facts by affidavit; nor is proof thereof necessary or proper.⁷⁶ Where the complaint is verified, the averments required by rule 277 are *prima facie* proof, and the burden of proof is shifted upon the defendant, who must controvert the same as a matter of affirmative evidence.⁷⁷ The four defenses specified in section 1153 of the Civil Practice Act are not available to the defendant unless they are pleaded, although three of them by the rule are required to be negated by the complaint or affidavit.⁷⁸ The provisions of rule 277 apply

70. *Blott v. Rider*, 47 How. Pr. 30.

71. *Pugsley v. Pugsley*, 9 Paige, 589; *Turney v. Turney*, 4 Edw. 566; *Dobbs v. Dobbs*, 3 Edw. 377; *Arborgast v. Arborgast*, 8 How. Pr. 297.

72. *Linden v. Linden*, 38 Barb. 61.

73. *Robinson v. Robinson*, 1 Barb. 27.

74. *People ex rel. Commissioners v. Smith*, 13 Hun, 414.

75. See *supra*, Art. II-B-3, Negating defenses.

76. *Evans v. Evans*, 27 Misc. 10, 57 N. Y. Supp. 274.

77. *Farace v. Farace*, 1 Civ. Pro. 419.

78. *Lowenthal v. Lowenthal*, 157 N. Y. 236; *Thompson v. Thompson*, 127 App. Div. 296, 111 N. Y. Supp. 426.

only where the defendant makes default and the rule has no application to contested actions.⁷⁹

9. Separation.

A final decree of divorce, *a mensa et thoro*, is not made unless the facts appear before the court on actual proof, otherwise a divorce might be procured by collusion; it will not be made merely upon taking the bill as confessed.⁸⁰

A judgment of separation entered by consent and based on findings agreed to by the parties without evidence supporting the allegations of the complaint is void, and a defendant by consenting to the entry of such a judgment is not estopped from attacking its validity. Rule 283 provides that no judgments in matrimonial actions shall be made "of course" on the default of the defendant or in consequence of any neglect to appear or by consent. This rule has all the force of a statute, and the court is not at liberty to disregard it.⁸¹

B. Interlocutory judgment.

1. Civil Practice Act, § 1175. Interlocutory judgment in action to annul a marriage or for divorce.

In an action brought for judgment annulling a marriage, or divorcing the parties and dissolving a marriage, the decision of the court or report of the referee must be filed and interlocutory judgment thereon must be entered within fifteen days after the party becomes entitled to file or enter the same, and can not be filed or entered after the expiration of said period of fifteen days unless by order of the court upon application and sufficient cause being shown for the delay. The interlocutory judgment, in the discretion of the court, may provide for the payment of alimony or for the support and maintenance of the children of the marriage until the interlocutory judgment becomes final or until the entry of final judgment; it may include a judgment for costs, when costs are awarded, in which case said judgment for costs shall be docketed by the clerk, and thereupon shall have the same force and effect as if docketed upon the entry of final judgment therein, except that it shall not be enforceable by execution or punishment until the interlocutory judgment becomes the final judgment or until the entry of final judgment in said action.

2. Contents.

It is the proper practice that an interlocutory judgment should contain a provision for alimony and that all questions between the parties should be then determined, so that final judgment can be entered in accordance therewith.⁸²

⁷⁹ *McCarthy v. McCarthy*, 143 N. Y. 235; *Ackerman v. Ackerman*, 123 App. Div. 750, 108 N. Y. Supp. 534; *aff'd*, 200 N. Y. 72.

⁸⁰ *Barry v. Barry*, Hopk. 118; *Pal-*

mer v. Palmer, 1 Paige, 276.

⁸¹ *Boyer v. Boyer*, 129 App. Div. 647, 114 N. Y. Supp. 15.

⁸² *Byrnes v. Byrnes*, 126 App. Div. 619, 111 N. Y. Supp. 72.

3. Marriage before final judgment.

An interlocutory judgment of divorce in the form prescribed by section 1175 is ineffectual to dissolve the marriage relation, and a marriage contracted by the guilty husband prior to the entry of the final judgment is void.⁸³

4. After jury trial of issue of adultery.

When in an action for divorce the answer sets up no affirmative defense, and the defendant demands a jury trial, and the sole issue presented to the jury is that of adultery, which is found in the affirmative, it has been thought proper for the court to order judgment for the relief demanded in the complaint, without making findings or conclusions, or filing a decision under section 440 of the Civil Practice Act.⁸⁴

Where the issues in an action for divorce were tried before a jury and the cause was then placed on the Special Term calendar for trial, at which defendant failed to appear, it was held that plaintiff was not entitled to enter an interlocutory judgment without giving defendant notice of the application therefor. In such a case a decision must be filed before the interlocutory judgment can be entered.⁸⁵ Where, in an action for divorce brought by a husband upon the issues respectively of plaintiff's consent, condonation, connivance, privity and procurement of the adultery charged in the complaint, the jury found in favor of plaintiff, it was held that the verdict being only advisory was not conclusive as the court might adopt or reject the jury findings, the only issue conclusively determined being that as to defendant's adultery, and plaintiff's motion for an interlocutory judgment upon the verdict in his favor, upon issues directed to be tried by the jury must be denied.⁸⁶

C. Final judgment.

1. Civil Practice Act, § 1176. Final judgment in action to annul a marriage or for divorce.

Three months after the entry of the interlocutory judgment in an action brought for judgment annulling a marriage or divorcing the parties and dissolving a marriage such interlocutory judgment shall become the final judgment as of course unless the decision of the court or report of the referee shall require and the interlocutory judgment shall provide for the entry of final judgment or unless for sufficient cause the court in the meantime shall have otherwise ordered. If the interlocutory judgment provides for the entry of final judg-

83. *Pettit v. Pettit*, 105 App. Div. 312, 93 N. Y. Supp. 1001.

84. *Lowenthal v. Lowenthal*, 157 N. Y. 236, aff'g 92 Hun, 385, 36 N. Y. Supp. 1053.

85. *Boller v. Boller*, 96 App. Div. 163, 89 N. Y. Supp. 200.

86. *King v. King*, 91 Misc. 254, 154 N. Y. Supp. 794.

ment such final judgment must be entered within thirty days after the expiration of said period of three months and cannot be entered after the expiration of such period of thirty days except by order of the court on application and sufficient cause being shown for the delay.

2. Power of court upon motion for final judgment.

When an application for final judgment is made to the court, proof of all the facts necessary must be presented in support of the application, and it must be made to appear that the decision or report has been filed, and the interlocutory judgment has been entered at least three months prior to the application.⁸⁷ Upon the return of the motion for final judgment, or at any time prior to its entry, the court may refuse upon proper grounds to grant the final judgment, and may open the interlocutory judgment and allow an amendment of the pleadings.⁸⁸ But ordinarily the plaintiff is entitled to the final judgment, as a matter of course.⁸⁹ The court is without power to refuse to enter final judgment, merely because the defendant shows that he is unable to pay costs, which were imposed as a condition for granting a prior application to open his default.⁹⁰ In an action by a wife for divorce, either final judgment should be entered, or the interlocutory judgment in her favor vacated without prejudice to the acts done or payments made while it was in force.⁹¹

3. Application by defeated party.

Where the plaintiff in an action for absolute divorce against her husband obtains an interlocutory judgment in her favor, the defendant cannot compel the entry of a final judgment, against the objections of the plaintiff who is innocent and desirous of a reconciliation which she hopes that time will bring and who does not wish to avail herself of her statutory rights.⁹²

4. Entry after delay of thirty days.

The provisions of section 1176 require the final decree to be entered within thirty days after the expiration of three months from the entry of the interlocutory decree, and prohibit a later entry except upon order of

87. *Phillips v. Phillips*, 45 Misc. 232, 92 N. Y. Supp. 78.

88. *Wood v. Wood*, 141 N. Y. Supp. 929.

89. *Bernzott v. Bernzott*, 122 App. Div. 543, 107 N. Y. Supp. 424.

90. *Bernzott v. Bernzott*, 122 App. Div. 543, 107 N. Y. Supp. 424.

91. *Bishop v. Bishop*, 82 Misc. 676, 144 N. Y. Supp. 143.

92. *Adams v. Adams*, 57 Misc. 150, 106 N. Y. Supp. 1064.

the court on sufficient excuse for the delay being shown.⁹³ The requirement is based upon public policy, and the parties will not be permitted to ignore or evade it.⁹⁴ Unless a sufficient excuse for the delay is shown, the entry will be denied, although the defendant does not oppose the application.⁹⁵ The fact that the plaintiff has agreed to pay her attorney for his services before the entry of the final order, and that she did not do so within the prescribed period, is no excuse for a later entry of the final judgment.⁹⁶

Although a plaintiff's delay in moving for final judgment is excusable, it is better practice to enter an order excusing the delay and directing a final judgment. But the entry of judgment under the signature of the trial judge answers every requirement of the statute.⁹⁷

5. Death of party between interlocutory and final judgment.

An action of divorce does not survive the death of a party; and, if the plaintiff dies after the entry of the interlocutory decree, a final judgment thereafter entered is unwarranted

93. Amendment of 1906.—Where the interlocutory judgment in an action to annul a marriage was entered before the amendment of 1906, by which there was added to section 1774 of the Code of Civil Procedure the provision that final judgment must be entered within thirty days after the expiration of three months from the entry of the interlocutory judgment and cannot be entered thereafter except by order of the court on application and sufficient cause being shown for the delay, it must be shown upon an application for final judgment that the provisions of said section, as amended, have been complied with, though the three months' period had expired before the amendment took effect. *Brown v. Brown*, 63 Misc. 110, 115 N. Y. Supp. 1039.

Proper filing.—In *Rothstein v. Rothstein*, 40 Misc. 101, 13 Anno. Cases, 21, 81 N. Y. Supp. 342, it was held at special term that an application for a final judgment could not be granted in an uncontested action for a divorce unless it appeared that an interlocutory judgment was filed in the office of the county clerk more than three months before the application. Filing the interlocutory judg-

ment with the clerk of a particular part of the Supreme Court is not filing it with the clerk of the court, the county clerk; that it was not sufficient that the interlocutory judgment was signed more than three months before the application. In *Gibson v. Gibson*, 40 Misc. 103, 81 N. Y. Supp. 343, 13 Anno. Cases, 25, it was held that the date of the entry of the interlocutory judgment, and not that of filing of the referee's report, established the date from which is to be reckoned the three months after which a judgment for a divorce may be made final.

94. Kellogg v. Kellogg, 183 App. Div. 236, 171 N. Y. Supp. 39.

Entry nunc pro tunc.—In *Townsend v. Townsend*, 50 Misc. 277, 100 N. Y. Supp. 464, it was held that an interlocutory decree of divorce may not be filed *nunc pro tunc*, it being held that to allow such filing would subvert the purpose of the section.

95. Kellogg v. Kellogg, 183 App. Div. 236, 171 N. Y. Supp. 39.

96. Kellogg v. Kellogg, 183 App. Div. 236, 171 N. Y. Supp. 39; *Kellogg v. Kellogg*, 166 N. Y. Supp. 417.

97. Howatt v. Howatt, 158 App. Div. 28, 142 N. Y. Supp. 908.

and ineffective.⁹⁸ Where no application was made for final judgment within the time prescribed by law after entry of interlocutory judgment, and no sufficient explanation made of failure to do so, final judgment of divorce cannot be entered after the death of a plaintiff so as to take effect as of a date prior thereto.⁹⁹

6. Judgment for temporary separation.

In an action of separation the judgment may be for temporary separation.¹

A person who has been granted a judgment of separation for a limited time, and whose motion made at the end of such time for a permanent separation has been denied, can maintain a new action for a permanent separation on a complaint alleging the same facts set forth in the first action.²

Where, in an action for a separation from bed and board forever, the trial court finds as a matter of law that the plaintiff is entitled to a judgment of separation for a period of one year and that the parties or either of them may after the expiration of said period apply to the court to have such judgment made permanent, modified or discharged, the court, after the expiration of the judgment for one year, has no authority to enter a judgment permanently separating the parties, without permitting the presentation of new findings upon all of the evidence.³

D. Resumption of maiden name.

It has been said that it is not necessary for a decree of divorce to contain special authority to allow the wife to resume her maiden name; and that she can use her own discretion in the matter. A divorced woman may assume her maiden name and sue thereunder after divorce.⁴ The court has power, in a decree of absolute divorce against a wife, to prohibit her from using the full name or surname of her husband.⁵

98. *Bryon v. Bryon*, 134 App. Div. 320, 119 N. Y. Supp. 41.

99. *Matter of Crandall*, 196 N. Y. 127.

1. *Bedell v. Bedell*, 1 Johns. Ch. 604.

2. *Murdock v. Murdock*, 148 App.

Div. 564, 132 N. Y. Supp. 964.

3. *Pollitzer v. Pollitzer*, 178 App. Div. 744, 165 N. Y. Supp. 953.

4. *Rich v. Mayer*, 7 N. Y. Supp. 69.

5. *Blanc v. Blanc*, 21 Misc. 268, 47 N. Y. Supp. 694.

E. Forms in action of annulment.

1. Decision after trial.

(Title.)

(Caption.)

This action having regularly come on to be heard before Hon., one of the justices of this court, without a jury, at a Trial Term of this court, held on the day of, 19..., and the allegations and proofs of the parties having been heard, and the plaintiff having appeared by, his attorney, and the defendant having appeared by, her attorney, and due deliberation having been had, I find and decide as follows:

FINDINGS OF FACT.

1. That the plaintiff and defendant were married at, New York, on the day of, 19..., and lived and cohabited together as husband and wife until on or about

2. That the defendant above named was, prior to said marriage, to wit, on the day of, 19..., married to one, and that at the time of the marriage of the above-named plaintiff and defendant, the said marriage of the said defendant with the said was in full force and effect.

3. That the issue of the marriage between the plaintiff and defendant was a son,, who was born on day of, 19...

4. That the marriage between the plaintiff and the defendant was contracted by the plaintiff in good faith and without any knowledge on the part of the plaintiff of the former marriage of the defendant with the said

CONCLUSIONS OF LAW.

1. That the plaintiff is entitled to final judgment, unless the court shall otherwise order in the meantime, three months after the filing of the decision herein and the entry of interlocutory judgment, annulling the marriage contracted between the plaintiff,, and the defendant,, which was solemnized on the day of, 19..., on the ground that the former wife of defendant is living and his former marriage being in force (*and, unless otherwise ordered, the plaintiff is hereby required to enter final judgment*).

2. That the said, the issue of the marriage between the plaintiff and the defendant, shall be deemed the legitimate child of the plaintiff,

3. That the plaintiff be awarded costs to be taxed, but the judgment therefor shall not be enforceable by execution or punishment until final judgment herein.

I direct interlocutory judgment accordingly.

2. Interlocutory judgment after trial.

(Title.)

(Caption.)

This action having regularly come on to be heard before Hon., one of the justices of this court, without a jury, at a Trial Term of this court, held on the day of, 19..., and the allegations and proofs of the parties having been heard, and the plaintiff having appeared by, his attorney, and the defendant having appeared by, her attorney, and the court having made findings and conclusions of law, deciding, among other things,

that the plaintiff is entitled to a judgment against the defendant annulling the marriage contracted by the parties hereto.

Now, on motion of, attorney for the plaintiff, it is

ORDERED, ADJUDGED AND DECREED, That the plaintiff have final judgment herein unless the court shall otherwise order in the meantime, three months after the filing of the decision herein and entry of this interlocutory judgment, annulling the marriage contracted between the plaintiff,, and the defendant,, which was solemnized on the day of, 19.., on the ground that the former wife of defendant is living and his former marriage being in full force; and that, the issue of said marriage between plaintiff and defendant, shall be deemed the legitimate child of the plaintiff; and it is further

ORDERED, ADJUDGED AND DECREED, That this judgment is interlocutory only; and it is further

ORDERED, ADJUDGED AND DECREED, That three months after the entry of this interlocutory judgment and the decision herein this interlocutory judgment shall become the final judgment herein as of course, unless the court in the meantime shall have otherwise ordered.

(Ordered, Adjudged and Decreed, That final judgment shall not be entered in this action until after the expiration of three months from the entry and filing of the decision and this interlocutory judgment, and that within thirty days after the expiration of said three months final judgment shall be entered upon said decision and interlocutory judgment unless otherwise ordered by the court.)

ORDERED, ADJUDGED AND DECREED, That costs to be taxed are hereby awarded to the plaintiff and against the defendant, but the judgment therefor shall not be enforceable by execution or punishment until this interlocutory judgment becomes the final judgment as of course *(or until the entry of final judgment in this action)*.

3. Notice of motion for final judgment.

(Title.)

PLEASE TAKE NOTICE, That on the annexed affidavit of, verified the day of, 19.., and on the interlocutory judgment herein, made the day of, 19.., and entered in the office of the clerk of the county of, on the day of, 19.., and on all the pleadings and proceedings in this action, a motion will be made at a Special Term of this court, appointed to be held at, on the day of, 19.., on the opening of court on that day, or as soon thereafter as counsel can be heard, for final judgment annulling the marriage between the plaintiff and defendant, providing for the payment of alimony to the plaintiff by defendant *(here set forth other matters to be inserted in the final judgment or attach a proposed final judgment and here refer to it)*, and for such other and further relief as to the court may seem just.

Yours, etc.,

.....
Plaintiff's Attorneys.

Office and Post Office Address,, N. Y.

To,
Defendant's Attorney.

4. Affidavit on application for final judgment.

(Title.) (Venue.)

....., being duly sworn, deposes and says:

1. That he is the attorney for the plaintiff in the above-entitled action, and that on or about the day of, 19.., the court duly made its decision herein, annulling the marriage between the plaintiff and the defendant, and the said decision was duly filed in the office of the clerk of the county of on said day; that on the day of, 19.., interlocutory judgment thereon was duly entered in the office of the clerk of the county of; that a copy of said interlocutory judgment is hereto annexed.

2. That more than three months have elapsed since the filing of said decision and the entry of said interlocutory judgment, and that said interlocutory judgment provided for the entry of final judgment herein within thirty days after the expiration of said period of three months, unless the court shall have otherwise ordered.

3. That the court has not forbidden the entry of final judgment herein nor has any order or decree been made in this action since the entry of said interlocutory judgment, and that no application has been made for any order or direction herein since the entry of said interlocutory judgment.

Sworn to before me, this day }
of, 19.. }
.....

5. Final judgment.

(Title.) (Caption.)

This action having regularly come on to be heard before, one of the justices of this court, without a jury, at a Trial Term of this court, held on the day of, 19.., and the allegations and proofs of the parties having been heard, and the plaintiff having appeared by, his attorney, and the defendant having appeared by, her attorney, and the court having made findings of fact and conclusions of law, deciding, among other things, that the plaintiff is entitled to a judgment against the defendant annulling the marriage contracted by the parties hereto, and interlocutory judgment having been entered thereon and the said decision having been filed in the office of the clerk of the county of, on the day of, 19.., and said interlocutory judgment having been entered in said clerk's office on the day of, 19.., and it appearing that three months have elapsed since the filing of said decision and the entry of said interlocutory judgment and that no order has been made by the court herein forbidding the entry of final judgment herein, or in any wise affecting the right of the plaintiff to enter final judgment, and that no application for such an order has been made, and on reading and filing the affidavit of, verified the day of, 19.., and the notice of motion for final judgment, dated the day of, 19.., and due proof of the service thereof upon, attorney for the plaintiff, by affidavit of, verified the day of, 19.., and after due delibera-

tion, it is, on motion of, attorney for the plaintiff, no one appearing in opposition,

ORDERED, ADJUDGED AND DECREED, That the marriage contracted between the plaintiff,, and the defendant,, which was solemnized on the day of, 19.., be, and the same hereby is, annulled.

ORDERED, ADJUDGED AND DECREED, That the said, the issue of said marriage, is and shall be deemed the legitimate child of the plaintiff; and it is further

ORDERED, ADJUDGED AND DECREED, That the plaintiff recover of the defendant the sum of dollars costs as taxed, and have execution therefor.

Enter:

.....
Justice of Supreme Court.

F. Forms in action of divorce.

1. Affidavit on default.

(Title.)

(Venue.)

....., being duly sworn, deposes and says:

That he is an attorney for the plaintiff in the above-entitled action; that the summons and complaint herein were duly served upon the defendant within the State of New York on the day of, 19.., as appears by the affidavit of hereto annexed, and that more than twenty days have elapsed since such service; that the last day of defendant to appear, plead or move herein was, 19..; that the defendant has not appeared nor answered nor demurred herein, and the time for her to make her appearance or plead has not been extended by stipulation or by order of the court or otherwise and that defendant is now in default; that the defendant is not in the military service of the United States as appears by the affidavit of, verified the day of, 19.., and that this affidavit is made in order to place the above-entitled action on the undefended divorce calendar of this court.

Sworn to before me, this day
of, 19.. }

.....

2. Decision on default.

(Title.)

(Caption.)

This matter having been brought on for hearing at a Special Term of this court, held on the day of, 19.., and on reading and filing the summons and verified complaint and the affidavit of, verified the day of, 19.., from which it appears that the summons and complaint were duly and personally served upon the defendant within the State on the day of, 19 (and that there was written upon the face of the copy of the summons delivered to the defendant the inscription, "Action for a Divorce"); and on reading and filing the affidavit of, verified the day of, 19.., from which it appears that the defendant is not in the military service of the United States as defined by Act of Congress approved March 8,

1918; and on reading and filing the affidavit of, verified the day of, 19.., from which it appears that more than twenty days have elapsed since the service upon the defendant of the summons and complaint herein, and that the defendant has failed to appear or plead herein, but has made default in appearing and pleading although the time so to do has heretofore fully expired, and has not been extended by stipulation by order of this court or otherwise; and it further appearing that the defendant is of full age; and after hearing the allegations and proofs of the plaintiff, and the court having, after due deliberation, found as matters of fact and conclusions of law.

FINDINGS OF FACT.

1. That the plaintiff and the defendant were married at, N. Y., on the day of, 19...
2. That the plaintiff and defendant have, ever since their marriage, been and now are actual residents and inhabitants of this State.
3. That on the day of, 19.., the defendant herein committed adultery with one, at, N. Y.
4. The said act of adultery was committed without the consent, connivance, privity or procurement of the plaintiff.
5. That the plaintiff has not voluntarily cohabited with the defendant since the discovery of said act of adultery.
6. That five years have not elapsed since the discovery of said act of adultery by plaintiff.
7. That the plaintiff has not forgiven or condoned said act of adultery.
8. That no decree of divorce has been granted against either plaintiff or defendant in any of the courts of any states or territories of the United States or of any foreign country, and that no action for divorce has ever been brought by either of the parties against the other.
9. That the defendant,, is employed by (*state facts as to income*).
10. That the plaintiff has been for about one year last past supported by her father and that she has no income or other means of support.
11. That the issue of said marriage is one child,, who was born on the day of, 19.., and who is now in the custody of the plaintiff and is being supported by plaintiff's father.

CONCLUSIONS OF LAW.

1. That the plaintiff is entitled to final judgment, unless the court shall otherwise order in the meantime, three months after the filing of the decision herein and the entry of interlocutory judgment, dissolving the marriage between the plaintiff,, and the defendant,, which was solemnized on the day of, 19.., and divorcing the parties on the ground of defendant's adultery, and permitting the plaintiff to remarry, but forbidding the defendant to remarry any other person during the lifetime of the plaintiff, except with the permission of the court; *and unless otherwise ordered in the meantime, the plaintiff is hereby required to enter final judgment.*
2. That the custody of, the issue of said marriage, should be awarded to the plaintiff until and after final judgment.

3. That the defendant,, pay the plaintiff,, the sum of dollars per month, payable at, for the support of herself and child until and after final judgment.

4. That the plaintiff be awarded costs to be taxed, but judgment for the same shall not be enforceable by execution or punishment until final judgment herein.

Enter:

.....

Justice Supreme Court.

3. Interlocutory judgment on default.

(Title.)

(Caption.)

This matter having been brought on for hearing at a Special Term of this court, held on the day of, 19.., at, New York, and on reading and filing the summons and verified complaint and the affidavit of, verified on the day of, 19.., from which it appears that the summons and complaint were duly and personally served upon the defendant within the State on the day of, 19.. (and that there was written upon the face of the copy of the summons delivered to the defendant the inscription "Action for a Divorce"); and on reading and filing the affidavit of, verified the day of, 19.., from which it appears that the defendant is not in the military service of the United States as defined by Act of Congress, approved March 8, 1918; and on reading and filing the affidavit of, verified the day of, 19.., from which it appears that more than twenty days have elapsed since the service upon the defendant of the summons and complaint herein, and that the defendant has failed to appear or plead herein, but has made default in appearing and pleading, although the time so to do has heretofore fully expired, and has not been extended by stipulation by order of this court or otherwise; and it further appearing that the defendant is of full age; and after hearing the allegations and proofs of the plaintiff and the court having, after due deliberation, duly made its decision in writing.

Now, on motion of, attorney for the plaintiff, it is

ORDERED, ADJUDGED AND DECREED, That the plaintiff have final judgment, unless the court shall otherwise order in the meantime, three months after the filing of the decision herein and the entry of this interlocutory judgment, dissolving the marriage solemnized between the plaintiff,, and the defendant,, on the day of, 19.., and divorcing the parties on the ground of the defendant's adultery and permitting the plaintiff to remarry, but forbidding the defendant to remarry any other person during the lifetime of the plaintiff, except with the permission of the court; and it is further

ORDERED, ADJUDGED AND DECREED, That the custody of, the issue of said marriage, be, and the same is hereby, awarded to the plaintiff until and after final judgment; and it is further

ORDERED, ADJUDGED AND DECREED, That the defendant,, pay to the plaintiff,, the sum of dollars per month payable at, N. Y., for the support of herself and child until and after final judgment herein; and it is further

ORDERED, ADJUDGED AND DECREED, That this judgment is interlocutory only; and it is further

ORDERED, ADJUDGED AND DECREED, That three months after the entry of this interlocutory judgment and the decision herein this interlocutory judgment shall become the final judgment herein, as of course, unless for sufficient cause the court in the meantime shall have otherwise ordered;

(Ordered, Adjudged and Decreed, That final judgment shall not be entered in this action until after the expiration of three months from the entry and filing of the decision and this interlocutory judgment, and that within thirty days after the expiration of said three months final judgment shall be entered upon said decision and interlocutory judgment unless otherwise ordered by the court); and it is further

ORDERED, ADJUDGED AND DECREED, That the plaintiff recover of the defendant costs in the sum of dollars as taxed, but judgment for same shall not be enforceable by execution or punishment until final judgment herein.

Enter:

.....

Justice Supreme Court.

4. Interlocutory judgment on referee's report.

(Caption and title.)

This cause coming on regularly to be heard before me, the undersigned, one of the justices of this court, at a Special Term, on the day of, 19.., upon the order herein, entered the day of, and the report of, Esq., the referee thereby appointed, which was filed the day of, 19.., and satisfactory evidence having been produced to the court on the part of the plaintiff, proving the material allegations of the complaint, and showing also that there is no judgment or decree of any court of the State of competent jurisdiction against plaintiff in favor of the defendant for a divorce upon the ground of adultery; and on reading and filing the notice of motion herein, dated day of, 19.., and the affidavit of, verified, 19.., on behalf of the plaintiff, and the affidavit of, verified, 19.., on behalf of the defendant; and after hearing, for the plaintiff, and, for the defendant, the court, after due deliberation, having granted this application and made its decision thereon.

Now, on motion of, attorney for the plaintiff, it is

ORDERED, ADJUDGED AND DECREED, That said application to confirm said report and for judgment thereon be, and the same hereby is, granted in all respects, and the finding of fact and conclusions of law of the said referee, contained in said report, hereby are made the findings and decisions of the court; and it is further

ORDERED, ADJUDGED AND DECREED, That, unless the court shall otherwise order in the meantime, there shall be entered in this action, three months after the filing of the decision herein, and entry of this interlocutory judgment a final judgment for an absolute divorce in favor of the plaintiff,, and against the defendant,, by reason of the adultery of the defendant and as prayed in the complaint herein; and it is further

ORDERED, ADJUDGED AND DECREED, That this judgment is interlocutory only and ineffectual to dissolve the marriage relations existing between the parties; and it is further

ORDERED, ADJUDGED AND DECREED, That the custody of, one of the children of said marriage, is hereby awarded to her, etc.;

ORDERED, ADJUDGED AND DECREED, That the said defendant pay to the said plaintiff the sum of dollars per annum, from the date of this judgment, in equal monthly payments of per month in advance, for the support and maintenance of said plaintiff during her natural life; and it is further

ORDERED, ADJUDGED AND DECREED, That the defendant pay to the plaintiff or to her attorney the sum of dollars as and for an extra allowance of costs and counsel fee herein.

Enter:

.....
Justice of the Supreme Court.

G. Forms in action of separation.

1. Decision.

(Title.)

(Caption.)

The above-entitled action, having been duly brought on for trial at a Trial Term of the Supreme Court for the State of New York on the day of, 19.., before Mr. Justice, without a jury, and it appearing that the original issues herein were those made by the complaint of the plaintiff asking for an absolute divorce against the defendant, and the answer of the defendant in denial of the complaint, and by the counterclaim contained in defendant's said answer asking for a judgment of separation from bed and board against the plaintiff, and the plaintiff's reply in denial to such counterclaim, and the plaintiff having discontinued his action against the defendant, and the issues raised by defendant's counterclaim for separation having been tried by the court on said, 19.., and due proof of the facts and circumstances set forth in the said counterclaim having been made and due deliberation having been had, I do find and decide as follows:

FINDINGS OF FACT.

1. That the plaintiff and defendant were, at the commencement of this action, both residents of the State of New York.

2. That the parties hereto were married and became husband and wife in the city of New York on or about, 19...

3. That there is no issue of such marriage.

4. That the plaintiff has, from the time of said marriage, neglected and refused to provide for the defendant and abandoned her.

5. That the circumstances of the parties are such that defendant should have the sum of dollars per week paid to her by plaintiff as and for permanent alimony for her support and maintenance.

CONCLUSIONS OF LAW.

1. That defendant is entitled to a decree dismissing the plaintiff's complaint and separating the parties hereto from bed and board with a provision therein that plaintiff pay to defendant twelve dollars per week as and for permanent alimony for her support.

2. That defendant have taxable costs of this action.

.....
J. S. C.

2. Judgment.

(Title of action and caption.)

This action having been commenced by the due and personal service of the summons and complaint herein on the defendant within the State of New York on the day of, 19.., and the defendant having appeared and answered herein by her attorney, and this cause having duly come on for trial before this court and this court having heard all the evidence adduced by the plaintiff and defendant herein and having duly made and filed its decision herein, wherein and whereby it finds that all the material allegations of the complaint herein have been established and that the plaintiff herein is entitled to judgment as prayed for in the complaint.

Now, after hearing, attorney for the defendant, in opposition thereto, on motion of, attorney for the plaintiff, it is hereby

ORDERED AND ADJUDGED, That the said plaintiff and defendant be, and hereby are, separated from bed and board forever; it is hereby further

ORDERED AND ADJUDGED, That the plaintiff have the care, custody and control of the children born of the marriage of such plaintiff and defendant, to wit: (*state names and ages of children*); and that the defendant be permitted to visit and see such children at (*state times, places and under what conditions the children may be seen and visited by the defendant*); it is hereby further

ORDERED AND ADJUDGED, That during the joint lives of the plaintiff and defendant herein the said defendant pay to the plaintiff herein the sum of dollars, weekly (*or monthly*), for her support and maintenance, which sum is to be paid (*state time and place of payment*); it is hereby further

ORDERED AND ADJUDGED, That the plaintiff herein have and recover from the defendant herein her costs and disbursements in this action, to be taxed.

Enter:

.....
Justice Supreme Court.

ARTICLE XI.**PERMANENT ALIMONY AND CUSTODY OF CHILDREN.****A. Civil Practice Act, § 1155. Maintenance and support of wife and children in action for divorce by wife.**

The court, in the final judgment dissolving the marriage in an action for divorce brought by the wife, may require the defendant to provide suitably for the education and maintenance of the children of the marriage, and for the support of plaintiff, as justice requires, having regard to the circumstances of the respective parties; and, by order, upon the application of either party to the action, and after due notice to the other, to be given in such manner as the court shall prescribe, at any time after final judgment whether heretofore or hereafter rendered, may annul, vary or modify such a direction. But no such application shall be made by a defendant unless leave to make the same shall have been previously granted by the court by order made upon or without notice as the court in its discretion may deem proper after presentation to the court of satisfactory proof that justice requires that such an application should be entertained.

B. Civil Practice Act, § 1159. Modification of judgment or order in action for divorce brought by wife.

Where an action for divorce is brought by a wife, and a final judgment of divorce has been rendered in her favor, the court, by order upon the application of the defendant on notice, and on proof of the marriage of the plaintiff after such final judgment, must modify such final judgment and any orders made with respect thereto by annulling the provisions of such final judgment or orders, or of both, directing payments of money for the support of the plaintiff.

C. Civil Practice Act, § 1164. Maintenance of wife and children in action for separation.

Where an action for separation from bed and board is brought by the wife, the court, in the final judgment of separation, may give such directions as the nature and circumstances of the case require. In particular, it may compel the defendant to provide suitably for the education and maintenance of the children of the marriage and for the support of the plaintiff, as justice requires, having regard to the circumstances of the respective parties. And the court, in such an action, may render a judgment compelling the defendant to make the provision specified in this section where, under the circumstances of the case, such a judgment is proper, without rendering a judgment of separation.

D. Civil Practice Act, § 1170. Custody and maintenance of children and support of plaintiff in action for divorce or separation.

Where an action for divorce or separation is brought by either husband or wife, the court, except as otherwise expressly prescribed by statute, must give, either in the final judgment, or by one or more orders, made from time to time before final judgment, such directions as justice requires, between the parties, for the custody, care, education, and maintenance of any of the children of the marriage, and where the action is brought by the wife, for the support of the plaintiff. The court, by order, upon the application of either party to the action, or any other person or party having the care, custody and control of said child or children pursuant to said final judgment or order, after due notice to the other, to be given in such manner as the court shall prescribe, at any time after final judgment, may annul, vary or modify such directions, or in case no such direction or directions shall have been made, amend it by inserting such direction or directions as justice requires for the custody, care, education and maintenance of any such child or children in such final judgment or order or orders. But no such application shall be made by a defendant, or any other person or party having the care, custody and control of said infant or infants, unless leave to make the same shall have been previously granted by the court by order made upon or without notice as the court in its discretion may deem proper after presentation to the court of satisfactory proof that justice requires that such an application should be entertained.

E. Permanent alimony.**1. In general.**

Section 1155 of the Civil Practice Act contains provisions relating to the granting of permanent alimony in an action of divorce, and section 1164 contains provisions for such alimony in an action of separation, and section 1170 provides for such relief in actions either of divorce or separa-

tion. A decree of divorce or separation in favor of the wife gives her a clear right to alimony.⁶ A decree of divorce is an adjudication of the facts bearing on plaintiff's right to alimony, which might have been litigated, as well as those that were litigated.⁷

In the discretion of the court, the alimony may be made payable from the commencement of the action.⁸ But, where no temporary alimony has been awarded, permanent alimony, awarded in the interlocutory decree, is not payable until entry of the final order.⁹ And counsel fees and the expenses of the suit cannot be directed by the judgment.¹⁰ An extra allowance to counsel of a wife cannot be granted after the trial and determination of the action unless it appears that an appeal is to be taken or further expense is necessary to maintain her rights under the judgment.¹¹

Alimony may be granted in an action for separation although not demanded in the complaint.¹²

The amount of alimony may be fixed after an interlocutory decree of divorce and before the entry of final judgment.¹³ After verdict of a jury in favor of the wife, the husband is entitled to a hearing on the question of alimony.¹⁴ A reference may be ordered to determine the proper amount.¹⁵

In an action by the wife for a separation in which the husband sets up a counterclaim, an order for the examination of the husband before trial to disclose the amount of his income and property in order that the amount of alimony may be determined should not be granted.¹⁶

2. Nature of permanent alimony.

Alimony awarded to an innocent wife is simply an allowance for her support and maintenance, and the awarding of it is not the enforcement of a debt due to her from her husband, but the marital obligation of support from which the husband

6. *Forrest v. Forrest*, 3 Bosw. 667.

7. *Goodsell v. Goodsell*, 46 Misc. 158, 93 N. Y. Supp. 1038; *aff'd*, 107 App. Div. 625, 95 N. Y. Supp. 242.

8. *McCarthy v. McCarthy*, 143 N. Y. 235.

9. *Shaw v. Shaw*, 154 App. Div. 324, 138 N. Y. Supp. 999.

10. *Straus v. Straus*, 67 Hun, 491, 22 N. Y. Supp. 567. See *supra*, Art. VIII-P, Allowance of counsel fees.

11. *Atherton v. Atherton*, 82 Hun, 179, 31 N. Y. Supp. 977, 64 St. Rep. 798; *aff'd*, 155 N. Y. 129; *rev'd*, 181

U. S. 155.

12. *Hecht v. Hecht*, 14 Misc. 597, 36 N. Y. Supp. 271, 71 St. Rep. 10.

13. *Shurman v. Shurman*, 148 N. Y. Supp. 947.

14. *Forrest v. Forrest*, 6 Duer, 102.

15. *Forrest v. Forrest*, 6 Duer, 102; *Gilenger v. Gilenger*, 4 Lans. 473; *Coolidge v. Coolidge*, 1 Barb. Ch. 77; *Miller v. Miller*, 6 Johns. Ch. 91.

16. *Van Valkenburgh v. Van Valkenburgh*, 149 App. Div. 482, 133 N. Y. Supp. 942.

because of his misconduct is not relieved by the decree. The allowance becomes a debt only in the sense that the general duty has been changed to a specific duty by fixing the amount payable to the wife for such support, and that while alimony is in one sense property of the wife, it is a specific fund provided for a specific purpose; an express limitation to take it out of the general law of property being created by equity, it should have the protection of equity so that it may not be perverted for a purpose for which it was not intended.¹⁷ Hence, it is not subject to be appropriated to the payment of debts and liabilities of the wife disconnected from her necessary support and maintenance.¹⁸ Alimony is not her property or separate estate, and cannot be reached by creditors whose claims and judgment antedate such decree.¹⁹

A final judgment containing a provision for alimony creates and vests substantial rights which constitute property of the wife; and this right must be determined as of the statutes in force at the time of the decree. If the statutes at that time give no right to the husband to secure a modification of the decree, and no such right is preserved by the decree itself, a subsequent statute permitting the court to modify the judgment is unconstitutional as to such decrees rendered before its adoption.²⁰

The right of the wife to alimony allowed by a decree does not survive the death of the husband.²¹ The fact that the decree assumes to award the alimony "as long as she shall live" does not give her any claim against her husband's estate after his death.²² But alimony which accrued before the death of the husband is not destroyed by his death, and the claim for such alimony is based on a judgment debt and is entitled to a preference as moneys due under a decree.²³

If the judgment allowing the alimony is reversed upon appeal, the husband is not entitled to restitution of sums paid

17. *Romaine v. Chauncey*, 129 N. Y. 566. See, also, *Andrews v. Whitney*, 82 Hun, 117, 31 N. Y. Supp. 977.

18. *Matter of Bolles*, 78 App. Div. 180, 79 N. Y. Supp. 530.

19. *Romaine v. Chauncey*, 60 Hun, 479, 39 St. Rep. 480, 15 N. Y. Supp. 198; *aff'd*, 129 N. Y. 566.

20. *Livingston v. Livingston*, 74 App. Div. 261, 77 N. Y. Supp. 476; *aff'd*, 173 N. Y. 377. See, also, *Goodsell v. Goodsell*, 43 Misc. 158, 93 N.

Y. Supp. 1038; *aff'd*, 107 App. Div. 625.

21. *Wilson v. Hinman*, 182 N. Y. 408; *Field v. Field*, 15 Abb. N. C. 434. See, also, *Johns v. Johns*, 44 App. Div. 533, 60 N. Y. Supp. 865; *aff'd*, 166 N. Y. 613, on opinion below.

22. *Wilson v. Hinman*, 182 N. Y. 408.

23. *Matter of Curtis*, 188 App. Div. 470, 176 N. Y. Supp. 841; *aff'd*, 228 N. Y. 534.

before the reversal.²⁴ And it has been held that she is entitled to recover on alimony checks given by the husband before the reversal of the judgment, although he stopped payment on them.²⁵

A decree of absolute divorce subsequently secured by the husband terminates the right of the wife to have alimony under a prior judgment in her favor for a separation, but the interlocutory judgment does not have this effect.²⁶

One entitled to alimony payable in installments can release and discharge her claim therefor in full and in advance for a stipulated sum, and where such release is made without fraudulent practice or artifice, it is binding.²⁷

3. Judgment on substituted service.

A judgment for alimony and costs cannot be awarded against a defendant, in an action for divorce, if he was served by publication or substituted service and he did not appear in the action.²⁸

4. Amount.

The amount of alimony depends upon the circumstances of each case, as the rank and condition of the parties, the fortune of the husband, his conduct toward his wife.²⁹ The amount of alimony should be fixed with reference to the husband's property and income, the claims of the children and others on him for support and education, and his ability to provide for the support of himself and his family by his own exertions.³⁰ It is doubtful if a judgment of separation can fix a gross sum of alimony based on a percentage of the husband's assets.³¹

The circumstances may be such as to justify an allowance of over one-half of the husband's income.³² On the other hand, an allowance of one-third may be excessive in some

24. *Averett v. Averett*, 110 Misc. 584, 178 N. Y. Supp. 405; *aff'd* without opinion, 191 App. Div. 948.

25. *Averett v. Averett*, 112 Misc. 487, 183 N. Y. Supp. 48. Compare *Averett v. Averett*, 111 Misc. 542, 183 N. Y. Supp. 702.

26. *Burton v. Burton*, 150 App. Div. 790, 135 N. Y. Supp. 248.

27. *Smith v. Smith*, 43 Super. Ct. 140.

28. *Burch v. Burch*, 116 App. Div. 865, 102 N. Y. Supp. 305; *Edwards v. Edson*, 119 App. Div. 684, 104 N. Y. Supp. 1126; *Baylies v. Baylies*,

196 App. Div. 677; *Park v. Park*, 24 Misc. 372, 53 N. Y. Supp. 677.

29. *Burr v. Burr*, 10 Paige, 20.

30. *Lawrence v. Lawrence*, 3 Paige, 267.

31. *Sleeper v. Sleeper*, 48 St. Rep. 41, 65 Hun, 454; *aff'd* without opinion, 142 N. Y. 625. See, also, *Burr v. Burr*, 7 Hill, 207; *Crane v. Cavana*, 62 Barb. 120.

32. *Valentine v. Valentine*, 87 App. Div. 156, 84 N. Y. Supp. 37; *Harris v. Harris*, 83 App. Div. 123, 82 N. Y. Supp. 568.

cases.³³ The proportion of the husband's income which may be applied will vary according to the circumstances of the case.³⁴

Where defendant, though without means of profitable employment, is in the early prime of life, well and strong, of good education and of more than usual intelligence and nothing but a disinclination to work interferes with his ability to earn a reasonable living for his wife and child, he will be directed to pay a certain sum weekly for their support with leave to either party to move at the foot of the judgment to change the amount at any time conditions shall seem to so require.³⁵

In an action for absolute divorce, an award of alimony should not be based upon an assumption that if it becomes necessary to enforce the award by contempt proceedings the mother of the defendant will come to his aid rather than allow him to be imprisoned.³⁶

A decree allowing alimony at twenty dollars per week, payable in sums of forty dollars semi-monthly, after payment and receipt of the semi-monthly sums for several years without objection, will not be construed as requiring the payment of more than \$960 per year.³⁷

5. Wife unsuccessful in separation suit.

The last sentence of section 1164 permits the court in an action of separation to make an allowance for the maintenance of the wife and children, without rendering a judgment of separation. This provision does not allow the court to make such an allowance or to award the custody of the children, when the wife has failed to show a cause of action for separation. It applies only where a separation can be decreed upon the evidence.³⁸ If the wife is defeated in the principal relief sought because she has failed to establish a cause of

33. *Cowles v. Cowles*, 29 App. Div. 476, 51 N. Y. Supp. 1057.

34. *Davis v. Davis*, 78 App. Div. 500, 79 N. Y. Supp. 621. And see the following cases discussing the proper amount of alimony: *Valentine v. Valentine*, 87 App. Div. 156, 84 N. Y. Supp. 37; *Miller v. Miller*, 6 Johns. 91; *Peckford v. Peckford*, 1 Paige, 274; *Gilenger v. Gilenger*, 4 Lans. 473; *Collins v. Collins*, 10 Hun, 272; *Forrest v. Forrest*, 25 N. Y. 501 (below, 3 Abb. Pr. 144); *Burr v. Burr*, 7 Hill, 207, aff'd 10 Paige, 20; *Lynde*

v. Lynde, 2 Barb. Ch. 72; *Leslie v. Leslie*, 6 Abb. (N. S.) 193; *Worden v. Worden*, 3 Edw. 387.

35. *Snyder v. Snyder*, 98 Misc. 431, 162 N. Y. Supp. 607.

36. *Sidway v. Sidway*, 156 App. Div. 61, 141 N. Y. Supp. 14.

37. *Mooney v. Mooney*, 10 Misc. 386, 63 St. Rep. 403, 31 N. Y. Supp. 118.

38. *Kamman v. Kamman*, 167 App. Div. 423, 152 N. Y. Supp. 579; *Chamberlin v. Chamberlin*, 193 App. Div. 784, 184 N. Y. Supp. 464; *Kamman v. Kamman*, 151 N. Y. Supp. 226.

action, the court can make no provision for the maintenance of herself or children.³⁹ If the plaintiff fails to make out a case, the complaint is to be dismissed.⁴⁰ The statute does not permit the wife to maintain an action merely for maintenance and support.⁴¹ A decree for maintenance is only an incident to one for separation.⁴²

Where a separation is granted to the husband in a suit commenced by him, the court has no power to order an allowance for the support of the wife.⁴³

A final judgment separating husband and wife from bed and board forever, entered in favor of the husband without alimony, is, while remaining in full force and effect, a conclusive adjudication as to his obligation for further support and maintenance, and the wife, although successful in a subsequent action for absolute divorce, is not entitled to alimony. The subsequent commission of adultery by the husband, while entitling the wife to a judgment dissolving the marriage, does not revive his obligation of support, either before or after the judgment.⁴⁴

6. Action for support and maintenance.

Courts of this State have no jurisdiction of an action brought merely to secure maintenance and support or alimony, where there is no prayer for a decree of separation.⁴⁵ The circumstances under which a decree for maintenance may be made must be of such a nature as would justify separation.⁴⁶ A wife who voluntarily separates from her husband, not charging him with adultery or cruelty, cannot have a support from his property, though it was derived from her.⁴⁷

Where a foreign judgment of divorce awards the custody of a child to the mother, but makes no allowance for its support and maintenance, it will be presumed the wife's claim for such allowance was decided adversely to her, and such judgment is a bar to an action brought in this State for such an allowance.⁴⁸

39. *Davis v. Davis*, 75 N. Y. 221; *Robinson v. Robinson*, 146 App. Div. 533, 131 N. Y. Supp. 260; *Curnen v. Curnen*, 155 App. Div. 536, 140 N. Y. Supp. 805; *Kamman v. Kamman*, 167 App. Div. 423, 152 N. Y. Supp. 579.

40. *Davis v. Davis*, 75 N. Y. 221.

41. *Ramsden v. Ramsden*, 91 N. Y. 281.

42. *Ruckman v. Ruckman*, 58 How. Pr. 278.

43. *Waring v. Waring*, 100 N. Y. 570; *Perry v. Perry*, 2 Barb. Ch. 311;

Palmer v. Palmer, 1 Paige, 276.

44. *Byrnes v. Byrnes*, 126 App. Div. 619, 111 N. Y. Supp. 72.

45. *Johnson v. Johnson*, 206 N. Y. 561; *Atwater v. Atwater*, 36 How. Pr. 431.

46. *Ruckman v. Ruckman*, 58 How. Pr. 278. See *Davis v. Davis*, 75 N. Y. 221; *Ramsden v. Ramsden*, 91 N. Y. 281.

47. *Noe v. Noe*, 13 Hun, 436.

48. *Rich v. Rich*, 88 Hun, 566, 34 N. Y. Supp. 854, 68 St. Rep. 823.

7. Effect of separation agreement.

Where there is a valid, existing separation agreement between a husband and wife, under which provision is made for her support, she has no cause of action against the husband for separation and alimony in excess of the amount provided for in the agreement.⁴⁹ An agreement on the part of husband and wife to live apart, made after the separation of parties, is not void on the ground of public policy,⁵⁰ and it may measure the duty of the husband as to the maintenance of the wife.⁵¹

While a separation agreement made while the parties are living together is void, the amount the husband agrees to contribute to the support of his wife by such agreement may be considered when awarding alimony in a decree of separation.⁵² An agreement entered into by parties for separation, by which the husband becomes bound to contribute a specified sum toward the support of his wife and child, is binding on the parties so long as it remains unrevoked and may properly be followed in the decree of divorce as to the provisions for the wife, but is not binding upon the child.⁵³

Where the complaint in an action for separation shows that a separation agreement between the parties has been broken by the defendant, the right of the plaintiff to a separation and to support is an open question, and what she may have received under the agreement is a matter to be considered when the court makes its decree awarding alimony.⁵⁴

Where husband and wife are separated under an agreement by which he was to pay a specified sum per month for her support, and there was abundant evidence of cruelty on his part, it was held that when the husband refused to continue payments on pretext of a release by mistake for a receipt, the wife might maintain an action for a limited divorce without offering to return to her husband.⁵⁵

A general release given by the wife to the husband after the judgment of absolute divorce, releasing him from all claims for alimony and for the support of the child while in the

49. *Benesch v. Benesch*, 182 App. Div. 221, 169 N. Y. Supp. 561.

50. *Duryea v. Biiven*, 122 N. Y. 567.

51. *Galusha v. Galusha*, 116 N. Y. 635; *Clark v. Fosdick*, 118 N. Y. 7.

52. *Tower v. Tower*, 134 App. Div. 670, 119 N. Y. Supp. 506.

53. *Cain v. Cain*, 188 App. Div. 780,

177 N. Y. Supp. 178; *Atherton v. Atherton*, 82 Hun, 179, 31 N. Y. Supp. 977, 64 St. Rep. 798; *aff'd*, 155 N. Y. 129; *rev'd*, 181 U. S. 155.

54. *Landes v. Landes*, 172 App. Div. 758, 159 N. Y. Supp. 230.

55. *Schleifer v. Schleifer*, 47 St. Rep. 417, 19 N. Y. Supp. 973.

custody of the wife, bars the court from granting her an amendment of the decree requiring the husband to provide for her support and that of the child.⁵⁶

An agreement by a husband to make payments to the wife for support of the children is not merged in a judgment for absolute divorce which contains no provision for alimony.⁵⁷

A separation agreement which makes inadequate provision for the wife and which was executed by her unadvisedly and imprudently, as a result of prior ill-treatment, will be set aside by an action brought for that purpose upon a restoration of so much of the consideration as she has not expended for her support.⁵⁸

The right of the wife to recover sums provided by a separation agreement is assignable.⁵⁹

F. Custody of children.

1. In general.

The final judgment in an action of divorce awards the custody of the children of the parties. Section 1170 of the Civil Practice Act expressly directs that such award be made. Jurisdiction to determine the right to the possession of a child of parties to an action for separation is in the court and not in a judge.⁶⁰ In the absence of an action of divorce or separation between the parties, if they are living in a state of separation, habeas corpus is the appropriate remedy to determine the right of custody.⁶¹

Where in an action for separation a decision has been filed awarding the custody of the children to their father, but judgment has not been entered, a motion by the mother, praying that the care and custody be awarded to her, is premature.⁶²

2. Discretion of court.

The award of the custody of the children is a matter to be decided by the court in its wisest discretion.⁶³ As it is a discretionary matter, an appeal cannot be taken to the Court of

56. *Gould v. Gould*, 18 Misc. 334, 42 N. Y. Supp. 147.

57. *Lawrence v. Lawrence*, 31 Misc. 646, 64 N. Y. Supp. 1113; rev'd, 32 Misc. 503, 66 N. Y. Supp. 393.

58. *Hungerford v. Hungerford*, 161 N. Y. 550, aff'g 16 App. Div. 612, 44 N. Y. Supp. 973.

59. *Phinney v. Andrus*, 108 Misc.

717, 178 N. Y. Supp. 760.

60. *People ex rel. Hyland v. Hyland*, 137 App. Div. 374, 175 N. Y. Supp. 626.

61. See chapter on Habeas Corpus.

62. *Ullman v. Ullman*, 151 App. Div. 419, 135 N. Y. Supp. 1080.

63. *Waring v. Waring*, 100 N. Y. 570.

Appeals.⁶⁴ While the award is usually to the successful party,⁶⁵ the court has power to give the defendant the custody of the children, while granting an absolute divorce to the plaintiff.⁶⁶ This practice is proper where the wife has procured a foreign divorce and in reliance thereon remarried, and the husband secures a divorce in this State on the ground that cohabitation by the wife under her second marriage was adulterous.⁶⁷

In determining to whom the award shall be made, the court regards mainly the welfare of the children.⁶⁸ The fact that the husband may be absent from the home a large part of the time, while the wife can give more attention to the child, may be considered.⁶⁹ The wishes of the child, while not controlling,⁷⁰ may affect the discretion of the court.⁷¹ An agreement between the parties as to the custody of the children will not have a controlling influence on the court in formulating the decree.⁷²

The husband is regarded as the head of the household and the law awards to him the care and custody of the children, and the court is bound to confirm the husband's rights in this respect, where it appears that the welfare of the child will not be prejudiced thereby, although the prime consideration is the welfare of the child. The courts will award the custody of very young children to the wife where she has shown herself to be a proper person and able to fully discharge her duty to the child.⁷³ Other things being equal, the propriety of giving the mother the custody of a young child is obvious.⁷⁴

64. *Price v. Price*, 55 N. Y. 656; *Allen v. Allen*, 105 N. Y. 628; *Osterhout v. Osterhout*, 168 N. Y. 358.

65. See the following subdivision.

66. *Osterhout v. Osterhout*, 168 N. Y. 358.

67. *Osterhout v. Osterhout*, 48 App. Div. 74, 62 N. Y. Supp. 529, 7 N. Y. Anno. Cases, 300, appeal dismissed, 168 N. Y. 358; *Winston v. Winston*, 65 App. Div. 231, 72 N. Y. Supp. 456. Compare *Bailie v. Bailie*, 30 App. Div. 461, 52 N. Y. Supp. 228.

68. *Waring v. Waring*, 100 N. Y. 570; *People ex rel. Elder v. Elder*, 98 App. Div. 244, 90 N. Y. Supp. 703; *Newman v. Newman*, 105 App. Div.

63, 93 N. Y. Supp. 847; *Chamberlain v. Chamberlain*, 194 App. Div. 470, 185 N. Y. Supp. 98.

69. *People ex rel. Elder v. Elder*, 98 App. Div. 244, 90 N. Y. Supp. 703.

70. *Newman v. Newman*, 105 App. Div. 63, 93 N. Y. Supp. 847.

71. *Israel v. Israel*, 38 Misc. 335, 77 N. Y. Supp. 912.

72. *Cook v. Cook*, 1 Barb. Ch. 639.

73. *People ex rel. Sinclair v. Sinclair*, 91 App. Div. 322, 86 N. Y. Supp. 539, citing *People ex rel. Sternberger v. Sternberger*, 12 App. Div. 398, 42 N. Y. Supp. 423.

74. *Lee v. Lee*, 93 Misc. 677, 157 N. Y. Supp. 821.

3. Successful plaintiff generally entitled to custody.

The successful plaintiff in an action of divorce or separation is generally entitled to the custody of the issue of the marriage.⁷⁵ Where the husband obtains a divorce for the wife's adultery, he is entitled to the custody of the children unless their good clearly requires otherwise.⁷⁶ And where the wife is entitled to a divorce for the adultery of the husband, she has the right to the custody of the children, unless their good requires some other disposition of them.⁷⁷

Although the interest of the child is the paramount consideration upon the question of its custody, it is not the exclusive consideration, and the natural right of the parent is an important factor, especially where it has not been forfeited by gross misconduct.⁷⁸

4. Divided custody.

It is frequent practice to award the custody of the children to the innocent party and give the guilty party the right to visit them at intervals.⁷⁹ Where the proof establishes that the successful wife is a proper person to have the care of her infant daughters, aged, respectively, two and four years, she may be awarded the custody of them as matter of absolute right, and the petition of the paternal grandfather for such custody will be dismissed; but the decree, awarding the custody of the children to their mother, may provide that at suitable times and places their father as well as their paternal grandparents shall have an opportunity for seeing them.⁸⁰ Where, pending divorce, the custody of children has been given to one parent and the other given a right to visit them, it has been held that security must be required that the children will not be removed beyond the jurisdiction of the court.⁸¹

5. Action dismissed.

It has been held that where the plaintiff fails in an action of separation and the complaint is dismissed, it is improper

75. *Price v. Price*, 55 N. Y. 656; *Lester v. Lester*, 178 App. Div. 205, 165 N. Y. Supp. 187; *McNeir v. McNeir*, 76 Misc. 661, 129 N. Y. Supp. 481; *aff'd*, 151 App. Div. 889, 135 N. Y. Supp. 1126.

76. *Uhlman v. Uhlman*, 7 Abb. N. C. 236.

77. *McNeir v. McNeir*, 129 N. Y. Supp. 481.

78. *Lester v. Lester*, 178 App. Div. 205, 165 N. Y. Supp. 187.

79. *McGown v. McGown*, 22 Misc. 307, 49 N. Y. Supp. 996; *aff'd*, 29 App. Div. 628, 53 N. Y. Supp. 1108.

80. *McNeir v. McNeir*, 76 Misc. 661, 129 N. Y. Supp. 481; *aff'd*, 151 App. Div. 889, 135 N. Y. Supp. 1126.

81. *People ex rel. v. Paulding*, 15 How. Pr. 67.

to make directions as to the custody of the children of the parties.⁸² The right to custody, in such a case, may be determined by habeas corpus.⁸³ But, it has been held that, where a husband sued for separation on the ground of cruelty makes a general denial and recriminates by charging the plaintiff with adultery and demands a divorce, and the court although dismissing both the complaint and the counterclaim finds that the plaintiff left her husband "without just cause or provocation," it may award the custody of a child to the defendant.⁸⁴

6. Effect of death of party.

After the death of the mother, to whom the custody of the children has been awarded by the decree of divorce, the father is entitled to their custody, and the sums which he has been required to pay for their support by the decree do not constitute a trust which survives the death of the mother.⁸⁵

Where by the terms of a decree of divorce the care and custody of an infant, the issue of the marriage, is limited to the joint lives of the parents, the decree has no possible operation after the death of either parent, in which event all matters of status of the parties and the infant are remitted to the common law, and where the infant is under the age of fourteen years the surrogate has jurisdiction to appoint a guardian for him.⁸⁶

G. Modification of provisions.

1. In general.

Prior to 1900 when amendments were made to the provisions of the Code of Civil Procedure, the right to modify a decree in an action of divorce was very limited.⁸⁷ And the

82. *Davis v. Davis*, 75 N. Y. 221; *Simon v. Simon*, 6 App. Div. 469, 39 N. Y. Supp. 573; *aff'd*, 159 N. Y. 549; *Chamberlain v. Chamberlain*, 193 App. Div. 784, 184 N. Y. Supp. 464.

83. See the chapter on Habeas Corpus.

84. *Light v. Light*, 124 App. Div. 567, 108 N. Y. Supp. 931.

85. *Matter of Robinson*, 17 Abb. Pr. 399, note.

86. *Matter of de Daulles*, 101 Misc. 447, 167 N. Y. Supp. 445.

87. *Kamp v. Kamp*, 59 N. Y. 212; *Erkenbrach v. Erkenbrach*, 96 N. Y. 456; *Anderson v. Cullen*, 8 N. Y.

Supp. 643.

Separation agreement.—Where a judgment of divorce which did not award alimony did not determine that plaintiff was not entitled to it, but only that a previous agreement for separation fixed the amount, it was held that plaintiff, on proof of facts entitling her to a cancellation of the agreement, could move for alimony without opening the judgment of divorce, and was not required to restore what she had received under the agreement, as a condition of obtaining relief. *Galusha v. Galusha*, 138 N. Y. 272.

view was taken that the amendment of 1900 was unconstitutional so far as it attempted to confer power on the court to annul or vary judgments rendered before the enactment of the statute.⁸⁸ Amendments to the statute adopted a few years previously and authorizing the modification of judgments were construed as not to apply to judgments rendered before the enactment of the amendments.⁸⁹

The right to modify a judgment, however, existed before the adoption of the statutes expressly authorizing it, when the final decree reserved to the court the right to make modifications thereto.⁹⁰

There seems to have been more power of modification in case of provisions for the maintenance of children than for alimony of wife.⁹¹ Thus, prior to 1880, where the decree was silent on the maintenance of the children, it was thought proper to make subsequent directions for their maintenance.⁹² But other cases can be found where the power to make the modification was denied.⁹³ And from 1880 to the enactment to the modern statutes, the right to make modifications in favor of children was generally denied.⁹⁴ Under the present statutes, there is no doubt of the power to make modifications for the maintenance of the children.⁹⁵

Under the present statute, section 1170, if the final judgment in an action of separation provides for the support of the plaintiff, the judgment cannot deprive her of her right

88. See *Livingston v. Livingston*, 178 N. Y. 377. See, also, *Livingston v. Livingston*, 65 App. Div. 242, 72 N. Y. Supp. 487.

89. *Walker v. Walker*, 155 N. Y. 77; *Matter of Haworth*, 59 App. Div. 393, 69 N. Y. Supp. 843.

90. *Noble v. Noble*, 20 App. Div. 395, 46 N. Y. Supp. 820; *Hauscheld v. Hauscheld*, 33 App. Div. 296, 53 N. Y. Supp. 831; *Stahl v. Stahl*, 36 St. Rep. 228, 12 N. Y. Supp. 854; *Milderberger v. Milderberger*, 12 Daly, 195. Compare *Cullen v. Cullen*, 55 Super. Ct. 346, 18 St. Rep. 381.

91. **Correction of decree.**—Where the decision of the court in an action for divorce found the date of the marriage and that the plaintiff was entitled to the custody of her child, but through clerical error the date of the marriage was misstated in the interlocutory decree, and by inadvertence no provision awarding the child to the plain-

tiff was inserted, the court in its inherent power may correct a final judgment entered in conformity with the interlocutory judgment so as to state the correct date of the marriage and award the child to the plaintiff. *Martin v. Martin*, 138 App. Div. 758, 123 N. Y. Supp. 509.

92. *Erkenbrach v. Erkenbrach*, 96 N. Y. 456; *Catlin v. Catlin*, 31 Hun, 632; *aff'd*, 97 N. Y. 623; *Wells v. Wells*, 10 St. Rep. 248. See, also, *Kerr v. Kerr*, 9 Daly, 517.

93. *Crimmins v. Crimmins*, 28 Hun, 200; *Johnson v. Johnson*, 18 Wkly. Dig. 27.

94. *Chamberlain v. Chamberlain*, 63 Hun, 96, 43 St. Rep. 502, 17 N. Y. Supp. 578; *Sandford v. Sandford*, 42 St. Rep. 1, 17 N. Y. Supp. 181.

95. *White v. White*, 154 App. Div. 250, 138 N. Y. Supp. 1082; *Earle v. Earle*, 164 App. Div. 713, 150 N. Y. Supp. 173.

to apply for a modification of the provision, unless she has expressly waived it.⁹⁶ A modification should be affected by an order of the court, not by agreement of the parties. An agreement of parties will not have any effect on the decree unless it is ratified by judicial sanction.⁹⁷ The court has no power to modify a judgment in an action of separation on the merits so as to award a separation to the wife, when the original judgment did not grant such relief.⁹⁸

2. No provision in original decree.

Before the enactment of the modern statutes on the subject, it was generally held that, if the final judgment was silent on the permanent alimony to be awarded the plaintiff or contained no provisions as to custody of the children, the decree could not be subsequently amended so as to insert provisions on such matters. Section 1170 of the Civil Practice Act clearly allows the addition of the clauses relating to the maintenance of the children. But it is thought that there is no statutory authority allowing an addition to be made to a decree for separation so as to grant alimony to the plaintiff, if the original decree contained no provision on the subject.⁹⁹ And the same principle may apply when it is sought to add to a decree of absolute divorce.¹

3. Application by husband.

A defendant who has left the jurisdiction to escape payment of alimony cannot move to vacate an order for payment until he submits himself to the court's jurisdiction.² A modification or resettlement of a judgment reducing alimony should be upon condition that the accrued alimony at the reduced rate be paid forthwith, and in event of the failure of the husband to comply with such condition the application should be denied and the wife permitted to enforce the original judgment by contempt proceedings.³ An order reducing the amount of alimony and directing the payment of a certain sum will not be disturbed on the ground of inability to pay, where it is shown that there has been no change in the condition of the parties, and that the husband

96. *Anderson v. Anderson*, 110 Misc. 123, 179 N. Y. Supp. 865.

97. *Gewirtz v. Gewirtz*, 189 App. Div. 483, 178 N. Y. Supp. 738.

98. *Allers v. Allers*, 194 App. Div. 96, 185 N. Y. Supp. 440.

99. *Koehl v. Koehl*, 92 Misc. 579, 156 N. Y. Supp. 234.

1. *Salomon v. Saloman*, 101 App. Div. 588, 92 N. Y. Supp. 184, 34 Civ. Pro. 113; *White v. White*, 154 App. Div. 250, 138 N. Y. Supp. 1082.

2. *Bates v. Bates*, 145 N. Y. Supp. 411.

3. *Matzke v. Matzke*, 185 App. Div. 533, 173 N. Y. Supp. 244.

has expended in his proceeding for a reduction a sum sufficient, if capitalized, to pay the entire amount of alimony accruing since the judgment.⁴

4. Change in conditions.

A change in the husband's means may justify a change in the amount of permanent alimony.⁵ The provisions of a judgment in an action for separation fixing the amount of alimony should not be changed in any case without clear and satisfactory evidence of a change with respect to the ability of the husband to comply therewith, and this rule should be most rigidly adhered to, where the husband has long been in default in making the payments required by the judgment which left him in contempt, regardless of his inability to comply therewith.⁶ The present high cost of living may be considered on an application for an increase of alimony.⁷

On an application to reduce the amount of alimony made on the ground of a change in the financial condition of the parties since the entry of the decree, the court may take into consideration a contract for separate support and maintenance previously entered into by the husband and wife.⁸

On an application for reduction of alimony, the fact that the wife is being cared for in a hospital, and that the husband has incurred, and must necessarily incur, expenses in consequence of her illness, are proper matters for consideration.⁹

A decree of separation awarding alimony for the support of the plaintiff and her children on condition that she reside with the children in the county in which the defendant is compelled to reside by reason of his business should be modified so as to permit the plaintiff to live in another county at certain periods of the year, when it is shown that by so doing she can materially increase her income by teaching and it appears that the business of the defendant frequently calls him to that county so that he can visit his children.¹⁰

Where a decree of divorce awards to the plaintiff the sole maintenance, care, custody and control of her child, she having waived counsel fees and alimony, her financial standing

4. *Kabatchnick v. Kabatchnick*, 26 App. Div. 292, 49 N. Y. Supp. 612.

5. *Kiralfy v. Kiralfy*, 36 Misc. 407, 73 N. Y. Supp. 408, 10 Anno. Cas. 346.

6. *Matzke v. Matzke*, 185 App. Div. 533, 173 N. Y. Supp. 244.

7. *Parker v. Parker*, 189 App. Div. 603, 179 N. Y. Supp. 51.

8. *Levy v. Levy*, 149 App. Div. 561, 133 N. Y. Supp. 1084.

9. *Davis v. Davis*, 78 App. Div. 500, 79 N. Y. Supp. 621.

10. *De Lamoutte v. De Lamoutte*, 129 App. Div. 283, 113 N. Y. Supp. 321.

being such that she required no support for herself or daughter, an application to amend the judgment so as to require the defendant to maintain the child will not be granted unless it appears that the mother is unable to provide proper maintenance.¹¹

5. Remarriage of wife.

Since 1904, the statute, now contained in section 1159 of the Civil Practice Act, requiring the annulling of the wife's alimony upon her remarriage, has been in force.¹² Previously, it had been held that alimony was not affected by the subsequent remarriage of the wife.¹³ The amendment in 1904 was not retroactive and did not apply to decrees existing at the time it was enacted. Where alimony has accrued under the terms of the decree the wife has a vested right therein, of which she cannot be deprived by any subsequent action of the courts or of the Legislature. Hence, although a wife has remarried, the court is without power to cut off alimony already accrued by the entry of an order annulling the provision *nunc pro tunc* as of the date of the remarriage.¹⁴ But there may have been a discretionary power under other sections of the Code permitting a modification of the judgment on the remarriage of the wife.¹⁵

11. *Earle v. Earle*, 158 App. Div. 552, 143 N. Y. Supp. 841.

12. **Provision in separation agreement.**—Where, because prior to the trial of a wife's action for divorce, alimony for her and an allowance for the support and education of their child and the time and manner of the payments thereof were fixed by a written contract between the parties, which was received in evidence, neither the interlocutory nor final decree contained any provision as to such matters, and a motion by defendant to amend both decrees by inserting therein a provision to the effect that plaintiff by reason of her remarriage subsequently to the entry of said decrees was not entitled to any allowance from defendant for her maintenance and support was denied, a motion for an order amending *nunc pro tunc* both decrees by incorporating and making a part thereof the provisions of the written contract in order that defend-

ant may have relief under section 1159 of the Civil Practice Act will be denied, the remedy of defendant being an action in equity to cancel or modify said agreement because of the remarriage of plaintiff, or by an appropriate defense to the action or actions pending against him to recover the accrued alimony under said agreement. *Lester v. Lester*, 102 Misc. 630, 169 N. Y. Supp. 267. See, also, *Goldfish v. Goldfish*, 193 App. Div. 686, 184 N. Y. Supp. 512.

13. *Shepherd v. Shepherd*, 1 Hun, 240; *aff'd*, 58 N. Y. 644; *Moore v. Moore*, 8 Abb. N. C. 171.

14. *Krauss v. Krauss*, 127 App. Div. 740, 111 N. Y. Supp. 788.

15. *Krauss v. Krauss*, 127 App. Div. 740, 111 N. Y. Supp. 788; *Skidmore v. Skidmore*, 160 App. Div. 594, 145 N. Y. Supp. 939. See, also, *Comstock v. Comstock*, 49 Misc. 599, 99 N. Y. Supp. 1057.

The present section is clear, distinct and mandatory and the court is without discretion in carrying out its provisions.¹⁶ A provision for alimony in a decree entered after said amendment went into effect must be annulled on proof that the plaintiff has remarried, even though the defendant ceased to pay alimony from the date of the remarriage.¹⁷

A defendant should continue to provide for his child after the mother's remarriage, and the court may so direct by virtue of the authority conferred upon it by statute.¹⁸ The remarriage of the plaintiff in a divorce action to an entirely worthy and respectable man does not diminish her just claim to the custody of her infant child. The fact that the defendant in a divorce action was financially able to provide his nine-year-old daughter and only child with better educational advantages and social opportunities than the mother could furnish where she lived is not a sufficient ground for depriving her of the custody of the child.¹⁹ But if the wife obtains a decree of divorce and her new husband legally adopts her children, their father's motion to strike from the decree of divorce the direction requiring him to support the children will be granted.²⁰

6. Misconduct of wife.

Under sections 1155 and 1159 of the Civil Practice Act, the misconduct of fornication, or immoral course of living of a wife, subsequent to a final decree of divorce in her favor, does not justify the court in amending the final judgment in her favor by annulling the provision for alimony.²¹ Nor can the defendant husband, on the hearing of a reference to readjust alimony, introduce newly-discovered evidence of the wife's adultery prior to the divorce decree in support of a reduction of the award.²²

7. Custody of children.

Under the present statutes, the court has power to modify from time to time the provisions of the judgment as to the custody of the children of the marriage, having in mind the

16. *Mowbray v. Mowbray*, 136 App. Div. 513, 121 N. Y. Supp. 45; *Linton v. Hall*, 86 Misc. 560, 149 N. Y. Supp. 385.

17. *Mowbray v. Mowbray*, 136 App. Div. 513, 121 N. Y. Supp. 45.

18. *Linton v. Hall*, 86 Misc. 560, 149 N. Y. Supp. 385.

19. *Lester v. Lester*, 178 App. Div. 205, 165 N. Y. Supp. 187.

20. *Gross v. Gross*, 110 Misc. 278, 179 N. Y. Supp. 900.

21. *Hayes v. Hayes*, 220 N. Y. 596.

22. *Goodsell v. Goodsell*, 82 App. Div. 65, 81 N. Y. Supp. 896.

welfare of the child.²³ The right of modification in such cases has existed since 1895.²⁴

The court has no jurisdiction by habeas corpus to modify a judgment in an action for separation awarding the custody of a child without qualification, especially where the situation of the parties has in no way changed since the entry of the judgment.²⁵

A decree of divorce precluding the wife from seeing her children may be subsequently modified so that she may visit them occasionally, where, since her remarriage, she had led a blameless life.²⁶ An application by the wife while she continues to live with her paramour should not be granted.²⁷ Where a husband who has procured a divorce keeps from their child all knowledge of the existence of the wife, the court may properly, under a provision in the decree of divorce, permit the mother to visit it occasionally under proper restrictions.²⁸

If the judgment awards custody of children to plaintiff and there is no provision that defendant be allowed to see them, it cannot be inserted after entry, by the justice who tried the cause, without leave to move therefor first obtained pursuant to section 1170, since the jurisdiction of the justice terminates with the entry of the final judgment.²⁹

Upon a reference on a motion for the modification of a decree of divorce as to the custody of an infant, unlimited investigation into the antecedents of the parties and their respective families during the period of their differences which culminated in their separation and final divorce, aside from the guilt of the defendant proven in the divorce action,

23. *Burritt v. Burritt*, 53 Misc. 24, 102 N. Y. Supp. 475; *Davis v. Davis*, 150 N. Y. Supp. 636.

24. *Perry v. Perry*, 17 Misc. 28, 39 N. Y. Supp. 863.

Prior rule.—As to the rule before the amendment, see *Crimmins v. Crimmins*, 28 Hun, 200; *Catlin v. Catlin*, 31 Hun, 632; *aff'd*, 97 N. Y. 623.

25. *People ex rel. Hyland v. Hyland*, 187 App. Div. 374, 175 N. Y. Supp. 626.

26. *Powers v. Powers*, 164 App. Div. 533, 150 N. Y. Supp. 213; *aff'd*, 214 N. Y. 660.

Erroneous order.—In divorce, the interlocutory judgment gave the husband exclusive custody of the children. Seven months later the wife failed to

obtain their custody on habeas corpus before another judge, and on application for the final judgment before another judge the wife was denied leave to see the children periodically. Eleven days later, before another judge, she obtained an order that she might see them and have their custody periodically. *Held*, that the latter order was erroneous. *Powers v. Powers*, 119 App. Div. 436, 104 N. Y. Supp. 94.

27. *Woodhouse v. Woodhouse*, 89 App. Div. 88, 85 N. Y. Supp. 442.

28. *McGown v. McGown*, 22 Misc. 307, 49 N. Y. Supp. 996; *aff'd*, 29 App. Div. 628, 53 N. Y. Supp. 1108.

29. *Mersereau v. Mersereau*, 51 App. Div. 461, 64 N. Y. Supp. 635.

does not tend to establish that as to moral and intellectual fitness, or in parental affection, either party in comparison with the other is unworthy to have the custody of the child, in whole or in part, but merely tends to prolong the reference. It is error on such a reference for the referee to exclude evidence establishing defendant's guilt in the divorce action and showing its character as gross and continued, and not casual, temporary and exceptional.³⁰

ARTICLE XII.

EFFECT OF JUDGMENT.

A. Divorce.

1. Civil Practice Act, § 1156. Property rights in action for divorce by wife.

If, in an action for divorce brought by the wife, when final judgment is rendered dissolving the marriage, the plaintiff is the owner of any real property, or has in her possession or under her control any personal property or thing in action which was left with her by the defendant or acquired by her own industry or given to her by bequest or otherwise, or if she is or thereafter may become entitled to any property by the decease of a relative intestate, the defendant shall not have any interest therein, absolute or contingent, before or after her death. Where final judgment in such an action is rendered dissolving the marriage, the plaintiff's inchoate right of dower in any real property of which the defendant then is or was theretofore seized is not affected by the judgment.

2. Civil Practice Act, § 1158. Property rights in action for divorce by husband.

A judgment dissolving the marriage, in an action for divorce brought by the husband, does not impair or otherwise affect the plaintiff's rights and interests in and to any real or personal property which the defendant owns or possesses when the judgment is rendered. Where judgment is rendered dissolving the marriage, the defendant is not entitled to dower in any of the plaintiff's real property or to a distributive share in his personal property.

3. Civil Practice Act, § 1160. Insurance upon dissolution of marriage.

Whenever the relation of husband and wife ceases by the entry of a judgment dissolving the marriage, the defendant guilty of adultery is not entitled to any interest in any policy of insurance on the life of the plaintiff wherein such defendant is named as a beneficiary, and the plaintiff may apply to the court granting the final decree or to a special term of the supreme court on notice to the defendant or the attorney who appeared for defendant in the action for divorce, and to the insurance company issuing the policy or policies, for an order directing the insurance company issuing the policy or policies to substitute therein such beneficiary as the plaintiff may nominate. In a case where it is shown that the defendant has contributed from his or her separate estate

30. *Lester v. Lester*, 178 App. Div. 205, 165 N. Y. Supp. 187.

toward the payment of the premiums on such policy, the court shall grant such order on such terms as in the discretion of the court shall be equitable. This section shall also apply in like manner when the defendant obtains a decree against the plaintiff on a counterclaim.

4. Interlocutory judgment.

An interlocutory judgment in an action for divorce does not dissolve the marriage relation between the parties thereto, but contemplates and provides for a final judgment which shall accomplish that result.³¹ A marriage by one of the parties thereafter and before final judgment which was not entered is void.³² Although an interlocutory decree of divorce has been entered against a wife, she is entitled to dower if her husband die prior to the entry of the final decree. Nothing short of a final decree divorces the parties and deprives the wife of dower. An interlocutory judgment or proof of adultery is not sufficient.³³

5. Property rights.

Where husband and wife are seized of a tract of land by the entirety and a divorce is granted on the ground of the wife's adultery, they are thereafter seized as tenants in common.³⁴ A divorced wife, whether the divorce was granted because of the misconduct of herself or her husband, is not entitled, if he die intestate, to administration, or to a distributive share of his estate.³⁵ A wife, after divorce, may release her dower to her husband.³⁶

A divorce dissolving the marriage contract, on the ground of adultery of the husband, does not deprive the wife of her right to dower in his real estate.³⁷ A wife can only be barred of dower by a conviction of adultery in an action of divorce, and by the judgment in such action. An admission of proof of adultery, or a verdict or judgment in any other action, will not work a forfeiture. A cohabitation of the husband with the wife after the commission of adultery by her condones the offense, and is an absolute bar to an action for divorce; and an action for divorce cannot be sustained merely to establish

31. *Matter of Crandall*, 196 N. Y. 127; *Kingsbury v. Sternberg*, 173 App. Div. 435, 165 N. Y. Supp. 493.

32. *Pettit v. Pettit*, 105 App. Div. 312, 93 N. Y. Supp. 1001, rev'g 45 Misc. 155, 91 N. Y. Supp. 979.

33. *Bryon v. Byron*, 134 App. Div. 320, 119 N. Y. Supp. 41.

34. *Steltz v. Schreck*, 10 N. Y.

Supp. 790.

35. *Estate of Emsign*, 103 N. Y. 284.

36. *Savage v. Crill*, 19 Hun, 4; aff'd, 80 N. Y. 630.

37. *Wait v. Wait*, 4 N. Y. 95. And see the chapter on Dower as to matters relating to that subject.

that the offense, which has thus been blotted out, has been committed in order to attach the penalty of forfeiture of dower to the offending wife.³⁸ It is only where, upon proof and a finding or verdict of adultery, that the court has, in an action for divorce, given judgment against the wife and dissolved the marriage contract, that the right of dower is lost; the forfeiture is not a consequence of her offense but of the judgment founded thereon. Where, therefore, in an action for divorce *a vinculo*, it is found the wife is guilty of adultery, but it is also found that the husband is guilty of the same offense and the complaint is dismissed, the wife does not lose her right of dower.³⁹

A divorce obtained by the wife in another State, although for a cause not recognized as a ground for absolute divorce in this State, does not bar her claim to dower in real estate in this State owned by the husband during the marriage; but after-acquired lands are not subject to such claim of dower.⁴⁰

If the wife procures a divorce, the husband is released from the payment of any sum due under a separation agreement which did not in terms provide as to the length of time the payments thereunder should continue, but he is liable for any payments falling due before the entry of the final decree.⁴¹

B. Annulment.

1. Civil Practice Act, § 1146. Judgment annulling a marriage; how far conclusive.

A final judgment, annulling a marriage rendered during the life-time of both the parties is conclusive evidence of the invalidity of the marriage in every court of record or not of record, in any action or special proceeding, civil or criminal. Such a judgment rendered after the death of either party to the marriage is conclusive only as against the parties to the action and those claiming under them.

2. Effect of annulment decree.

The provision that a final judgment annulling a marriage rendered during the lifetime of both parties is conclusive evidence of the invalidity of the marriage is merely a rule of evidence with respect to the effect of the decree as evidence; but was not intended thereby to declare a rule of law with respect to whether the marriage should be deemed invalid from the date of its celebration or from the date of the decree,

38. *Pitts v. Pitts*, 52 N. Y. 593, App. Div. 278, 130 N. Y. Supp. 925; aff'g 64 Barb. 482. aff'd, 205 N. Y. 355.

39. *Schiffer v. Pruden*, 64 N. Y. 47. 41. *Boate v. Boate*, 114 Misc. 321,

40. *Van Blaricum v. Larson*, 146 187 N. Y. Supp. 321.

and those matters were left to be regulated by the provisions of the Domestic Relations Law.⁴²

Where a marriage has been annulled by a judicial decree upon the ground that when it was contracted the husband had a former wife living, who had absented herself for more than five successive years immediately preceding the second marriage, without being known by him to be living, although until it was so annulled it was voidable only and not void, and the cohabitation of the parties was not adulterous, and although both parties entered into the marriage in entire good faith, yet the wife is not entitled to dower in the real estate owned by her husband at the date of the decree.⁴³

If a judgment dissolving the marriage is recovered by the wife against her husband, it disables the husband from prosecuting an action, brought by himself, against her.⁴⁴

C. Separation.

A final judgment separating husband and wife from bed and board forever, entered in favor of the husband without alimony, is, while remaining in full force and effect, a conclusive adjudication as to his obligation for further support and maintenance, and the wife, although successful in a subsequent action for absolute divorce, is not entitled to alimony. The subsequent commission of adultery by the husband, while entitling the wife to a judgment dissolving the marriage, does not revive his obligation of support, either before or after the judgment.⁴⁵

An action for separation on the ground of nonsupport is not barred by a prior judgment dismissing the complaint on the merits in an action based upon cruel and inhuman treatment.⁴⁶

D. Collateral attack on decree.

If the court had jurisdiction, the decree in a matrimonial action cannot be attacked collaterally.⁴⁷ But a decree which is void for want of jurisdiction is open to collateral attack.⁴⁸

The effect of a decree of divorce in favor of the second wife is not to establish the validity of the second marriage, in an

42. *McCullen v. McCullen*, 162 App. Div. 599, 147 N. Y. Supp. 1069.

43. *Price v. Price*, 124 N. Y. 589.

44. *Jones v. Jones*, 36 Hun, 414.

Alienation of affections.—See *Wolf v. Wolf*, 111 Misc. 391, 181 N. Y. Supp. 368, as to the effect of an annulment decree on a pending action for alienation of affections.

45. *Byrnes v. Byrnes*, 126 App. Div. 619, 111 N. Y. Supp. 72.

46. *Wendling v. Wendling*, 134 N. Y. Supp. 55.

47. *Delafield v. Brady*, 108 N. Y. 524.

48. *Mainzer v. Avril*, 108 Misc. 230, 177 N. Y. Supp. 596.

action between children of the second and a child of the first marriage.⁴⁹

E. Vacating of judgment.

1. Fraud.

A judgment for divorce may be set aside upon the ground that it was procured through fraud and imposition. The judgment may be vacated in a proper case on motion, and it is not necessary to maintain an action to secure the relief.⁵⁰ The fraud or accident which will authorize interference with judgments must be unmixed with negligence on the part of the moving party. The proof must be clear and satisfactory to induce the court to interfere with a regular judgment alleged to have been fraudulently obtained; it is not sufficient merely to raise a suspicion or to show constructive fraud, but there must be proof of actual fraud.⁵¹ A decree will not be set aside on account of fraud or collusion between the plaintiff's attorney and the defendant, when the plaintiff was not a party to such fraud and collusion, and was entitled to a decree.⁵²

On an application to set aside a judgment of divorce as procured by fraud and duress a *prima facie* case is established by an affidavit which states that plaintiff brought the action at defendant's request against her own wishes and only after defendant had threatened to abandon her if she refused; that the defendant furnished the plaintiff's attorney with the evidence used and that an agreement to pay alimony was signed at the time the summons was served. The fact that the defendant has married again is immaterial, especially where the marriage was contracted in another State within seven days of the entry of the judgment of divorce which absolutely forbade his remarriage.⁵³

A judgment of divorce will not be set aside, at the suit of the defendant who agreed that she would allow the divorce and make no defense upon the plaintiff's agreement to pay her a sum of money and provide for her, for plaintiff's failure to keep his agreement.⁵⁴

Notice of motion to set aside a decree of absolute divorce obtained by a wife may properly be served on her attorney of record.⁵⁵

49. *Townsend v. Van Buskirk*, 22 App. Div. 441, 48 N. Y. Supp. 260, appeal dismissed, 162 N. Y. 265.

50. *Megarge v. Megarge*, 2 Wkly. Dig. 352.

51. *Jones v. Jones*, 71 Hun, 519, 54 St. Rep. 885, 24 N. Y. Supp. 1031.

52. *Harft v. Harft*, 16 Wkly. Dig.

461.

53. *Lake v. Lake*, 124 App. Div. 89, 108 N. Y. Supp. 964.

54. *Whittley v. Whittley*, 60 Misc. 201, 111 N. Y. Supp. 1078.

55. *Gebhard v. Gebhard*, 25 Misc. 1, 54 N. Y. Supp. 406.

2. Irregularities.

A judgment may be vacated for irregularities affecting the jurisdiction of the person, even after the prevailing party has been married again; but this power should be exercised rarely.⁵⁶ A decree of divorce will not be set aside because the wife had previously contracted another marriage, believing she had the right to do so, nor after several months for the insufficiency of the testimony, unless there was an entire failure of proof, nor because the motion to confirm the referee's report made before one judge was renewed before another, and there was no competent evidence of leave to renew, notice of the second motion having been given, no objection taken at the time.⁵⁷ It will not be opened for irregularity where the defendant has been guilty of unexcused laches.⁵⁸

3. Collusion, etc., as to adultery.

Where it clearly appears that a decree has been obtained by collusion, it is the duty of the court to set it aside.⁵⁹ But a collusive divorce, on the strength of which the plaintiff has married an innocent third person, defendant having, in pursuance of the collusive agreement, procured a judgment in another court, will not be set aside and the second marriage thereby invalidated, without the most cogent proof of a right to defend.⁶⁰

The fact that the husband did not actively interfere to prevent an act of adultery on the part of his wife whom he suspected of infidelity, but instead took measures to detect her, is not sufficient ground for setting aside a decree of divorce.⁶¹

Where it appears that the husband confederated with others to procure his wife to commit adultery and to be witnesses thereof; that she was induced to withdraw her defense and that a decree was procured on his testimony that he had not procured, connived at or consented to such act, such decree will be set aside as a fraud on the court.⁶²

A mother, on allegations that a divorce between her daughter and the latter's husband was obtained by collusion,

56. *Wortman v. Wortman*, 19 Abb. Pr. 66.

57. *Robertson v. Robertson*, 9 Daly 44.

58. *Schmidt v. Schmidt*, 1 Wkly. Dig. 124.

59. *McIntyre v. McIntyre*, 9 Misc. 252, 61 St. Rep. 75, 30 N. Y. Supp.

200.

60. *Crocker v. Crocker*, 1 Buff. Super. Ct. 257.

61. *Reierson v. Reierson*, 32 App. Div. 62, 52 N. Y. Supp. 509.

62. *Helmes v. Helmes*, 24 Misc. 125, 52 N. Y. Supp. 734.

has no right to be made guardian *ad litem*, or to move to open the judgment; but the court will inquire into her statements to see if it has been imposed upon.⁶³

4. Opening judgment procured by default.

Where a judgment is taken by default, the defendant may, in a proper case, be allowed to open the default and interpose a defense. This may be done, although the plaintiff has remarried relying on the decree;⁶⁴ but in such a case the decree should be allowed to stand for the protection of the second husband or wife and the cohabitation under such marriage should not be treated as adulterous.⁶⁵

The ordinary strict rules relating to the opening of defaults are not applied in matrimonial actions.⁶⁶ A default, in the strict sense of the word, cannot be made in an action of divorce, for the court is vigilant to prevent a divorce by collusion.⁶⁷

The rule that a default will not be opened to permit the interposition of a defense which is not meritorious is not rigorously applied in actions for absolute divorce, but such default will be opened unless there has been laches, or facts are shown from which it can be seen that injustice would result.⁶⁸

The default of a defendant wife in an action for divorce will be opened where on three prior trials the jury disagreed and the defendant at the time of the default was ill and without funds to prosecute the case.⁶⁹

An order opening the default in an action for divorce against a wife is improper, where she does not present affidavit of merits or a proposed answer, or even deny the charges set out in the complaint, and no sufficient excuse for the default is shown.⁷⁰

On motion to open judgment by default against defendant, it appeared defendant was ill when she received information that a postponement had been refused for more than that day, because the physician's certificate which was relied on

63. *E. B. v. E. C. B.*, 28 Barb. 299.

64. *Scripture v. Scripture*, 70 Hun, 432, 54 St. Rep. 53, 24 N. Y. Supp. 301.

65. *Scripture v. Scripture*, 70 Hun, 432, 54 St. Rep. 53, 24 N. Y. Supp. 301; *Von Rhade v. Von Rhade*, 2 T. & C. 491; *Dunn v. Dunn*, 4 Paige, 425.

66. *Schoeller v. Schoeller*, 161 N. Y.

Supp. 399.

67. *Mott v. Mott*, 134 App. Div. 569, 119 N. Y. Supp. 483.

68. *Hamilton v. Hamilton*, 29 App. Div. 331, 51 N. Y. Supp. 365.

69. *Mott v. Mott*, 134 App. Div. 569, 119 N. Y. Supp. 483.

70. *Maguire v. Maguire*, 75 App. Div. 534, 78 N. Y. Supp. 312.

for postponement was not verified. The physician was not able to procure a notary public, and sent another certificate to the attorneys, stating his reasons for not verifying it, but such letter and certificate did not reach the attorney's office until the next day, and after default had been taken; it was held that it was error not to open the default.⁷¹

Where, upon application for an order opening and setting aside interlocutory and final judgments of divorce, the default is opened and defendant permitted to come in and defend, but the judgments already entered are not vacated, and thereafter, after hearing evidence, the justice denies defendant's application to vacate said judgments and directs that they "remain in full force and effect," the decision and the judgment entered thereon must be construed as an order denying defendant's application to vacate the original judgments and is not appealable, as of right, to the Court of Appeals.⁷²

5. Reconciliation.

Cohabitation between interlocutory and final judgment, constituting a condonation of the offense, requires that the final judgment subsequently entered be vacated on motion.⁷³ Where a decree for divorce, for adultery, was regularly obtained by the wife while the husband was a convict in State prison, the court refused to open the decree to enable the husband to set up condonation.⁷⁴

6. After death of party.

After the death of one party to an action of divorce, the surviving party cannot ordinarily prosecute a motion to vacate the judgment.⁷⁵ But where, after final judgment for divorce was entered against a wife, she moved to set aside and to revive the action upon the ground of newly-discovered evidence of the adultery of her husband, and the husband's attorneys in consideration of a postponement of a hearing of the motion agreed that the defendant should not be prejudiced by the adjournment as to any possible present or future rights in the plaintiff's property, and that her status should remain unchanged pending the determination of the

71. *Henderson v. Henderson*, 83 App. Div. 449, 82 N. Y. Supp. 444.

72. *Mokarzel v. Mokarzel*, 224 N. Y. 340.

73. *Cary v. Cary*, 144 App. Div. 846, 129 N. Y. Supp. 444.

74. *Hoffmire v. Hoffmire*, 7 Paige, 60 aff'g 3 Edw. 73.

75. *Groh v. Groh*, 35 Misc. 354, 71 N. Y. Supp. 985; *Watson v. Watson*, 1 Hun, 267.

motion, the court has jurisdiction to entertain the motion, although the husband died before it was brought to a hearing. This is true, although the deceased husband's representatives cannot be substituted as parties plaintiffs and the case retried.⁷⁶

7. Application by subsequent husband or wife.

When a court having jurisdiction of the parties and subject-matter decrees an absolute divorce, with leave to the wife to marry again, and she does so marry, her second husband cannot maintain an action to have the judgment of divorce cancelled and his marriage declared void on the ground that the divorce was obtained fraudulently or by collusion.⁷⁷

8. Application by husband in default of alimony.

A motion to vacate a judgment of separation should not be granted while the defendant is in default in payment of alimony.⁷⁸ Where the defendant's appearance and answer have been stricken out for contempt in disobeying an order for the payment of alimony, the court has no power to set aside the judgment and grant the defendant leave to answer upon the application of the third party, with whom the adultery is alleged to have been committed.⁷⁹

F. Revocation of separation by consent.

1. Civil Practice Act, § 1165. Judgment for separation may be revoked.

Upon the joint application of the parties, accompanied with satisfactory evidence of their reconciliation, a judgment for a separation, forever, or for a limited period, rendered as prescribed in this article, may be revoked at any time by the court which rendered it, subject to such regulations and restrictions as the court thinks fit to impose.

2. Necessity of order.

A decree of separation is not vacated or in any manner revoked by the reconciliation or cohabitation of the parties. This can only be done by an order of the court as contemplated by section 1165 of the Civil Practice Act.⁸⁰ In actions for separation, the statute provides for the kind of judgment and gives no authority to the court to reserve any question or to modify or change the judgment entered, except to revoke the same as authorized by section 1165.⁸¹

76. *Hunt v. Hunt*, 154 App. Div. 833, 139 N. Y. Supp. 413.

77. *Ruger v. Heckel*, 85 N. Y. 483.

78. *Knauer v. Knauer*, 121 App. Div. 750, 106 N. Y. Supp. 490.

79. *Quigley v. Quigley*, 45 Hun, 23.

80. *Hobby v. Hobby*, 5 App. Div. 496, 38 N. Y. Supp. 1059; *Jones v. Jones*, 90 Hun, 414, 35 N. Y. Supp. 877, 70 St. Rep. 319.

81. *Pollitzer v. Pollitzer*, 178 App. Div. 744, 165 N. Y. Supp. 953.

ARTICLE XIII.

ENFORCEMENT OF ALIMONY.

A. In general.

Sections 1171 and 1172 of the Civil Practice Act provide for the enforcement of alimony in actions of divorce and separation. Section 1171 authorizes the court to direct the husband to give security for the payments, and provides for a sequestration of his property in case of his default. Section 1172 authorizes contempt proceedings against the husband, if the remedy by way of security and sequestration is ineffectual. These sections are exclusive as to the proper procedure to be followed for the enforcement of alimony.⁸²

These sections apply to temporary, as well as permanent, alimony.⁸³ On the theory that they contain the exclusive provisions for the enforcement of temporary alimony, it is held that an action at law to procure a judgment for temporary alimony is unauthorized.⁸⁴ But it has been held that, if permanent alimony is awarded by the final decree and it remains unpaid, the wife can secure an order from the court directing the clerk to enter a judgment against the husband for the unpaid alimony.⁸⁵

An order for temporary alimony cannot be enforced by the issuance of an execution,⁸⁶ or through supplementary proceedings.⁸⁷ But it has been held, where during the pendency of an action by the wife against her husband for a separation, he goes beyond the jurisdiction, leaving her and her children without resources, and an order for alimony has been obtained, she may maintain an equitable action against him and his father's executors to reach a surplus of an income, given him by his father's will, for her support during the prosecution of the suit, under the order for alimony.⁸⁸ The payment of alimony will not be enforced by a creditor's bill until other remedies are exhausted.⁸⁹

82. *Stewart v. Stewart*, 127 App. Div. 724, 111 N. Y. Supp. 734; *People ex rel. Ready v. Walsh*, 132 App. Div. 462, 116 N. Y. Supp. 839; *Mills v. Mills*, 95 Misc. 231, 158 N. Y. Supp. 753.

83. *Weber v. Weber*, 93 App. Div. 149, 87 N. Y. Supp. 519.

84. *Mills v. Mills*, 95 Misc. 231, 158 N. Y. Supp. 753; *Jacobson v. Jacobson*, 85 Misc. 253, 148 N. Y. Supp. 341.

85. *Thayer v. Thayer*, 145 App. Div.

268, 129 N. Y. Supp. 1035. See, also, *Jacobson v. Jacobson*, 85 Misc. 253, 148 N. Y. Supp. 341.

86. *Weber v. Weber*, 93 App. Div. 149, 87 N. Y. Supp. 519.

87. *Weber v. Weber*, 93 App. Div. 149, 87 N. Y. Supp. 519; *Ostrom v. Ostrom*, 38 Misc. 232, 77 N. Y. 594.

88. *McGlynn v. McGlynn*, 37 Misc. 12, 74 N. Y. Supp. 744.

89. *Halstead v. Halstead*, 21 App. Div. 589, 47 N. Y. Supp. 814.

A wife may maintain an action against the mother of her husband who, after he has defaulted in making payments under an order for alimony, induces him to leave the State and furnishes him money to do so.⁹⁰

B. Security and sequestration.

1. Civil Practice Act, § 1171. Security for payments by defendant in action for divorce or separation; sequestration.

Where a judgment rendered or an order made in an action in this state for divorce or separation, or a judgment rendered in another state for divorce upon the ground of adultery, or for separation or separate support and maintenance for any of the causes specified in section eleven hundred and sixty-one of this act, upon which an action has been brought in this state and judgment rendered therein, requires a husband to provide for the education or maintenance of any of the children of a marriage, or for the support of his wife, the court, in its discretion, also may direct him to give reasonable security, in such a manner and within such a time as it thinks proper, for the payment, from time to time, of the sums of money required for that purpose. If he fails to give the security, or to make any payment required by the terms of such a judgment or order, whether he has or has not given security therefor, or to pay any sum of money for the expenses of the plaintiff or for her support and maintenance or the support and maintenance of the children during the pendency of the action which he is required to pay by an order, the court may cause his personal property and the rents and profits of his real property to be sequestered, and may appoint a receiver thereof. The rents and profits and other property so sequestered may be applied, from time to time, under the direction of the court, to the payment of any of the sums of money specified in this section, as justice requires; and if the same shall be insufficient to pay the sums of money required, the court, on application of the receiver, may direct the mortgage or sale by the receiver, under such terms and conditions as it may prescribe, of sufficient of his real estate to pay such sums.

2. Security.

Under section 1171 of the Civil Practice Act, there can be no question as to the power of the court to require the husband to give security for the payment of alimony.⁹¹ If, however, such security is duly given and there is no default in the payment of alimony, the court is without power to sequester property of the husband or to appoint a receiver thereof.⁹²

Remedies of security and sequestration for the enforcement of the payment apply not only to alimony which has

90. *Hoefler v. Hoefler*, 12 App. Div. 84, 42 N. Y. Supp. 1035.

91. *Maney v. Maney*, 119 App. Div. 765, 104 N. Y. Supp. 541; *Jacobson v. Jacobson*, 85 Misc. 253, 148 N. Y. Supp. 341; *Doerle v. Doerle*, 96 Misc. 72, 159 N. Y. Supp. 637.

Discharge of surety.—In *Stendal v. Ackerman*, 43 Misc. 54, 86 N. Y. Supp.

468, a surety was held discharged from liability to the wife for alimony by reason of her laches and acts, which were construed as indicating an intention not to hold the surety.

92. *Logan v. Logan*, 125 App. Div. 724, 110 N. Y. Supp. 174; *Bradley v. Bradley*, 137 App. Div. 751, 122 N. Y. Supp. 626.

accrued, but alimony which will accrue as the Legislature did not intend to require successive proceedings for each periodical payment. Nor did it intend to require an action at law for alimony already accrued and a suit in equity to enforce future payments. While security need not be given as a condition precedent to sequestration, it is thought that, if security has been given, the remedy thereon must be exhausted before resorting to sequestration.⁹³ The court may make an order appointing a receiver and sequestering defendant's property, even though no direction to furnish security for the payment of alimony had been made in the judgment and defendant had not refused to furnish such security.⁹⁴

3. Property subject to sequestration.

The Supreme Court has jurisdiction to reach the income of property held in trust for the benefit of a husband to satisfy a judgment for alimony obtained by his wife in an action for divorce.⁹⁵ A wife who has obtained a final decree for alimony after exhausting the remedies given by the statute to obtain payment may maintain a suit in equity to subject the surplus income, over what is required for the husband's support, of a testamentary trust created for the husband's benefit, without any valid direction for the accumulation of income, to the payment of alimony both overdue and to accrue.⁹⁶

Upon an application by a wife to sequester her husband's property, earnings accruing subsequent to the appointment of the receiver cannot be reached.⁹⁷

The pension of a retired policeman is not exempt under section 352 of the Greater New York charter from sequestration for payment of alimony. But costs and disbursements of the action are not for support and maintenance, but are a debt to be collected by execution, and hence the provision of the charter prevents their collection by sequestration.⁹⁸

93. *Moore v. Moore*, 143 App. Div. 428, 128 N. Y. Supp. 259; *aff'd*, 208 N. Y. 27.

94. *Percival v. Percival*, 14 St. Rep. 255.

It was formerly held that the court could not sequester a husband's estate to pay an allowance ordered by final judgment until it had made an order for him to give a bond with surety to pay the allowance, and the husband and surety have failed to fulfill the condition. *Forrest v. Forrest*, 9 Bosw,

686; *Davies v. Davies*, 1 Hun, 444.

95. *Wetmore v. Wetmore*, 149 N. Y. 520; *Hoagland v. Leask*, 154 App. Div. 101, 138 N. Y. Supp. 790; *Thompson v. Thompson*, 52 Hun, 456, 5 N. Y. Supp. 604.

96. *Moore v. Moore*, 142 App. Div. 459, 126 N. Y. Supp. 936.

97. *Tompers v. Tompers*, 159 N. Y. Supp. 817.

98. *Monck v. Monck*, 184 App. Div. 656, 172 N. Y. Supp. 401.

4. Receiver.

Section 1171 authorizes the appointment of a receiver of the husband's property in a sequestration proceeding. Where a receiver has been appointed in sequestration proceedings to enforce alimony, he takes title to whatever personalty in the hands of a third party formerly belonged to defendant, and has the remedies afforded by law to ascertain what property or indebtedness he is entitled to claim.⁹⁹ He acquires no title to the real estate, but simply is entitled to possession as against the defendant and all claiming under him; and so long as his rights are unquestioned and there is no interference therewith, either actual or threatened, he has no concern with the title and cannot maintain an action to try the validity of the transfers thereof by defendant.¹ And he takes no title to a trust fund income so far as it accrues after his appointment; a proceeding to reach such income should be brought by the wife, not the receiver.² The receiver cannot bring an action without leave of the court.³

Where, on failure of a husband to comply with an order to pay alimony, his personal property has been sequestered and a receiver appointed, a separate action to restrain executors of a will from paying the husband a legacy in their hands may be maintained by the wife, and the proceeds thereof directed to be paid to the receiver.⁴

Where it appears that the defendant in an action for a separation sought to thwart plaintiff's right to recover certain money deposited by defendant after the entry of final judgment in favor of the plaintiff and that he disobeyed the order of the court, an order discharging the receiver in sequestration proceedings will not be granted, nor will he be directed to withdraw all claims to said money applicable to the payment of alimony awarded the plaintiff.⁵

The provisions of section 976 of the Civil Practice Act providing that a receiver appointed in an action or special proceeding, before entering on his duties, shall file with the proper clerk a bond, etc., is applicable to a receiver appointed to take charge of the personal property of the husband against whom a judgment for alimony had been recovered and who failed to pay the sum decreed. But the failure to

99. *Bucki v. Bucki*, 26 Misc. 69, 56 N. Y. Supp. 439.

1. *Foster v. Townshend*, 68 N. Y. 203.

2. *Wetmore v. Wetmore*, 149 N. Y. 520; *Wetmore v. Wetmore*, 67 Hun, 9, 21 N. Y. Supp. 746.

3. *Garden v. Garden*, 34 Misc. 97, 69 N. Y. Supp. 481.

4. *Garden v. Garden*, 34 Misc. 97, 69 N. Y. Supp. 481.

5. *Radloski v. Radloski*, 72 Misc. 101, 129 N. Y. Supp. 818.

give such bond has been held not to affect proceedings for contempt in refusing to turn over personal property to the receiver.⁶

5. Attack on fraudulent transfers of husband's property.

A wife in order to enforce an order for the payment of alimony may maintain a creditor's action against the defendant husband and those to whom he has fraudulently transferred property without showing that an execution against the property of the husband has been returned unsatisfied.⁷ But a wife having obtained a decree of separation, cannot maintain a suit to set aside transfers of lands alleged to have been made by her husband for the purpose of avoiding payment of alimony, without proving that the husband was made insolvent by such conveyance.⁸

C. Contempt.

1. Civil Practice Act, § 1172. Enforcement by contempt proceedings of judgment or order in action for divorce or separation.

Where the husband, in action for divorce or separation, or for the enforcement in this state of a judgment for divorce or separation rendered in another state, makes default in paying any sum of money as required by the judgment or order directing the payment thereof, and it appears presumptively, to the satisfaction of the court, that payment cannot be enforced by means of the sequestration of his property, or by resorting to the security, if any, given as prescribed by statute, the court, in its discretion, may make an order requiring the husband to show cause before it at a time and place therein specified why he should not be punished for his failure to make the payment; and thereupon proceedings must be taken to punish him, as prescribed in article nineteen of the judiciary law for the punishment of a contempt of court other than a criminal contempt, and where the judgment or order directs the payment to be made in instalments, or at stated intervals, failure to make such single payment or instalment may be punished as therein provided, and such punishment, either by fine or commitment, shall not be a bar to a subsequent proceeding to punish him as for a contempt for his failure to pay subsequent instalments, but for such purpose he may be proceeded against under the said order in the same manner and with the same effect as though such instalment payment was directed to be paid by a separate and distinct order, and the provisions of section seventy-two of the civil rights law are hereby superseded so far as they are in conflict herewith. Such order to show cause may also be made without any previous sequestration or direction to give security where the court is satisfied that they would be ineffectual. No demand of any kind upon the husband shall be necessary in order that he be proceeded against and punished for failure to make any such payment or to pay any such instalment.

6. *Matter of Spies*, 92 App. Div. Y. Supp. 1098.
175, 86 N. Y. Supp. 1043.

7. *Ludlam v. Bloodgood*, 3 Bradb.
569; *aff'd*, 163 App. Div. 863, 146 N.

8. *Longworth v. Longworth*, 157
App. Div. 377, 142 N. Y. Supp. 71.

2. Contempt proceedings, in general.

The equivalent section of the Code of Civil Procedure, section 1773, was first added to the statutory law of the State, at the time of the adoption of the Code of Civil Procedure.

The section was said by the codifiers to have been added for the purpose of settling the question whether non-payment of costs and alimony, in an action for divorce, could be punished as a contempt. It had been held that the decree could not be enforced by contempt proceedings,⁹ though the better opinion was to the contrary.¹⁰

Under the present statutes there can be no question as to the general right, in a proper case, to enforce by contempt proceedings a decree or an order granting alimony.¹¹ The fact that section 505 of the Civil Practice Act particularly prescribes the cases when a judgment may be enforced by contempt and does not mention judgments for alimony does not affect the situation.¹² And the fact that the decree assumes to authorize the issuance of an execution against the husband's property in case he defaults in the payments does not estop the wife from resort to contempt proceedings.¹³

The payment of alimony which has accrued between the entering of the final judgment and the service of a certified copy thereof, with notice of entry and demand upon the defendant, may be enforced by contempt proceedings.¹⁴

In proceedings for contempt for the nonpayment of alimony, pursuant to a judgment of separation, default must be clearly shown, and an Appellate Court may not indulge in inferences and assumptions with respect to what occurred on the original hearing, especially where the motion to punish was denied. The moving party in such a case must show as a condition precedent to her right to the entry of an order upon which her husband may be deprived of his liberty, not only that a certified copy of the judgment has been duly served, but also that the husband failed to pay, for while the authority for enforcing such judgments by civil contempt proceedings is conferred by section 1172 of the Civil Practice Act, and the provisions of article 19 of the Judiciary Law must be followed, the practice requires substantially the same

9. *Lansing v. Lansing*, 4 *Lans.* 377.

10. *Park v. Park*, 80 *N. Y.* 156; *Strobridge v. Strobridge*, 21 *Hun.* 288.

11. *Erkenbrach v. Erkenbrach*, 96 *N. Y.* 466; *Stanley v. Stanley*, 116 *App. Div.* 544, 101 *N. Y. Supp.* 725; *Compton v. Compton*, 97 *N. Y. Supp.*

618.

12. *Stanley v. Stanley*, 116 *App. Div.* 544, 101 *N. Y. Supp.* 725.

13. *Park v. Park*, 80 *N. Y.* 156.

14. *Gunn v. Gunn*, 120 *App. Div.* 353, 105 *N. Y. Supp.* 340.

proof of default as is prescribed in section 505 of the Civil Practice Act.¹⁵

Where a valid agreement between the parties, rather than a judicial decree, is the basis for alimony or maintenance of the wife, the remedy in case of default in payment is an action on the agreement, not a contempt proceeding. For the failure of a husband to comply with the provisions of an agreement entered into by him after a divorce decree as to a payment of a gross sum as advance alimony and for periodic instalments less than the rate fixed in the decree, he cannot be punished for contempt, and the wife is left to her action on the contract, where contempt proceedings under the decree would be ineffectual because the advance payment was full compliance with the decree up to the time of breach of the agreement.¹⁶ After a judgment of an absolute divorce in favor of the wife had been rendered, but at or immediately before its entry, the parties entered into an agreement for the payment of a less sum as alimony than that provided in the decree, it was held that an order for contempt in not paying the additional amount, the sum agreed upon having been paid would not be granted, pending a reference to ascertain defendant's pecuniary ability.¹⁷

If, however, the agreement is after a decree allowing alimony and is invalid, it does not affect the right of the wife to secure his punishment as for a contempt.¹⁸ An agreement by a husband to pay a certain sum *in praesenti* to his wife in consideration of a release by her of his liability to pay alimony under a foreign decree of divorce does not "relieve the husband from his liability to support his wife," within the meaning of section 51 of the Domestic Relations Law, and will be upheld where the provision is adequate. If, however, such provision is inadequate or has been accepted by the wife unadvisedly or imprudently, a court of equity has power to intervene.¹⁹

A stipulation to make specified future payments of alimony in consideration of the withdrawal of proceedings to punish for contempt for failure to pay alimony in the past is a new contract, upon which an action may be brought in case of a

15. *Matzke v. Matzke*, 185 App. Div. 533, 173 N. Y. Supp. 244.

16. *Clark v. Clark*, 130 App. Div. 610, 115 N. Y. Supp. 500; appeal dismissed, 195 N. Y. 612.

17. *Goodsell v. Goodsell*, 94 App. Div. 443, 88 N. Y. Supp. 161.

18. *Gewirtz v. Gewirtz*, 189 App. Div. 483, 178 N. Y. Supp. 738.

19. *Levy v. Doekendorff*, 177 App. Div. 249, 163 N. Y. Supp. 435. Compare *Gewirtz v. Gewirtz*, 189 App. Div. 483, 178 N. Y. Supp. 738.

breach. It is no defense to such an action that proceedings for contempt were renewed after a default in payment.²⁰

An order adjudging the husband in contempt for failure to pay alimony should not include the fees and costs in the divorce action.^{20a}

3. Temporary alimony and counsel fees.

Section 1172 of the Civil Practice Act applies to orders granting temporary alimony and counsel fees, etc., as well as to judgments awarding permanent alimony.²¹ Thus, the payment of the referee's fees on a reference as to alimony and counsel fees may be enforced by process of contempt.²²

A husband who refuses to pay alimony which accrued pending an unsuccessful appeal, after due service of the order and demand for payment, should be punished for contempt.²³ Costs and a counsel fee awarded the wife by the final judgment in the action cannot be enforced by proceedings to punish for contempt.²⁴ But the right to enforce by proceedings as for a contempt compliance with an order made during the pendency of an action for divorce, requiring the husband to pay a certain sum as counsel fee, is not lost by reason of the fact that the order improperly provided that such allowance might be included in the final judgment in the action to be enforced by execution, and it was thereafter inserted in the judgment.²⁵

All proceedings to compel the payment of alimony during the pendency of the action must be taken in the action in which the alimony was granted.²⁶

4. Failure to furnish security.

The defendant in an action for divorce who has failed to pay alimony, while punishable for contempt for such failure, cannot be held in contempt for failing to secure payment by the execution of an undertaking as ordered.²⁷

20. *Davidson v. Davidson*, 29 App. Div. 629, 52 N. Y. Supp. 7.

20a. *Shepard v. Shepard*, 99 App. Div. 308, 90 N. Y. Supp. 982.

21. *Monerief v. Monerief*, 155 N. Y. Supp. 592.

22. *Mahon v. Mahon*, 5 Civ. Pro. 58.

23. *Wallace v. Wallace*, 140 App. Div. 800, 125 N. Y. Supp. 561.

24. *Jacquin v. Jacquin*, 36 Hun, 378,

7 Civ. Pro. 327; *Branth v. Branth*, 20 Civ. Pro. 33, 13 N. Y. Supp. 360.

25. *Mercer v. Mercer*, 73 Hun, 192, 25 N. Y. Supp. 867.

26. *Matter of Thrall*, 12 App. Div. 235, 42 N. Y. Supp. 439; *aff'd*, 153 N. Y. 644.

27. *People ex rel. Ready v. Walsh*, 132 App. Div. 462, 116 N. Y. Supp. 830.

5. Security and sequestration ineffective.

One of the essential elements to authorize contempt proceedings is that it must appear presumptively, to the satisfaction of the court, that payment cannot be enforced by means of the sequestration of the husband's property, or by resorting to the security, if any.²⁸ An order to show cause why the husband should not be punished for contempt for failure to pay alimony and counsel fees is defective, if it fails to set forth an adjudication that such payment cannot be enforced by sequestration proceedings, or by resort to the security, if any was given.²⁹ A motion to punish a defendant for contempt for failure to pay alimony will be denied when the plaintiff fails to show that a sequestration of his property would be ineffectual.³⁰ But the order to show cause may be made without previous sequestration or direction to give security if the court is satisfied that it will be ineffectual.³¹

The moving papers must show whether the husband has any real or personal property which is subject to sequestration.³² The statute contemplates the appropriation of the property of the husband first.³³ But the order of commitment of the husband for contempt for failure to pay alimony need not state whether he has any personal or real property.³⁴

Where the husband was excused from paying a counsel fee upon the ground of poverty, a presumption to that effect may be entertained and he may be adjudged in contempt in the discretion of the court which may be exercised by the Appellate Division.³⁵

An affidavit, on information and belief, that defendant has no real estate or personal property unless he has accumulated his earnings; that deponent believes such earnings cannot be reached, and that defendant cannot give security, is sufficient to warrant an order to show cause why defendant should not be punished for contempt in not paying alimony.³⁶

23. *Uttal v. Uttal*, 140 App. Div. 255, 125 N. Y. Supp. 2; *Goldman v. Goldman*, 103 Misc. 700, 171 N. Y. Supp. 26; *Whitney v. Whitney*, 19 Civ. Pro. 265, 11 N. Y. Supp. 582, 33 St. Rep. 704.

29. *Goldman v. Goldman*, 103 Misc. 700, 171 N. Y. Supp. 26.

30. *Conklin v. Conklin* No. 2, 125 App. Div. 280, 109 N. Y. Supp. 189.

31. *Uttal v. Uttal*, 140 App. Div. 255, 125 N. Y. Supp. 2.

32. *Sandford v. Sandford*, 44 Hun, 563.

33. *Sandford v. Sandford*, 44 Hun, 563.

34. *Distasio v. Distasio*, 26 Misc. 491, 57 N. Y. Supp. 672; *Ryer v. Ryer*, 67 How. Pr. 369.

35. *Uttal v. Uttal*, 140 App. Div. 255, 125 N. Y. Supp. 2.

36. *Rahl v. Rahl*, 14 Wkly. Dig. 560. But in *Isaacs v. Isaacs*, 61 How. Pr. 369, it was held that this section

Where it appears on the motion that defendant gave no security for the payment of alimony and counsel fees directed to be paid, and the only reference in the moving papers to the ineffectiveness of sequestration proceedings is contained in the affidavit of the plaintiff which merely states that the order for the payment of alimony and counsel fees cannot be enforced by sequestration for the reason that defendant has disposed of all his property so that plaintiff cannot reach it, the motion will be denied, with leave to renew upon sufficient papers.³⁷

6. Prejudice of wife.

In adjudging a husband in default for failing to pay alimony, the court should find and adjudge that his failure tended to and did defeat, impair, impede, and prejudice the rights of the wife.³⁸ This is necessary whether the contempt is based on the failure to pay either permanent or temporary alimony.³⁹

Although a husband directed by a decree of divorce to pay weekly alimony to his wife for her support and the support and education of their child may be guilty of a technical violation of the decree by paying a portion of the sum to his son in order to enable him to continue his education after the wife had refused to permit him to do so and by paying only the balance to the wife, yet his act is not such as to defeat, impair, impede or prejudice the rights of the wife and he should not be punished for contempt.⁴⁰

7. Excuses for failure to pay.

Notwithstanding adultery by the wife, the husband cannot refuse to make payments of alimony under a decree of separation until the decree has been modified, and if he does so he is guilty of contempt.⁴¹

When an order granting alimony *pendente lite* and requiring the plaintiff to allow the defendant to see his child at cer-

was intended to change the law as it existed and prohibit the commitment of the husband, for failure to pay alimony, until it was apparent it could not be collected otherwise.

37. *Goldman v. Goldman* (1918), 103 Misc. 700, 171 N. Y. Supp. 26.

38. *Schweig v. Schweig*, No. 2, 122 App. Div. 787, 107 N. Y. Supp. 905; *Krauss v. Krauss*, 127 App. Div. 743, 111 N. Y. Supp. 790; *Sandford v.*

Sandford, 40 Hun, 540; *Mahon v. Mahon*, 5 Civ. Pro. 58; *Whitney v. Whitney*, 19 Civ. Pro. 265, 11 N. Y. Supp. 582, 33 St. Rep. 704.

39. *Schweig v. Schweig*, No. 2, 122 App. Div. 787, 107 N. Y. Supp. 905.

40. *Brill v. Brill*, 148 App. Div. 63, 131 N. Y. Supp. 1030.

41. *Ronan v. Ronan*, 32 Misc. 467, 66 N. Y. Supp. 799.

tain times and places pending the action does not make the latter provision a condition precedent to the obligation to pay alimony, the defendant is not justified in refusing payment on the ground that the plaintiff has not allowed him access to the child as required.⁴²

Although an order for alimony *pendente lite* entitled the wife to ten dollars a week in addition to the amount set if she surrendered to her husband the premises in which she lived, the husband will not be punished for contempt in failing to pay the increased amount where it appears that the wife refused to permit him to borrow money on an insurance policy in order to pay the interest on a mortgage on the premises, that after a foreclosure the husband procured a purchaser at a certain price but the wife would not consent to the sale but insisted on a sale of the property to her own attorney on condition that her husband divide his equity in the premises equally with her, which he did, because under such circumstances there was no surrender of the premises to the husband, and the wife by her action waived her right to the increased alimony.⁴³

Where the defendant, against whom a decree for alimony was rendered on a judgment for absolute divorce, had failed to comply with the same and had kept without the jurisdiction, and a sequestration judgment applied the avails of a trust income to the support of children of the marriage only, and thereafter defendant obtained a discharge in bankruptcy, his schedule including the unpaid alimony, it was held he would not be allowed to have the judgment against him vacated and be relieved from contempt, on agreeing to pay the back alimony into court and give a new bond to support the children.⁴⁴

8. Inability of husband to pay.

It is no answer to an application to punish the husband for contempt that he has been unable to make the required payments.⁴⁵ Failure to pay alimony is not excused by poverty.⁴⁶

42. *Schweig v. Schweig*, No. 2, 122 App. Div. 787, 107 N. Y. Supp. 905.

43. *Pettibone v. Pettibone*, 141 App. Div. 861, 126 N. Y. Supp. 676.

44. *Wetmore v. Wetmore*, 34 Misc. 640, 70 N. Y. Supp. 604; aff'd without opinion, 72 App. Div. 620, 76 N. Y. Supp. 1037; appeal dismissed, 171 N. Y. 690; aff'd, 196 U. S. 68.

45. *Young v. Young*, 35 Misc. 335, 71 N. Y. Supp. 944; *Ryckman v. Ryckman*, 34 Hun, 234; aff'd without opinion, 98 N. Y. 639; *Cahzin v. Cahzin*, 112 N. Y. Supp. 525. See, also, *Holtham v. Holtham*, 6 Misc. 266, 58 St. Rep. 130, 26 N. Y. Supp. 762.

46. *Delanoy v. Delanoy*, 19 App. Div. 295, 46 N. Y. Supp. 106.

If the husband is unable to make compliance, his remedy is to apply for a modification for the decree or order, or for his release from imprisonment under section 775 of the Judiciary Law.⁴⁷

Where a wife moves the court for an order punishing her husband for contempt in failing to pay alimony for a period of two years, amounting to the sum of \$320, and at the same time the defendant moves for an order to modify the final decree of divorce by striking therefrom the provision for the payment of alimony, and that the defendant be purged of the contempt of court, and it appears that the defendant is poor and below normal physically, but the plaintiff is living comfortably, in good health and in no need of the alimony directed to be paid her, the decree should be modified and the plaintiff's motion denied. Although in a proper case the fact that the defendant is unable to pay alimony is no answer to plaintiff's motion to punish him for contempt, the fact that the defendant is distressingly poor, while the plaintiff is in good health and abundantly able to care for herself, is important as bearing upon the question as to whether the decree should be modified by striking out the allowance for alimony.⁴⁸

9. Attack on order granting alimony.

A motion to punish a defendant for contempt in failing to pay alimony after due demand should not be denied on the ground that he has moved to set aside a judgment taken by default.⁴⁹ Although an order to pay alimony is afterwards reversed by the Appellate Division as improperly granted, the defendant, who has not obtained a stay, must obey the order until it is modified, set aside or reversed.⁵⁰

10. Termination of suit.

Although a husband sued for divorce has failed to pay alimony *pendente lite*, he cannot be punished for contempt after a dismissal of the complaint.⁵¹ The dismissal of the complaint in an action for divorce deprives the court of jurisdiction to punish the defendant for contempt, for disobeying

47. *Ryckman v. Ryckman*, 34 Hun, 234; *aff'd* without opinion, 98 N. Y. 639; *Matter of Ryckman*, 39 Hun, 646.

48. *Burdick v. Burdick*, 183 App. Div. 488, 171 N. Y. Supp. 247.

49. *Knauer v. Knauer*, 121 App. Div. 748, 106 N. Y. Supp. 490.

50. *Schweig v. Schweig*, No. 2, 122 App. Div. 787, 107 N. Y. Supp. 905.

51. *Hayes v. Hayes*, 150 App. Div. 842, 135 N. Y. Supp. 225; *aff'd*, 208 N. Y. 600. Compare *Shepard v. Shepard*, 99 App. Div. 308, 90 N. Y. Supp. 982.

an order awarding alimony during the pendency of the action, by failing to pay the same.⁵²

The claim of an attorney for compensation for his services as attorney for plaintiff in an action for separation cannot be enforced by contempt proceedings where the parties have settled the action.⁵³

Where in an action for divorce a judgment is entered dismissing the case upon the failure of the plaintiff to appear and later the case is restored to the calendar as a favor to the plaintiff, the defendant should not be committed for contempt for failure to pay alimony *pendente lite* during the period between the entry of judgment of dismissal and the restoration of the case to the calendar.⁵⁴

11. Subsequent foreign divorce.

A judgment of separation granted to a wife in this State is superseded by a judgment of absolute divorce subsequently granted in a foreign State, in favor of the husband, and a motion by the plaintiff in the separation action to punish defendant for nonpayment of alimony pursuant to an order in the action will be granted, but only to the extent of the amount found to be due at the time of the entry of the decree of divorce.⁵⁵

Where, after the granting of a decree in an action for separation, plaintiff obtains a foreign decree of absolute divorce, defendant's motion to modify the decree in the separation action as to the payment of alimony will be granted, and plaintiff's motion to punish defendant for contempt for failure to pay alimony in the separation action after the granting of the foreign divorce will be denied.⁵⁶

12. Service of order or judgment on husband.

In order to put the husband in contempt for failure to obey an order or decree, it is necessary that an authenticated copy thereof be served upon him.⁵⁷ Where an order amending a judgment of divorce by increasing the amount of alimony and requiring defendant, who was non-resident, to give a bond as security for payment, was entered and served upon

52. *Hayes v. Hayes*, 208 N. Y. 600.

53. *Weill v. Weill*, 10 N. Y. Supp. 627, 18 Civ. Pro. 241.

54. *Fauls v. Fauls*, 153 App. Div. 367, 138 N. Y. Supp. 459.

55. *Richards v. Richards*, 87 Misc. 134, 149 N. Y. Supp. 1028.

56. *Gibson v. Gibson*, 81 Misc. 508, 143 N. Y. Supp. 37.

57. *Park v. Park*, 80 N. Y. 156; *Dikeman v. Dikeman*, 108 Misc. 406, 177 N. Y. Supp. 506; *Sandford v. Sandford*, 40 Hun, 540.

the attorney, who had appeared for him in the action but not upon defendant in person; it was held that the court did not acquire jurisdiction to adjudge defendant guilty of contempt for non-compliance with the terms of the order.⁵⁸ But where the husband has notice of a motion to compel him to pay alimony, and he contests it and is defeated and subsequently leaves the State and fails to comply with the order, it has been held that he may be in contempt although the order has not been served on him.⁵⁹

13. Demand for payment of alimony.

Until 1921, it was the law that a husband could not be placed in contempt for failure to pay alimony until a proper demand for the payment had been made.⁶⁰

Section 1172, however, was amended in 1921 by the addition of the last sentence which expressly provides that no demand of any kind shall be necessary.

14. Order to show cause.

An order to show cause is necessary in a contempt proceeding to punish a husband for non-payment of alimony.⁶¹ The provisions of article 19 of the Judiciary Law authorizing other means of proceeding to enforce a contempt have no application to the enforcement of alimony. The show cause order must be made by the court.⁶² An order adjudging the defendant guilty of contempt and committing him to the common jail, founded upon an order to show cause made by a judge, is without jurisdiction and void.⁶³ Whether or not an order granted requiring the defendant to show cause why he should not be punished for contempt in failing to pay alimony is a court or a judge's order will be determined, not by the form of the order, but by the facts whether or not at the time the judge granting the order was holding a term of court and was authorized to grant a court order.⁶⁴

58. *Keller v. Keller*, 100 App. Div. 325, 91 N. Y. Supp. 528.

59. *Knott v. Knott*, 6 App. Div. 589, 39 N. Y. Supp. 804.

60. *Goldie v. Goldie*, 77 App. Div. 12, 79 N. Y. Supp. 268, 12 Anno. Cas. 175; *Conklin v. Conklin*, 113 App. Div. 743, 99 N. Y. Supp. 310; *Compton v. Compton*, 125 App. Div. 859, 110 N. Y. Supp. 775; *Sutton v. Sutton*, 145 App. Div. 845, 130 N. Y. Supp. 368; *Kalmanowitz v. Kalmanowitz*, 95 N. Y.

Supp. 627; *Reich v. Reich*, 167 N. Y. Supp. 660.

61. *Stewart v. Stewart*, 127 App. Div. 724, 111 N. Y. Supp. 734; *Sandford v. Sandford*, 40 Hun. 540; *Rudolph v. Rudolph*, 12 N. Y. Supp. 81.

62. *Weich v. Weich*, 59 Misc. 238, 110 N. Y. Supp. 201.

63. *Weich v. Weich*, 59 Misc. 238, 110 N. Y. Supp. 201.

64. *Aiken v. Aiken*, 96 Misc. 561, 160 N. Y. Supp. 876.

15. Service of order to show cause.

The decisions are not in harmony as to whether the order to show cause may be served on the husband's attorney, or whether it must be served on the husband personally. When it is sought to enforce alimony awarded by a final judgment, the action having terminated by such judgment, the authority of the attorney for the husband may be said to have expired; and, in such a case, it is reasonably clear that the order to show cause should be served on the husband personally.⁶⁵ Especially is this true, when it affirmatively appears that the attorney has no authority to appear for the husband in the proceeding.⁶⁶ On the other hand, there are authorities to the effect that, in a contempt proceeding to enforce alimony and counsel fees, if the proceeding is commenced before the termination of the action, the order to show cause may be served on the husband's attorney.⁶⁷ It has been held, however, in the Fourth Department that personal service of the order must be made in such cases.⁶⁸ After the entry of final judgment in a matrimonial action a contempt proceeding for nonpayment of counsel fees and alimony may not be instituted without personal service of the order to show cause upon the husband.⁶⁹

16. Order adjudging contempt.

While the final order need not in terms adjudicate that the wife has no remedy by security or sequestration to secure the unpaid alimony, it must adjudicate that the acts of the husband in failing to comply with the order or judgment have tended to and did defeat, impair, impede and prejudice her rights.⁷⁰

Although a court order cannot be reviewed by a court of co-ordinate jurisdiction, yet an order punishing a defendant for contempt in failing to pay alimony made by a judge or court without authority and without notice may be vacated

65. *Keller v. Keller*, 100 App. Div. 325, 91 N. Y. Supp. 528.

66. *Keller v. Keller*, 100 App. Div. 325, 91 N. Y. Supp. 528.

67. *Weich v. Weich*, 59 Misc. 238, 110 N. Y. Supp. 201; *Carr v. Carr*, 64 Misc. 436, 118 N. Y. Supp. 625; *Zimmerman v. Zimmerman*, 26 Abb. N. C. 366, 14 N. Y. Supp. 444; *Mahon v. Mahon*, 5 Civ. Pro. 58.

68. *Goldie v. Goldie*, 77 App. Div. 12, 79 N. Y. Supp. 268, 12 Anno. Cas. 175.

69. *Wulff v. Wulff*, 74 Misc. 213, 133 N. Y. Supp. 807; *aff'd*, 151 App. Div. 22, 135 N. Y. Supp. 289.

70. *Schweig v. Schweig*, No. 2, 122 App. Div. 787, 107 N. Y. Supp. 905; *Whitney v. Whitney*, 33 St. Rep. 704, 19 Civ. Pro. 265, 11 N. Y. Supp. 532.

by the court on notice.⁷¹ A defendant who pays alimony after having been arrested under a void order adjudging him in contempt pays under duress and is not estopped from moving to vacate the order.⁷²

It is not necessary that there be served with final order adjudging party in contempt the affidavits and proofs recited therein.⁷³

17. Amount of fine.

A fine for failure to pay a weekly sum ordered as alimony in separation proceedings, and the attorney's fee, must be limited to the attorney's fee and the amount of alimony due under the order when demand was made therefor.⁷⁴

18. Imprisonment.

Prior to 1919 the duration of the imprisonment of a husband for a contempt was limited by section 111 of the Code of Civil Procedure to three months when the amount unpaid was less than five hundred dollars, and six months when the amount was five hundred dollars or over. But one imprisonment was allowed on account of temporary alimony and one on account of permanent alimony.⁷⁵ A second imprisonment was not allowed, except that after an imprisonment for temporary alimony an additional term was allowed if he defaulted in the permanent alimony.⁷⁶

71. *Stewart v. Stewart*, 127 App. Div. 724, 111 N. Y. Supp. 734.

72. *Stewart v. Stewart*, 127 App. Div. 724, 111 N. Y. Supp. 734.

73. *People ex rel. Clark v. Grant*, 13 Civ. Pro. 184.

74. *Woolworth v. Woolworth*, 115 App. Div. 405, 100 N. Y. Supp. 865.

75. *People ex rel. Levine v. Shea*, 201 N. Y. 471; *Maran v. Maran*, 137 App. Div. 348, 122 N. Y. Supp. 9; *People ex rel. Ready v. Walsh*, 132 App. Div. 462, 116 N. Y. Supp. 839; *Thayer v. Thayer*, 145 App. Div. 268, 129 N. Y. Supp. 1035; *Richards v. Richards*, 71 Misc. 532, 130 N. Y. Supp. 799; *Mendel v. Mendel*, 6 St. Rep. 511; *Clark v. Clark*, 1 St. Rep. 287.

Discharge without serving term.—The rule that one who has been imprisoned for a failure to pay alimony cannot again be imprisoned upon like

process in the same action applies only where such person has served the full term of imprisonment prescribed by this section. Hence, where a husband, having been arrested for failure to pay alimony, paid the same and was discharged without having served any term of imprisonment, he is not immune from a second arrest for contempt in failing to pay alimony which subsequently accrued. *Chadwick v. Chadwick*, 170 App. Div. 328, 156 N. Y. Supp. 190.

Jail liberties.—One arrested for contempt in failing to pay counsel fees and alimony is not entitled to jail liberties. *Matter of Clark*, 20 Hun, 551; appeal dismissed, 81 N. Y. 638.

76. *Roberts v. Roberts*, 3 Bradb. 328; *Reese v. Reese*, 46 App. Div. 156, 61 N. Y. Supp. 760, 30 Civ. Pro. 55, 7 N. Y. Anno. Cas. 209, aff'd 29 Misc. 249, 60 N. Y. Supp. 406.

An amendment made in 1919 to the Code of Civil Procedure, and now carried to section 1172 of the Civil Practice Act, in terms changes the rule and permits successive applications to punish the husband in case of successive defaults.

19. Defendant without jurisdiction.

While a party who has failed to pay alimony awarded in a matrimonial action is without the jurisdiction, the court may refuse to grant an order imposing a fine and committing him to custody, on the ground that such order would be futile.⁷⁷

20. Assisting husband to avoid decree.

It is not a civil contempt for the brother of one against whom an interlocutory decree awarding alimony has been entered to advise him to give a mortgage on an undivided interest in lands to his mother to secure the payment of a valid indebtedness and to convey his equity to his brothers and sisters for its full value.⁷⁸

D. Annulment.

An application to compel a husband suing for the annulment of his marriage to pay alimony should be made under section 753 of the Judiciary Law, rather than under section 1172 of the Civil Practice Act, which applies only to actions for divorce and separation. But under section 753 of the Judiciary Law to bring a husband in contempt for disobedience of an order or judgment requiring him to pay alimony, it is not sufficient that the order or judgment be served upon him; in addition a compliance with the order must be explicitly demanded by a party having a right to make such demand.⁷⁹

77. *Wulff v. Wulff*, 151 App. Div. 22, 135 N. Y. Supp. 289. But see *Davis v. Davis*, 83 Hun, 500, 32 N. Y. Supp. 10, holding that, in an action for a divorce, brought by a wife against her husband, which was commenced by the personal service of the summons and complaint and an order of arrest upon the defendant, who having been held to bail, after appearing and answering, departed from the State and continued to reside in

another State, the defendant is liable to be punished for contempt in failing to obey an order directing the payment by him of alimony, where he had knowledge of the existence of the order, and it had been personally served upon him in the State where he was residing.

78. *Sidway v. Sidway*, 156 App. Div. 375, 141 N. Y. Supp. 391.

79. *Sutton v. Sutton*, 145 App. Div. 845, 130 N. Y. Supp. 368.

E. Foreign decrees.

Sections 1171 and 1172 of the Civil Practice Act authorize sequestration and contempt proceedings to enforce a judgment of divorce or separation rendered in another State. By successive amendments the authority of our courts in this respect have been enlarged.⁸⁰

The Legislature in making amendments to the statute so as to make it apply to a judgment for divorce or separation rendered in another State upon the ground of adultery upon which an action has been brought in this State and judgment recovered intended to apply to a foreign judgment upon which action has been brought precisely the same remedies applicable to the enforcement of a judgment of the courts of this State. As these remedies are in the nature of execution and not of judgment, the amendments are retroactive.⁸¹

The courts of this State independently of the sections of the Civil Practice Act applicable to matrimonial actions have power in an action on a foreign decree for alimony to render a judgment *in personam* requiring a husband who has come into this State to apply part of the income received by him from a foreign testamentary trust to the support of his wife, and may adjudge him to be in contempt for a failure to do so. But he may not be punished for contempt in failing to secure such payment by the execution of an undertaking.⁸² Independently of statute, our courts will not punish as for contempt disobedience of the orders made by the courts of sister States.⁸³

Prior to the statutory authority, an action could be maintained in this State to recover instalments of alimony awarded by a foreign judgment of divorce as they fall due, but there is no principle of equity or comity by which the defendant's property can be sequestered or he can be compelled to give security in this State for future alimony awarded by a foreign judgment.⁸⁴

The courts of this State have jurisdiction to enforce the provisions of a foreign judgment of divorce duly rendered awarding a certain amount as permanent alimony payable

80. See *Tiedemann v. Tiedemann*, 172 App. Div. 819, 158 N. Y. Supp. 851, decided before the 1921 amendment.

81. *Moore v. Moore*, 143 App. Div. 428, 128 N. Y. Supp. 259; *aff'd*, 208 N. Y. 97.

82. *Moore v. Moore*, 142 App. Div. 459, 126 N. Y. Supp. 936.

83. *Mills v. Mills*, 95 Misc. 231, 158 N. Y. Supp. 753.

84. *Wood v. Wood*, 31 Abb. N. C. 235, 7 Misc. 579, 28 N. Y. Supp. 377

at certain times from and after the date of the decree.⁸⁵ Where a decree of divorce has been rendered in another State on personal service upon the husband and notice to appear and answer, and under such decree the husband is required to pay alimony in certain sums, it establishes a judicial debt of record, which will be enforced in the courts of New York.⁸⁶ A wife is entitled to maintain an action in this State for the enforcement of the payment of alimony under a foreign decree of divorce. Unpaid alimony under a foreign decree of divorce is treated as a judicial debt for which the courts of this State will give a pecuniary judgment.⁸⁷ Where a woman sues her former husband in this State upon a foreign decree of absolute divorce awarding alimony, it is no defense to allege that the foreign decree for alimony is not final, but may be amended by the foreign court if there be no allegation that it was in fact amended.⁸⁸

Where a wife sues in equity to enforce the payment of alimony decreed by a judgment of divorce rendered in the courts of a foreign State upon the ground of adultery, the court may in its discretion provide for security for payment and sequestration of the defendant's property. In such a case the wife may reach equitable assets of her former husband by sequestration, which may be done by an anticipatory order. Thus she may reach moneys which will become payable to her husband under a foreign trust created for his benefit.⁸⁹

A judgment of separation having been procured in Pennsylvania directing the payment of alimony to avoid which defendant moved into this State and an action having been brought in this State on said judgment and recovery had thereon, the plaintiff may resort to the provisions of section 1171 for the enforcement thereof.⁹⁰

An agreement by which a woman whose husband had brought an action in another State for divorce, on the ground of desertion, agreed not to defend the action if her husband would pay to her, during her life or until she should remarry, a certain sum per week for the support and maintenance of herself and minor child, such provision to be embodied in the decree to be entered in the action, is void as against public

85. *Williamson v. Williamson*, 169 App. Div. 597, 155 N. Y. Supp. 423.

86. *Moore v. Moore*, 40 Misc. 162, 81 N. Y. Supp. 729.

87. *Levy v. Dockendorff*, 177 App. Div. 249, 163 N. Y. Supp. 435.

88. *Werner v. Pelletier*, 148 App. Div. 137, 131 N. Y. Supp. 1010.

89. *Moore v. Moore*, 143 App. Div. 428, 128 N. Y. Supp. 259; *aff'd*, 208 N. Y. 97.

90. *Moore v. Moore*, 208 N. Y. 97.

policy. Such provision, however, if embodied in the decree by the court of another State having jurisdiction, is not available as a defense to an action brought by the wife in this State to recover past instalments of the money adjudged to be paid. The decree cannot be questioned collaterally, and provision having been inserted by the agreement of the parties neither party can allege fraud therein.⁹¹

F. Stay of husband's proceedings.

While the husband is in default in the payment of alimony, the court may properly stay all further proceedings by him until payment is made.⁹² The wife can prevent the husband from taking an affirmative advantage of his own wrong by forcing the case on to trial, while the wife, through his default, is without means to properly present her case.⁹³ Until a plaintiff has paid counsel fees and accrued alimony he can take no affirmative action in his own behalf, although he is entitled to be heard in his own defense on any motion which may be taken against him. Therefore, he will not be permitted to enter judgment dismissing his complaint and the defendant's counterclaim for a divorce, although the jury has found that neither party was guilty of the offense charged, and this, even though he has not yet been formally adjudged guilty of contempt.⁹⁴

Where the husband has been adjudged in contempt for refusal to pay alimony and counsel fees ordered, and he removes from the jurisdiction of the court to prevent enforcement of its order, the order will not be modified by reducing the amount directed to be paid, and the contempt vacated, until he places himself within its jurisdiction.⁹⁵

G. Striking out husband's pleading.

It was formerly considered proper practice, if a defending husband was in default in the payment of alimony and counsel fees, to strike out his answer and permit the wife to take judgment by default.⁹⁶ But it was held that the court has power to strike out his answer, but has no power to strike out

91. *France v. France*, 79 App. Div. 291, 79 N. Y. Supp. 579.

92. *Naveja v. Naveja*, 110 Misc. 279, 179 N. Y. Supp. 881; *Monerief v. Monerief*, 155 N. Y. Supp. 592.

93. *Monerief v. Monerief*, 155 N. Y. Supp. 592.

94. *Gray v. Gray*, 162 App. Div. 586, 148 N. Y. Supp. 24. But in an action by a husband for a divorce a stay of

all proceedings of the plaintiff should not be granted upon the ground that he is in contempt for failure to pay alimony in a prior action for separation. *Tafel v. Tafel*, 169 App. Div. 417, 155 N. Y. Supp. 164.

95. *Sibley v. Sibley*, 66 App. Div. 552, 73 N. Y. Supp. 244.

96. *Farnham v. Farnham*, 9 How. Pr. 231; *Brinkley v. Brinkley*, 47 N.

his notice of appearance, as he is entitled to appear in all proceedings in the action.⁹⁷

The procedure of striking out the answer, however, was condemned by the United States Supreme Court as the taking of property without due process of law.⁹⁸ The question is a Federal one, and the State courts are bound to follow the Supreme Court.⁹⁹ Moreover, it is now held that, when the husband is the plaintiff, his complaint will not be stricken out because of his default, although affirmative proceedings by him may be stayed.¹

H. Precedents.

1. Affidavit on application for appointment of receiver.

SUPREME COURT.

JULIA A. PERCIVAL, PLAINTIFF,

agst.

EDWARD S. PERCIVAL, DEFENDANT.

124 N. Y. 637.

CITY AND COUNTY OF NEW YORK, ss.:

Julia A. Percival, being duly sworn, says: I am the plaintiff in the above-entitled action; the defendant has not paid to me or for my use either the sum of \$300, awarded me by judgment herein for repayment of sums expended by me for my support and maintenance since the commencement of this action, or any part thereof, or any part of the further sum of \$250, awarded me by said decree for my counsel fees in addition to the costs of this action, or any part of \$161.94, the costs as taxed, nor has the defendant paid any part of \$350 a year alimony allowed me and required to be paid quarterly in advance from the 4th day of January, 1887.

That, as deponent is informed and believes, the defendant is possessed of choses in action or claims against George F. Gilman, Aaron Healy and others of the value of \$5,000 and upwards, and also an interest in certain real estate in the city of Brooklyn, being one-twentieth undivided part of the premises known as 265 Clinton street. That more than thirty days have elapsed since a copy of a decree in this action was served upon Edward P. Wilder, the attorney for the defendant herein.

(Jurat.)

JULIA A. PERCIVAL.

Y. 40; Walker v. Walker, 82 N. Y. 260; Brisbane v. Brisbane, 5 Civ. Pro. 352; Clark v. Clark, 1 St. Rep. 287; Quigley v. Quigley, 45 Hun, 26, 9 St. Rep. 486.

97. Knott v. Knott, 6 App. Div. 589, 39 N. Y. Supp. 804, citing Quigley v. Quigley, 45 Hun, 24; Brisbane v. Bris-

bane, 5 Civ. Pro. 352; Walker v. Walker, 82 N. Y. 261.

98. Hovey v. ElHott, 167 U. S. 409.

99. Sibley v. Sibley, 76 App. Div. 132, 78 N. Y. Supp. 743, 12 N. Y. Anno. Cas. 135.

1. Naveja v. Naveja, 110 Misc. 279, 179 N. Y. Supp. 881.

2. Order appointing receiver.

(Caption.)

JULIA A. PERCIVAL, PLAINTIFF,	}
<i>agst.</i>	
EDWARD S. PERCIVAL, DEFENDANT.	

124 N. Y. 637.

On reading and filing the affidavit of Julia A. Percival, verified on the 19th day of March, 1887, the pleadings and the decree entered herein on the 17th day of February, 1887, and on all the papers and proceedings herein, and proof of due service of notice of motion for a sequestration of the personal property, and of the rents and profits of the real property of the defendant, Edward S. Percival, and for the appointment of a receiver thereof on Edward P. Wilder, Esq., attorney for the defendant, and the said motion having duly come on to be heard, and after hearing Raphael J. Moses, Jr., attorney for the plaintiff in favor of the motion, and Edward P. Wilder, Esq., attorney for the defendant in opposition thereto, it is, on motion of Raphael J. Moses, Jr., attorney for plaintiff,

ORDERED, That Charles Prime of New York, counselor-at-law, be, and he is hereby, appointed receiver of the personal property and of the rents and profits of the real property of the defendant, Edward S. Percival, upon the said receiver executing, acknowledging and filing with the clerk of this court a bond in the usual form to the people in the penalty of \$500, with two sufficient sureties, conditioned for the faithful discharge of his duties as receiver.

3. Affidavit to obtain payment of moneys from receiver.

NEW YORK SUPREME COURT.

JULIA A. PERCIVAL, PLAINTIFF,	}
<i>agst.</i>	
EDWARD S. PERCIVAL, DEFENDANT.	

124 N. Y. 637.

CITY AND COUNTY OF NEW YORK, ss.:

Raphael J. Moses, Jr., being duly sworn, says: I am plaintiff's attorney herein; judgment was rendered herein on the 4th day of January, 1887, for \$711.94, docketed as of February 17, 1887, and also for alimony, payable in advance at the rate of \$350 a year, payable quarterly as of the 27th day of February, and 1st of April, and afterward on the 7th of April, a further payment of \$250 to the plaintiff for counsel fees on the pending appeal herein was ordered; that no part of said sums have been paid and there was due thereon the 13th day of April, \$1,145.28; there is not time to give notice before the third Monday and the plaintiff is without means and dependent

on this decree for support; that Charles Price has been duly appointed receiver of defendant and qualified as such, and has in his possession \$1,250 subject to the order of this court as per receipt hereto attached.

RAPHAEL J. MOSES, JR.

(Jurat.)

4. Order that receiver pay over moneys.

(Caption.)

JULIA A. PERCIVAL, PLAINTIFF,

agst.

EDWARD S. PERCIVAL, DEFENDANT.

124 N. Y. 637.

An order to show cause having been made herein on the 14th day of April, requiring the defendant, Edward S. Percival, and Charles Price, receiver herein, to show cause, if any they have, why an order should not be made directing Charles Price, as receiver aforesaid, to pay to Raphael J. Moses, Jr., as attorney for Julia A. Percival, plaintiff herein, the sum of \$1,145.28, due her on the 13th day of April, under previous orders and judgments in this action, together with \$10 costs of motion, and said motion having come on to be heard on the 18th day of April, Mr. Wilder appearing for the defendant Percival and filing the affidavit of the said Percival, verified April 16th, in opposition thereto, and Mr. Horne appearing for Charles Price, receiver herein, and filing the affidavit of Charles Price, verified the 18th day of April, 1887, and Mr. Moses appearing in behalf of the plaintiff and the counselors being duly heard, it is, on motion of Raphael J. Moses, Jr., attorney for plaintiff,

ORDERED, That Charles Price, receiver, pay to Raphael J. Moses, Jr., as attorney for Julia A. Percival, \$1,156.23, and the same shall be in full satisfaction of the amounts awarded, with interest to date in this action, so far as the same are now payable, and that the receiver retain for his fees \$62.50 and \$212, for his disbursements, including counsel fees paid Mr. Horne.

5. Order for commitment for contempt.

(Caption.)

ELIZABETH MERCER, PLAINTIFF,

agst.

WILLIAM STUART MERCER, DEFENDANT.

73 Hun, 192.

A motion having been made to punish defendant herein as for a contempt for misconduct in failing to obey the certain order of this court entered herein on the 21st day of December, 1891, after reading the said order entered herein on the 21st day of December, 1891, and the papers upon which said order was granted filed herein on the said 21st day of December, 1891, and after reading and filing the order to show cause upon this motion, on affidavit of F. De Lysle Smith, verified on the 8th day of January, 1892, and the affidavit of

Elizabeth Mercer, verified on the 7th day of January, 1892, in support of said motion, and the affidavit of William Stuart Mercer, verified on the 12th day of January, 1892, in opposition thereto, and after hearing F. De Lysle Smith, of counsel for plaintiff, in support of said motion, and Charles M. Berrian, counsel for defendant, in opposition thereto,

Now, on motion of F. De Lysle Smith, attorney for said plaintiff, it is hereby ordered, adjudged and determined:

1. That William Stuart Mercer is guilty of a contempt of court in having willfully disobeyed said order made in this action and entered and filed herein on the said 21st day of December, 1891, ordering and directing him to pay to F. De Lysle Smith at his office, No. 18 Cortland street, in the city of New York, \$10 per week alimony pendente lite from the 15th day of December, 1891, the same to be applied to the maintenance, support and expenses of the plaintiff herein, and further ordering and directing him to pay to said F. De Lysle Smith, \$50 as counsel fees, and that he has entirely neglected, failed and refused to pay the said alimony and counsel fees, or any part thereof, as directed by said court.

2. That said misconduct of William Stuart Mercer was calculated and actually did defeat, impair, impede and prejudice the rights and remedies of the plaintiff herein to her actual loss in the sum of \$90, being \$40 due as said alimony and \$50 counsel fee, besides the costs of this motion.

3. That the said William Stuart Mercer by reason of his said misconduct is hereby fined the sum of \$100 to be paid to F. De Lysle Smith, the said attorney of said plaintiff, together with \$10 costs of this motion.

4. That said William Stuart Mercer be committed by the sheriff of the county of New York to the county jail in the city of New York, to be there detained in close custody until he shall pay said sum or until he shall be discharged according to law.

GEORGE S. BARRETT,

Justice Supreme Court.

ARTICLE XIV.

REMARRIAGE.

A. Domestic Relations Law, § 8. Marriage after divorce for adultery.

Whenever a marriage has been or shall be dissolved, the complainant may marry again during the lifetime of the defendant. But a defendant for whose adultery the judgment of divorce has been granted in this state may not marry again during the lifetime of the complainant, unless the court in which the judgment of divorce was rendered shall in that respect modify such judgment, which modification shall be made only upon satisfactory proof that three years have elapsed since the decree of divorce was rendered, and that the conduct of the defendant since the dissolution of said marriage has been uniformly good; and a defendant for whose adultery the judgment of divorce has been rendered in another state or country may not marry again in this state during the lifetime of the complainant unless three years have elapsed since the rendition of such judgment and there is no legal impediment, by reason of such judgment, to such marriage in the state or country where the judgment was rendered. But this section shall not prevent the remarriage of the parties to an action for divorce.

(See B., C. & G. Consol. L., 2nd Ed., p. 1851.)

B. Effect of section.

Section 8 of the Domestic Relations Law prohibits the remarriage of the person against whom a divorce is procured, and a marriage contracted by the guilty party in this State without the approval of the court is said to be void.² But this section does not prohibit a marriage by such person in another State, if the marriage is valid according to the laws of such State.³

Parties to an action for divorce are not prevented from remarrying by section 8 of the Domestic Relations Law, as amended. But prior to the adoption of section 1761 of the Code of Civil Procedure in 1880, from which this section was derived, the parties could not marry without first procuring the *vacatur* of the decree of divorce and the prohibition contained therein against remarriage.⁴

Leave should not be granted to marry again except on full disclosure and satisfactory proof.⁵

On an application by a defendant against whom a divorce had been granted, for a modification of the decree, so as to permit him to marry again under the statute, notice of the application to plaintiff in the divorce suit is not necessary, since she is not affected by the granting of the order and her rights and interests are not affected by the modified decree, although the question of alimony was reserved by the original judgment, and remains to be passed upon.⁶

ARTICLE XV.**COSTS.****A. Civil Practice Act, § 1173. Costs in action for divorce or separation.**

The final judgment in an action for divorce or separation may award costs in favor of or against either party, and an execution may be issued for the collection thereof, as in an ordinary case; or the court, in the judgment, or by an order made at any time, may direct the costs to be paid out of any property sequestered, or otherwise in the power of the court.

B. Allowance of costs.

Where there is reason to believe that both parties have, through detectives employed for that purpose, procured false

2. Roth v. Roth, 97 Misc. 136, 161 N. Y. Supp. 99.

3. Cunningham v. Cunningham, 206 N. Y. 341, 43 L. R. A. (N. S.) 355.

4. Matter of Eichler, 84 Misc. 667,

671, 146 N. Y. Supp. 846; Moore v. Moore, 8 Abb. N. C. 171.

5. Waas v. Waas, 5 Law Bull. 59.

6. Matter of Salmon, 34 Misc. 251, 69 N. Y. Supp. 215.

testimony, no costs will be allowed.⁷ The court has no power to compel the wife to pay her husband's costs and disbursements, with costs of motion, in an action brought by him for absolute divorce, as a condition for granting her motion to vacate a decree rendered against her upon default and for leave to come in and defend. Moreover, justice does not require a wife, who is penniless and dependent upon her husband for support, to pay him the costs of such action.⁸ A finding of a jury in the negative upon the issue of adultery in an action for divorce is not a "special verdict" in the proper sense of the words, and the successful defendant upon his application at Special Term for judgment upon such finding is not entitled to tax in his bill of costs twenty dollars before argument and forty dollars for argument.⁹

C. Collection.

Where a husband was defeated in an action for absolute divorce and has failed to pay a judgment for costs, the wife in a subsequent action for separation is entitled to an order staying her husband's counterclaim for an absolute divorce upon the ground of the adultery charge in the former action until he pays the costs in said action.¹⁰

An attorney clothed with general authority to prosecute an action for an agreed compensation for services, which was paid, is authorized to issue an execution to collect the costs awarded in the judgment. The fact that the action was one for divorce or that a stated sum was agreed upon as compensation for services does not alter the general rule.¹¹

Where the parties become reconciled, the husband is not liable for the costs of the wife's attorneys.¹² A wife may compromise her suit for divorce without regard to her solicitor's claim for costs.¹³ Where a compromise was made, and the husband was to pay the costs of his wife's attorney, and he afterward served a verified answer and refused to pay the obligation, it was held that the court had power, upon the application of the wife, to compel him to pay the costs and expenses as fixed by the court.¹⁴

7. *Beadleston v. Beadleston*, 2 N. Y. Supp. 809.

8. *Fox v. Fox*, 143 App. Div. 483, 127 N. Y. Supp. 989.

9. *Anderson v. Anderson*, 103 Misc. 427, 170 N. Y. Supp. 612.

10. *Hasse v. Hasse*, 149 App. Div. 775, 134 N. Y. Supp. 83.

11. *Larkin v. Frazier*, 224 N. Y. 421.

12. *Phillips v. Simmons*, 20 How. Pr. 342. As to effect of refusal of wife to abide by settlement, see *Bolen v. Bolen*, 44 Hun, 362.

13. *Kirby v. Kirby*, 1 Paige, 565.

14. *Smith v. Smith*, 35 Hun, 378; *aff'd*, 99 N. Y. 639.

ARTICLE XVI.**APPEALS.****A. Appealable orders and decrees.**

An order reducing the amount of alimony previously awarded is appealable.¹⁵ A reversal by the Appellate Division of the order of Special Term, granting an application to modify a decree for alimony by reducing the amount, is reviewable by the Court of Appeals, since it is either a final order in a special proceeding or a final judgment in an action.¹⁶

An award of the custody of children to defendant in divorce after granting a divorce to plaintiff is within the discretion of the Supreme Court, and an affirmance thereof by the Appellate Division is not reviewable by the Court of Appeals.¹⁷

Where, in an action for divorce for adultery, a judgment for defendant, is reversed by the Appellate Division on questions of fact and new trial ordered, an appeal may be taken to the Court of Appeals, and, in case of affirmance, judgment absolute can be rendered against appellant, as the question of fact has been tried at General Term and in Court of Appeals, and the decision is that defendant is guilty.

Where a judgment by default contains erroneous provisions, the remedy is by motion to correct and not by appeal.¹⁸

B. Stay of proceedings.

An undertaking given on appeal to the Court of Appeals pursuant to section 594 of the Civil Practice Act stays all proceedings pending the appeal.¹⁹ But where the judgment required the plaintiff to give as security for payment of alimony security by way of mortgage on real estate, it was held that to stay proceedings pending an appeal defendant must also execute and deposit with the clerk the mortgage so required.²⁰

15. *Davis v. Davis*, 78 App. Div. 500, 79 N. Y. Supp. 621.

16. *Wetmore v. Wetmore*, 162 N. Y. 593, followed, *Livingston v. Livingston*, 173 N. Y. 377.

17. *Price v. Price*, 55 N. Y. 656; *Osterhout v. Osterhout*, 168 N. Y. 358.

18. *Conger v. Conger*, 77 N. Y. 432; *Park v. Park*, 24 Misc. 372, 53 N. Y. Supp. 677.

19. *Samuels v. Samuels*, 1 N. Y. Supp. 787.

20. *Galusha v. Galusha*, 108 N. Y. 114.

C. Action of appellate court.

Where a finding of guilt of one or both of the parties is made upon conflicting evidence, the appellate court will not generally interfere with the finding.²¹

A judgment of the Appellate Division affirming an incorrect and unwarranted judgment dismissing the complaint in an action for the annulment of such a marriage, upon the sole ground of some supposed collusion between the parties, where no such issue was raised on the trial or decided by the trial judge, is beyond the power of that court and requires the reversal of the judgments.²²

D. Restitution on reversal.

The principle on which restitution is ordered after a reversal does not apply either to temporary or permanent alimony.²³ Alimony is not a subject of restitution. And if notes or checks are given for such alimony, the court will not stay actions thereon, although the judgment awarding the alimony has been reversed on appeal.²⁴ Checks given by the husband for such alimony may be collected, although the husband has stopped payment thereon.²⁵

If a judgment of separation awards the custody of the children to the defendant, the plaintiff is not entitled to their custody upon a motion for restitution after a reversal of the judgment. The custody should be determined by habeas corpus proceedings.²⁶

21. *Tower v. Tower*, 134 App. Div. 670, 119 N. Y. Supp. 506; *Bucki v. Bucki*, 85 Hun. 619, 66 St. Rep. 432, 32 N. Y. Supp. 1028; *aff'd*, 155 N. Y. 653; *Bolen v. Bolen*, 6 N. Y. Supp. 164; *Steffins v. Steffins*, 11 N. Y. Supp. 424; *O'Keefe v. O'Keefe*, 11 N. Y. Supp. 628, 34 St. Rep. 493; *Murray v. Murray*, 16 N. Y. Supp. 363; *Holcomb v. Holcomb*, 3 St. Rep. 762.

22. *Svenson v. Svenson*, 178 N. Y. 54, *rev'g* 78 App. Div. 536, 79 N. Y. Supp. 657.

23. *Averett v. Averett*, 110 Misc. 584, 178 N. Y. Supp. 405; *aff'd* without opinion, 191 App. Div. 948.

24. *Averett v. Averett*, 110 Misc. 584, 178 N. Y. Supp. 405; *aff'd* without opinion, 191 App. Div. 948.

25. *Averett v. Averett*, 112 Misc. 487, 183 N. Y. Supp. 48. Compare *Averett v. Averett*, 111 Misc. 542, 183 N. Y. Supp. 702.

26. *Chamberlin v. Chamberlin*, 194 App. Div. 470, 185 N. Y. Supp. 98.

ARTICLE XVII.

MISCELLANEOUS MATTERS OF PRACTICE.

A. Joinder of causes of action.

Although a defendant in an action for divorce may, under the provisions of section 1168 of the Civil Practice Act, unite in his answer as counterclaims causes of action both for a divorce and for a separation, the plaintiff cannot, in her complaint, unite both causes of action.²⁷ An allegation of abandonment in a complaint for divorce for adultery may be stricken out.²⁸

B. Discontinuing.

The right to discontinue has, as a rule, been denied in matrimonial actions, particularly where a defense has been interposed demanding affirmative relief.²⁹ The plaintiff will not be permitted to discontinue where the answer sets up adultery, on his part, and asks for a decree, especially after the reference of an application for counsel fees and temporary alimony.³⁰ After an order for the payment of alimony and counsel fees, the plaintiff cannot discontinue without an order of the court or the payment of the sum fixed.³¹ Where the plaintiff, having commenced an action against defendant, her husband, for divorce *a vinculo*, and having examined a witness, conditionally, who testified to the acts of adultery charged, in consideration of the husband executing to her father a note for \$1,000, agreed to, and did, discontinue the action without costs, in an action on the note, it was held it was given for a good consideration and was valid, and not against public policy.³²

C. Death of party.

An action of divorce is of a personal nature which in the absence of statutory provision abates with the death of either party.³³ If the plaintiff die after the entry of an inter-

27. *Coñrad v. Conrad*, 56 Misc. 376, 107 N. Y. Supp. 655; *aff'd*, 124 App. Div. 780, 109 N. Y. Supp. 387; *Johnson v. Johnson*, 6 Johns. Ch. 163; *Pomeroy v. Pomeroy*, 1 Johns. Ch. 606; *McIntosh v. McIntosh*, 12 How. Pr. 289; *Henry v. Henry*, 17 Abb. 411; *McNamara v. McNamara*, 9 Abb. Pr. 18; *Burdell v. Burdell*, 2 Barb. 473; *Bucholz v. Bucholz*, 1 How. (N. S.) 46. See, also, *Hofman v. Hofman*, 195 App. Div. 597, 187 N. Y. Supp. 141.

28. *Ward v. Ward*, 5 Abb. (N. S.) 145.

29. *Gressman v. Gressman*, 145 N. Y. Supp. 819.

30. *Campbell v. Campbell*, 12 Hun, 636.

31. *Leslie v. Leslie*, 10 Abb. Pr. (N. S.) 64.

32. *Adams v. Adams*, 91 N. Y. 381.

33. *Matter of Crandall*, 196 N. Y. 127; *Millady v. Stein*, 19 Misc. 652, 44 N. Y. Supp. 408.

locutory decree, a final decree thereafter entered is unwarranted, extrajudicial and ineffective.³⁴ And after the death of a party, an application to vacate a judgment of divorce, entered during the lives of the parties, will not ordinarily be entertained.³⁵

An order for temporary alimony cannot be enforced after the death of either of the parties.³⁶ If, however, the wife survives the husband, and there remains unpaid alimony awarded by the final judgment, she can present a claim therefor to his estate.³⁷ But if she dies before her husband, her estate cannot collect the unpaid alimony from the husband.³⁸

ARTICLE XVIII.

FOREIGN DIVORCES.

A. Foreign decree based on substituted service.

The validity of foreign divorces granted without appearance or personal service of process on the defendant has occasioned much discussion. The courts of this State have consistently adopted and enforced the rule that a foreign divorce granted upon substituted service of process against a resident of this State who does not voluntarily appear in the action is void.³⁹ The courts of this State exercise the right of inquiring into the jurisdiction of the foreign court.⁴⁰

34. *Bryon v. Bryon*, 134 App. Div. 320, 119 N. Y. Supp. 41.

35. See, *supra*, Art. XII-E, Vacating of judgment.

36. *Millady v. Stein*, 19 Misc. 652, 44 N. Y. Supp. 408.

37. *Matter of Williams*, 208 N. Y. 32; *Matter of Brace*, 105 Misc. 178, 173 N. Y. Supp. 636.

38. *Faversham v. Faversham*, 161 App. Div. 521, 146 N. Y. Supp. 569.

39. *Hoffman v. Hoffman*, 46 N. Y. 30; *People v. Baker*, 76 N. Y. 78; *O'Dea v. O'Dea*, 101 N. Y. 23; *Cross v. Cross*, 108 N. Y. 628; *Matter of Kimball*, 155 N. Y. 62; *Winston v. Winston*, 165 N. Y. 553; *Ball v. Cross*, 231 N. Y. 329; *Bell v. Bell*, 4 App. Div. 527, 40 N. Y. Supp. 443; *aff'd*, 157 N. Y. 719, 181 U. S. 175; *Ackerman v. Ackerman*, 123 App. Div. 750, 108 N. Y. Supp. 534; *aff'd*, 200 N. Y. 72; *Gibson v. Airy*, 181 App. Div. 761, 169

N. Y. Supp. 242; *Kaiser v. Kaiser*, 192 App. Div. 400, 182 N. Y. Supp. 709; *Davis v. Davis*, 2 Misc. 549, 22 N. Y. Supp. 191, 51 St. Rep. 509; *Gebhard v. Gebhard*, 25 Misc. 1, 54 N. Y. Supp. 406; *Hamilton v. Hamilton*, 26 Misc. 336, 56 N. Y. Supp. 122; *Licht v. Licht*, 88 Misc. 107, 150 N. Y. Supp. 643; *Pearson v. Pearson*, 104 Misc. 675, 173 N. Y. Supp. 563; *Mellen v. Mellen*, 10 Abb. N. C. 329; *People v. Smith*, 13 Hun, 414; *Matter of Strong*, 86 Hun, 390, 33 N. Y. Supp. 502, 67 St. Rep. 215; *Campbell v. Campbell*, 35 N. Y. Supp. 280; *Matter of House's Estate*, 14 N. Y. Supp. 275, 40 St. Rep. 286, 2 Connolly, 524, 20 Civ. Pro. 130; *Beckwith v. Beckwith*, 24 Wkly. Dig. 5.

40. *Hunt v. Hunt*, 72 N. Y. 217; *Olmsted v. Olmsted*, 190 N. Y. 458; *Lie v. Lie*, 96 Misc. 3, 159 N. Y. Supp. 748; *Munson v. Munson*, 14 N. Y. Supp. 692, 60 Hun, 189, 38 St. Rep. 7.

The full faith and credit clause of the Federal Constitution, however, interferes with a general condemnation of all such divorces. The United States Supreme Court holds that the courts of this State must recognize as valid a foreign decree of divorce, although process was not personally served, if the decree was granted in the State of the matrimonial domicile of the parties; and the proceedings are in accord with the authorized practice of such State.⁴¹ The courts of this State are bound to follow the decisions of the United States Supreme Court on this question.⁴² The courts of the State of the last matrimonial domicile can grant a decree of divorce without personal service of process upon or the appearance of the defendant therein, where the constructive service of process is made in accordance with the laws of that State, and such a decree is entitled to full faith and credit in the courts of all the States of the Union.⁴³ But the Federal courts do not require the courts of this State to sustain a foreign decree under such circumstances, if it is rendered in a State which was not the domicile of either of the parties.⁴⁴ And, when not so required to recognize the validity of the foreign divorces, our courts hold them void.⁴⁵ Thus, as a practical proposition, if one of the parties leaves the State where the parties have been living and have acquired a matrimonial domicile, the party remaining may procure a divorce by substituted service;⁴⁶ but the party leaving cannot procure such a divorce in another State which would bind the courts of this State.⁴⁷

41. *Atherton v. Atherton*, 181 U. S. 155.

42. *De Meli v. De Meli*, 120 N. Y. 485, 31 St. Rep. 704; *Schenker v. Schenker*, 181 App. Div. 621, 169 N. Y. Supp. 35; *Lacey v. Lacey*, 38 Misc. 196, 77 N. Y. Supp. 235; *Callahan v. Callahan*, 65 Misc. 172, 121 N. Y. Supp. 39; *Benham v. Benham*, 69 Misc. 442, 125 N. Y. Supp. 923; *Campbell v. Campbell*, 90 Hun. 233, 35 N. Y. Supp. 380, 693, 69 St. Rep. 634, 70 St. Rep. 490; *Matter of Denick*, 92 Hun. 161, 36 N. Y. Supp. 518, 71 St. Rep. 549.

43. *Schenker v. Schenker*, 181 App. Div. 621, 169 N. Y. Supp. 35.

44. *Bell v. Bell*, 181 U. S. 175; *Streitwolf v. Streitwolf*, 181 U. S. 179; *Haddock v. Haddock*, 201 N. Y. 563.

45. *DeMeli v. DeMeli*, 120 N. Y. 485;

Hammond v. Hammond, 103 App. Div. 437, 93 N. Y. Supp. 1; *Gibson v. Airy*, 181 App. Div. 761, 169 N. Y. Supp. 242; *Matter of Caltabellotta*, 183 App. Div. 753, 171 N. Y. Supp. 82; *Ball v. Cross*, 106 Misc. 184, 174 N. Y. Supp. 259.

46. *Atherton v. Atherton*, 181 U. S. 155; *Matter of Hall*, 61 App. Div. 266, 70 N. Y. Supp. 406.

47. *De Meli v. De Meli*, 120 N. Y. 485; *People ex rel. Karlsoie v. Karlsoie*, 1 App. Div. 571, 37 N. Y. Supp. 481; *Bell v. Bell*, 4 App. Div. 527, 40 N. Y. Supp. 443; *aff'd*, 157 N. Y. 719, 181 U. S. 175; *Ransom v. Ransom*, 54 Misc. 410, 104 N. Y. Supp. 198; *aff'd*, 125 App. Div. 915, 109 N. Y. Supp. 1143; *Rontey v. Rontey*, 101 Misc. 166, 166 N. Y. Supp. 818. Compare *North*

But it is said that, while the courts of this State have uniformly protected its citizens against the decrees obtained by a constructive process in foreign jurisdictions, they have not gone so far as to protect a non-resident, and declare void a decree granted in a foreign jurisdiction against a non-resident of this State, and that in order to avoid a foreign decree of divorce it must be shown that the defendant was at the time of the rendition of the decree a resident of this State.⁴⁸ But this proposition has been denied, and foreign decrees have been declared void in behalf of persons other than residents of the State.⁴⁹ The true solution of the problem, when the invalidity of the divorce is urged by a non-resident, seems to depend upon the status which is given to such a decree by the courts of the State where such person was domiciled at the time of the decree. If the validity of the divorce is not recognized there, it will not be recognized in this State.⁵⁰ If the decree is valid as having been rendered in the State of matrimonial domicile, it must be regarded as valid in every State, irrespective of any question as to whether a resident or non-resident is interested in the problem.⁵¹

A divorce recognized as valid by the laws of Russia, granted by a Jewish rabbi in Russia to Russian subjects of the Jewish faith domiciled there, whose marriage was contracted in Russia, will be held valid here, after the parties have come to this country, though it was granted for cause that would be insufficient here.⁵²

The burden of proof is upon the one attacking the foreign decree to show that the matrimonial domicile of the parties was not within the State where the decree was granted.⁵³ Where a husband in a foreign State obtains a decree of divorce in accordance with the laws of that State, even if the wife be in this State and does not appear in the action and is only served by publication, the decree, in the absence of evidence showing that she had acquired a domicile other than that of her husband, is valid, as, in the absence of such

v. North, 47 Misc. 180, 93 N. Y. Supp. 512; *aff'd*, 111 App. Div. 921, 96 N. Y. Supp. 1138.

48. Percival v. Percival, 106 App. Div. 111, 94 N. Y. Supp. 909; *aff'd* without opinion, 186 N. Y. 587; Ball v. Cross, 106 Misc. 184, 174 N. Y. Supp. 259; Kaufman v. Kaufman, 160 N. Y. Supp. 19.

49. O'Dea v. O'Dea, 101 N. Y. 23; Matter of Caltabellota, 183 App. Div.

753, 171 N. Y. Supp. 82.

50. Ball v. Cross, 231 N. Y. 329.

51. Schenker v. Schenker, 181 App. Div. 621, 169 N. Y. Supp. 35.

52. Miller v. Miller, 70 Misc. 368, 128 N. Y. Supp. 787. See, also, Saperstone v. Saperstone, 73 Misc. 631, 131 N. Y. Supp. 241.

53. Percival v. Percival, 106 App. Div. 111, 94 N. Y. Supp. 909.

evidence, her domicile will be presumed to have been his. But where it appears that the parties while living in this State separated and the husband thereafter went to the foreign State, where he procured a divorce, the wife's domicile is not presumed to have followed that of the husband to the foreign State, but to have remained in this State, where she continued to reside, and the subsequent marriage of the husband during her lifetime will be presumed to be invalid.⁵⁴

B. Alimony and costs.

Although a judgment for divorce based on substituted service of process may be valid as affecting the marriage status of the parties, it is held void so far as it assumes to award alimony or costs against the defendant husband. To this extent the judgment is *in personam*, and the defendant is not deemed to have had due process of law. Thus if a judgment of divorce is rendered in another State, although our courts may be required by the United States Constitution to give faith and credit to the decree so far as it dissolves the marriage relation of the parties, they will not enforce the judgment so far as it grants alimony or costs, if the defendant did not voluntarily appear and process was served on him by publication.⁵⁵

But where, after the final decree, a motion is made to amend it by inserting a provision authorizing an application at the foot of the decree for reasonable alimony and reserving the power to make an order therefor, upon which application the defendant appears by attorney and appeals from such order, after the affirmance of which proof is taken and an order for alimony made and incorporated into the decree, such decree as to alimony is enforceable against the defendant in the courts of this State.⁵⁶

C. Voluntary appearance in foreign jurisdiction.

The voluntary appearance of the defendant or personal service of process upon him in the foreign jurisdiction changes the situation as to foreign divorces.⁵⁷ A foreign decree of divorce is conclusive in this State under the full faith and credit clause of the Federal Constitution where the

54. *Harry v. Dodge*, 66 Misc. 302, 123 N. Y. Supp. 37.

55. *Rigney v. Rigney*, 127 N. Y. 408.

56. *Lynde v. Lynde*, 162 N. Y. 405, aff'g 41 App. Div. 280, 58 N. Y. Supp. 567.

57. *Jones v. Jones*, 108 N. Y. 415;

Pearson v. Pearson, 20 N. Y. 141, aff'g 187 App. Div. 645, 176 N. Y. Supp. 626; *Rich v. Rich*, 88 Hun, 566, 34 N. Y. Supp. 854, 68 St. Rep. 823. See, also, *Strauss v. Strauss*, 122 App. Div. 729, 107 N. Y. Supp. 842.

plaintiff was domiciled in a foreign State and the defendant appeared in the action and the court of the foreign State had jurisdiction of the subject-matter and the parties. A judgment so obtained cannot be attacked collaterally in this State by a third party even though it was collusive.⁵⁸ The judgment may be attacked collaterally for fraud perpetrated upon the court or upon a party, but a stranger to the judgment can only impeach it for fraud which injuriously affects him.⁵⁹

The prosecution of an action brought in a foreign State by a woman to procure a judgment setting aside a judgment of divorce obtained by her against her husband in that State will not be enjoined in a suit brought in this State by a woman whom the divorced husband subsequently married, where she was not a party to the foreign action for divorce, and is not a party to the action sought to be enjoined.⁶⁰

After the entry of a decree of divorce by default in a foreign State based upon service made in this State, the decree was amended so as to cite an appearance and answer, based upon letter written by defendant to attorneys for plaintiff which was verified but not entitled in the action and consisted merely of a statement of the facts connected with his wife's leaving him, and it was held that such letter was not sufficient as a pleading or appearance and gave the court no jurisdiction over him.⁶¹

D. Who can attack illegal foreign decree.

The person who acquires an illegal divorce in another State is not in a position to question its validity.⁶² The plaintiff in the foreign action is estopped from afterwards setting up that the marriage is still in force.⁶³ A husband having procured a decree of divorce in another State cannot question its validity in the courts of the State of New York in order to establish that his subsequent marriage was a nullity.⁶⁴ Nor can the personal representatives of the plaintiff question the validity of the marriage.⁶⁵

58. *Guggenheim v. Wahl*, 138 App. Div. 269, 122 N. Y. Supp. 941; *Hall v. Hall*, 139 App. Div. 120, 123 N. Y. Supp. 1056; *Rupp v. Rupp*, 156 App. Div. 389, 141 N. Y. Supp. 484.

59. *Hall v. Hall*, 139 App. Div. 120, 123 N. Y. Supp. 1056.

60. *Guggenheim v. Wahl*, 138 App. Div. 269, 122 N. Y. Supp. 941.

61. *Matter of Kimball*, 155 N. Y. 62, aff'g 18 App. Div. 320, 46 N. Y. Supp. 177.

62. *Buxbaum v. Mason*, 95 N. Y.

Supp. 539.

63. *Starbuck v. Starbuck*, 173 N. Y. 503, rev'g 62 App. Div. 437, 71 N. Y. Supp. 104; *Voke v. Platt*, 48 Misc. 273, 96 N. Y. Supp. 725; *Simmonds v. Simmonds*, 78 Misc. 571, 138 N. Y. Supp. 639.

64. *People ex rel. Shradv v. Shradv*, 47 Misc. 333, 95 N. Y. Supp. 991.

65. *In re Feyh's Estate*, 5 N. Y. Supp. 90; *Matter of Morrison*, 52 Hun, 102, 5 N. Y. Supp. 90.

Where, in an action to annul a marriage between the plaintiff and the defendant, performed in Connecticut when they were residents of this State, on the theory that it was void on the ground that the defendant had a former husband living at the time, it appears that the plaintiff persuaded and induced the present defendant to obtain a divorce and supplied the necessary funds to enable her to go to and remain in Nevada for such purpose and was fully aware of all the material facts with respect thereto and with respect to the absence of her former husband at the time he married her, and that he advised and assured her that the divorce so obtained would be and was valid, the plaintiff is not in a position to contend that the Nevada divorce was void for want of jurisdiction because procured only by constructive service of process, even though the defendant's husband was then a resident of this State.⁶⁶

E. Effect of remarriage in reliance on foreign decree.

The fact that the plaintiff in a foreign divorce suit believes the decree to be valid and in reliance thereon enters into a marriage with a third party does not affect the validity of the divorce. While the plaintiff in the divorce action cannot dispute the validity of the divorce voluntarily procured, the second marriage is void when attacked by another interested party. Thus the victim of the second marriage may bring a suit of annulment;⁶⁷ or the defendant in the original divorce action may maintain an action to annul the second marriage, or may bring an action of divorce on the ground of adultery, charging the cohabitation under the second marriage as adulterous.⁶⁸ Or the second marriage may be for the basis for a criminal charge of bigamy.⁶⁹ The second husband or wife is not entitled to administration of the plaintiff's estate as against the first spouse.⁷⁰

The fact that a wife left her husband and went to another State to live, and there obtained a divorce from him, which under the authorities of this State was not binding upon him, is not a bar to her right to counsel fees in the husband's action for divorce, as she, in this State at least, is still his wife.⁷¹

66. *Kaufman v. Kaufman*, 177 App. Div. 162, 163 N. Y. Supp. 566.

67. *Davis v. Davis*, 2 Misc. 549, 51 St. Rep. 509, 22 N. Y. Supp. 191.

68. *Winston v. Winston*, 165 N. Y. 553; *Kaiser v. Kaiser*, 192 App. Div. 400, 182 N. Y. Supp. 709; *Rontey v. Rontey*, 101 Misc. 166, 166 N. Y. Supp.

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69. *People v. Baker*, 76 N. Y. 78.

70. *Matter of House's Estate*, 14 N. Y. Supp. 275, 40 St. Rep. 286, 2 Connolly, 524, 20 Civ. Pro. 130.

71. *Deane v. Deane*, 48 Misc. 149, 96 N. Y. Supp. 472.

